UNITED STATES

REPORTS

566

OCT. TERM 2011

UNITED STATES REPORTS

VOLUME 566

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2011

MARCH 20 THROUGH JUNE 4, 2012

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2017

Printed on Uncoated Permanent Printing Paper

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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SUPREME COURT OF THE UNITED STATES

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2011

MARTINEZ *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS

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

No. 10–1001. Argued October 4, 2011—Decided March 20, 2012

Arizona prisoners may raise claims of ineffective assistance of trial counsel only in state collateral proceedings, not on direct review. In petitioner Martinez's first state collateral proceeding, his counsel did not raise such a claim. On federal habeas review with new counsel, Martinez argued that he received ineffective assistance both at trial and in his first state collateral proceeding. He also claimed that he had a constitutional right to an effective attorney in the collateral proceeding because it was the first place to raise his claim of ineffective assistance at trial. The District Court denied the petition, finding that Arizona's preclusion rule was an adequate and independent state-law ground barring federal review, and that under *Coleman* v. *Thompson*, 501 U. S. 722, the attorney's errors in the postconviction proceeding did not qualify as cause to excuse the procedural default. The Court of Appeals for the Ninth Circuit affirmed.

Held:

1. Where, under state law, ineffective-assistance-of-trial-counsel claims must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing those claims if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. Pp. 8–17.

Syllabus

(a) Given that the precise question here is whether ineffective assistance in an initial-review collateral proceeding on an ineffective-assistance-at-trial claim may provide cause for a procedural default in a federal habeas proceeding, this is not the case to resolve the question left open in *Coleman:* whether a prisoner has a constitutional right to effective counsel in initial-review collateral proceedings. However, to protect prisoners with potentially legitimate ineffective-assistance claims, it is necessary to recognize a narrow exception to *Coleman*'s unqualified statement that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default, namely, that inadequate assistance of counsel at initial-review collateral proceedings may establish cause. Pp. 8–9.

(b) A federal court can hear Martinez's ineffective-assistance claim only if he can establish cause to excuse the procedural default and prejudice from a violation of federal law. *Coleman* held that a postconviction attorney's negligence "does not qualify as 'cause,'" because "the attorney is the prisoner's agent," and "the principal bears the risk of" his agent's negligent conduct, *Maples* v. *Thomas*, 565 U. S. 266, 280–281. However, in *Coleman*, counsel's alleged error was on appeal from an initial-review collateral proceeding. Thus, his claims had been addressed by the state habeas trial court. This marks a key difference between initial-review collateral proceedings and other collateral proceedings. Here, where the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise the ineffective-assistance claim, the collateral proceeding is the equivalent of a prisoner's direct appeal as to that claim because the state habeas court decides the claim's merits, no other court has addressed the claim, and defendants "are generally ill equipped to represent themselves" where they have no brief from counsel and no court opinion addressing their claim. *Halbert* v. *Michigan*, 545 U. S. 605, 617. An attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claim. Without adequate representation in an initial-review collateral proceeding, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-at-trial claim. The same would be true if the State did not appoint an attorney for the initial-review collateral proceeding. A prisoner's inability to present an ineffective-assistance claim is of particular concern because the right to effective trial counsel is a bedrock principle in this Nation's justice system.

Allowing a federal habeas court to hear a claim of ineffective assistance at trial when an attorney's errors (or an attorney's absence) caused

a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that a collateral proceeding, if undertaken with no counsel or ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. It thus follows that, when a State requires a prisoner to raise a claim of ineffective assistance at trial in a collateral proceeding, a prisoner may establish cause for a procedural default of such claim in two circumstances: where the state courts did not appoint counsel in the initial-review collateral proceeding for an ineffective-assistance-at-trial claim; and where appointed counsel in the initial-review collateral proceeding, where that claim should have been raised, was ineffective under *Strickland* v. *Washington*, 466 U. S. 668. To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-at-trial claim is substantial. Most jurisdictions have procedures to ensure counsel is appointed for substantial ineffective-assistance claims. It is likely that such attorneys are qualified to perform, and do perform, according to prevailing professional norms. And where that is so, States may enforce a procedural default in federal habeas proceedings. Pp. 9–15.

(c) This limited qualification to *Coleman* does not implicate *stare decisis* concerns. *Coleman*'s holding remains true except as to initial-review collateral proceedings for claims of ineffective assistance at trial. The holding in this case should not put a significant strain on state resources. A State facing the question of cause for an apparent default may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial. The limited circumstances recognized here also reflect the importance of the right to effective assistance at trial. Other claims may not implicate the same fundamentals of the adversary system. The Antiterrorism and Effective Death Penalty Act of 1996 does not speak to the question presented here, and thus does not bar Martinez from asserting attorney error as cause for a procedural default. Pp. 15–17.

2. Whether Martinez's attorney in his first collateral proceeding was ineffective and whether his ineffective-assistance-at-trial claim is substantial, as well as the question of prejudice, are questions that remain open for a decision on remand. Pp. 17–18.

623 F. 3d 731, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 18.

Robert Bartels argued the cause and filed briefs for petitioner.

Kent E. Cattani argued the cause for respondent. With him on the brief were *Thomas C. Horne*, Attorney General of Arizona, *David R. Cole*, Solicitor General, and *Michael T. O'Toole*, Assistant Attorney General.

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Scott A. C. Meisler*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The State of Arizona does not permit a convicted person alleging ineffective assistance of trial counsel to raise that claim on direct review. Instead, the prisoner must bring the claim in state collateral proceedings. In the instant case,

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *William T. Robinson III*, *Claudia Wilson Frost*, and *Lee Kovarsky;* and for Former State Supreme Court Justices by *George H. Kendall*, *Samuel Spital*, *Corrine Irish*, and *Pierre H. Bergeron*.

Briefs of *amici curiae* urging affirmance were filed for the State of Wisconsin et al. by *J. B. Van Hollen*, Attorney General of Wisconsin, and *Warren D. Weinstein* and *Rebecca Rapp St. John*, Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *James D. "Buddy" Caldwell* of Louisiana, *William Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Kenneth T. Cuccinelli II* of Virginia, *Rob McKenna* of Washington, and *Gregory A. Phillips* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

James P. Rouhandeh and *Keith A. Findley* filed a brief for the Innocence Network as *amicus curiae*.

however, petitioner's postconviction counsel did not raise the ineffective-assistance claim in the first collateral proceeding, and, indeed, filed a statement that, after reviewing the case, she found no meritorious claims helpful to petitioner. On federal habeas review, and with new counsel, petitioner sought to argue he had received ineffective assistance of counsel at trial and in the first phase of his state collateral proceeding. Because the state collateral proceeding was the first place to challenge his conviction on grounds of ineffective assistance, petitioner maintained he had a constitutional right to an effective attorney in the collateral proceeding. While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

I

A jury convicted petitioner, Luis Mariano Martinez, of two counts of sexual conduct with a minor under the age of 15. The prosecution introduced a videotaped forensic interview with the victim, Martinez's 11-year-old stepdaughter. It also put in evidence the victim's nightgown, with traces of Martinez's DNA. As part of his defense, Martinez introduced evidence of the victim's recantations, including testimony from the victim's grandmother and mother and a second videotaped interview in which the victim denied any abuse. The victim also denied any abuse when she testified at trial. App. to Pet. for Cert. 38a–39a. To explain the inconsistencies, a prosecution expert testified that recantations of child-abuse accusations are caused often by reluctance on the part of the victim's mother to lend support to the child's claims. Pet. for Cert. 3. After considering the conflicting evidence, the jury convicted Martinez. He was sentenced to two consecutive terms of life imprisonment

with no possibility of parole for 35 years. App. to Pet. for Cert. 39a.

The State appointed a new attorney to represent Martinez in his direct appeal. *Ibid.;* Pet. for Cert. 4. She made numerous arguments on Martinez's behalf, including a claim that the evidence was insufficient and that newly discovered evidence warranted a new trial. App. to Pet. for Cert. 39a. Arizona law, however, did not permit her to argue on direct appeal that trial counsel was ineffective. *State* v. *Spreitz*, 202 Ariz. 1, 3, 39 P. 3d 525, 527 (2002). Arizona instead requires claims of ineffective assistance at trial to be reserved for state collateral proceedings.

While Martinez's direct appeal was pending, the attorney began a state collateral proceeding by filing a "Notice of Post-Conviction Relief." *Martinez* v. *Schriro*, 623 F. 3d 731, 733–734 (CA9 2010); Ariz. Rule Crim. Proc. 32.4(a) (2011). Despite initiating this proceeding, counsel made no claim trial counsel was ineffective and later filed a statement asserting she could find no colorable claims at all. 623 F. 3d, at 734. Cf. *State* v. *Smith*, 184 Ariz. 456, 459, 910 P. 2d 1, 4 (1996).

The state trial court hearing the collateral proceeding gave Martinez 45 days to file a *pro se* petition in support of postconviction relief and to raise any claims he believed his counsel overlooked. 623 F. 3d, at 734; see *Smith*, *supra*, at 459, 910 P. 2d, at 4. Martinez did not respond. He later alleged that he was unaware of the ongoing collateral proceedings and that counsel failed to advise him of the need to file a *pro se* petition to preserve his rights. The state trial court dismissed the action for postconviction relief, in effect affirming counsel's determination that Martinez had no meritorious claims. 623 F. 3d, at 734. The Arizona Court of Appeals affirmed Martinez's conviction, and the Arizona Supreme Court denied review. *Id.*, at 733.

About a year and a half later, Martinez, now represented by new counsel, filed a second notice of postconviction relief

in the Arizona trial court. *Id.*, at 734. Martinez claimed his trial counsel had been ineffective for failing to challenge the prosecution's evidence. He argued, for example, that his trial counsel should have objected to the expert testimony explaining the victim's recantations or should have called an expert witness in rebuttal. Martinez also faulted trial counsel for not pursuing an exculpatory explanation for the DNA on the nightgown. App. to Brief in Opposition B–6 to B–12. Martinez's petition was dismissed, in part in reliance on an Arizona Rule barring relief on a claim that could have been raised in a previous collateral proceeding. *Id.*, at B–27; see Ariz. Rule Crim. Proc. 32.2(a)(3). Martinez, the theory went, should have asserted the claims of ineffective assistance of trial counsel in his first notice for postconviction relief. The Arizona Court of Appeals agreed. It denied Martinez relief because he failed to raise his claims in the first collateral proceeding. 623 F. 3d, at 734. The Arizona Supreme Court declined to review Martinez's appeal.

Martinez then sought relief in the United States District Court for the District of Arizona, where he filed a petition for a writ of habeas corpus, again raising the ineffective-assistance-of-trial-counsel claims. Martinez acknowledged the state courts denied his claims by relying on a well-established state procedural rule, which, under the doctrine of procedural default, would prohibit a federal court from reaching the merits of the claims. See, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 84–85, 90–91 (1977). He could overcome this hurdle to federal review, Martinez argued, because he had cause for the default: His first postconviction counsel was ineffective in failing to raise any claims in the first notice of postconviction relief and in failing to notify Martinez of her actions. See *id.*, at 84–85.

On the Magistrate Judge's recommendation, the District Court denied the petition, ruling that Arizona's preclusion rule was an adequate and independent state-law ground to bar federal review. App. to Pet. for Cert. 36a. Martinez

had not shown cause to excuse the procedural default, the District Court reasoned, because under *Coleman* v. *Thompson*, 501 U. S. 722, 753–754 (1991), an attorney's errors in a postconviction proceeding do not qualify as cause for a default. See *id.*, at 754–755.

The Court of Appeals for the Ninth Circuit affirmed. The Court of Appeals relied on general statements in *Coleman* that, absent a right to counsel in a collateral proceeding, an attorney's errors in the proceeding do not establish cause for a procedural default. Expanding on the District Court's opinion, the Court of Appeals, citing *Coleman*, noted the general rule that there is no constitutional right to counsel in collateral proceedings. 623 F. 3d, at 736. The Court of Appeals recognized that *Coleman* reserved ruling on whether there is "an exception" to this rule in those cases "where 'state collateral review is the first place a prisoner can present a challenge to his conviction.'" 623 F. 3d, at 736 (quoting *Coleman*, *supra*, at 755). It concluded, nevertheless, that the controlling cases established no basis for the exception. Certiorari was granted. 563 U. S. 1032 (2011).

II

Coleman v. *Thompson*, *supra*, left open, and the Court of Appeals in this case addressed, a question of constitutional law: whether a prisoner has a right to effective counsel in collateral proceedings which provide the first occasion to raise a claim of ineffective assistance at trial. These proceedings can be called, for purposes of this opinion, "initial-review collateral proceedings." *Coleman* had suggested, though without holding, that the Constitution may require States to provide counsel in initial-review collateral proceedings because "in [these] cases . . . state collateral review is the first place a prisoner can present a challenge to his conviction." *Id.*, at 755. As *Coleman* noted, this makes the initial-review collateral proceeding a prisoner's "one and only appeal" as to an ineffective-assistance claim, *id.*, at 756 (em-

phasis deleted; internal quotation marks omitted), and this may justify an exception to the constitutional rule that there is no right to counsel in collateral proceedings, see *id.*, at 755; *Douglas* v. *California*, 372 U. S. 353, 357 (1963) (holding States must appoint counsel on a prisoner's first appeal).

This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding. To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

A

Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule. See, *e. g.*, *Coleman*, *supra*, at 747–748; *Sykes*, *supra*, at 84–85. A state court's invocation of a procedural rule to deny a prisoner's claims precludes federal review of the claims if, among other requisites, the state procedural rule is a nonfederal ground adequate to support the judgment and the rule is firmly established and consistently followed. See, *e. g.*,

Walker v. *Martin*, 562 U. S. 307, 316 (2011); *Beard* v. *Kindler*, 558 U. S. 53, 60–61 (2009). The doctrine barring procedurally defaulted claims from being heard is not without exceptions. A prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law. See *Coleman*, *supra*, at 750. There is no dispute that Arizona's procedural bar on successive petitions is an independent and adequate state ground. Thus, a federal court can hear Martinez's ineffective-assistance claim only if he can establish cause to excuse the procedural default.

Coleman held that "[n]egligence on the part of a prisoner's postconviction attorney does not qualify as 'cause.'" *Maples* v. *Thomas*, 565 U. S. 266, 280 (2012). *Coleman* reasoned that "because the attorney is the prisoner's agent . . . under 'well-settled principles of agency law,' the principal bears the risk of negligent conduct on the part of his agent." *Maples*, *supra*, at 280–281.

Coleman, however, did not present the occasion to apply this principle to determine whether attorney errors in initial-review collateral proceedings may qualify as cause for a procedural default. The alleged failure of counsel in *Coleman* was on appeal from an initial-review collateral proceeding, and in that proceeding the prisoner's claims had been addressed by the state habeas trial court. See 501 U. S., at 755.

As *Coleman* recognized, this marks a key difference between initial-review collateral proceedings and other kinds of collateral proceedings. When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, *e. g.*, *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935); *Murdock* v. *Memphis*, 20 Wall. 590 (1875); cf. *Coleman*, *supra*, at 730–731. And if counsel's errors in an initial-review collateral proceeding do not estab-

lish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.

The same is not true when counsel errs in other kinds of postconviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding. See, *e. g.*, *Coleman*, *supra*, at 756.

Where, as here, the initial-review collateral proceeding is the first designated proceeding for a prisoner to raise a claim of ineffective assistance at trial, the collateral proceeding is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim. This is because the state habeas court "looks to the merits of the clai[m]" of ineffective assistance, no other court has addressed the claim, and "defendants pursuing first-tier review . . . are generally ill equipped to represent themselves" because they do not have a brief from counsel or an opinion of the court addressing their claim of error. *Halbert* v. *Michigan*, 545 U. S. 605, 617 (2005); see *Douglas*, *supra*, at 357–358.

As *Coleman* recognized, an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims. See 501 U. S., at 754; *Evitts* v. *Lucey*, 469 U. S. 387, 396 (1985); *Douglas*, *supra*, at 357–358. Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral

proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. *Halbert*, 545 U. S., at 619. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. Cf., *e. g.*, *id.*, at 620–621 (describing the educational background of the prison population). While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged. See, *e. g.*, *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932) ("[The defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence"). Effective trial counsel preserves claims to be considered on appeal, see, *e. g.*, Fed. Rule Crim. Proc. 52(b), and in federal habeas proceedings, *Edwards* v. *Carpenter*, 529 U. S. 446 (2000).

This is not to imply the State acted with any impropriety by reserving the claim of ineffective assistance for a collateral proceeding. See *Massaro* v. *United States*, 538 U. S. 500, 505 (2003). Ineffective-assistance claims often depend on evidence outside the trial record. Direct appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the claim. *Ibid.* Abbreviated deadlines to expand the record on direct appeal may not allow adequate time for an attorney to investigate the ineffective-assistance claim. See Primus, Structural Reform in Criminal Defense, 92 Cornell L. Rev. 679, 689–690, and n. 57 (2004) (most rules give between 5 and 30 days from the time of conviction to file a request to expand the record on appeal). Thus, there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage, but this decision is not without consequences for the State's ability to assert a procedural default in later proceedings. By deliberately choosing to move trial-ineffectiveness claims outside of the direct-appeal process, where counsel is constitutionally guaranteed, the State significantly diminishes prisoners' ability to file such claims. It is within the context of this state procedural framework that counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default.

The rules for when a prisoner may establish cause to excuse a procedural default are elaborated in the exercise of the Court's discretion. *McCleskey* v. *Zant*, 499 U. S. 467, 490 (1991); see also *Coleman*, *supra*, at 730–731; *Sykes*, 433 U. S., at 83; *Reed* v. *Ross*, 468 U. S. 1, 9 (1984); *Fay* v. *Noia*, 372 U. S. 391, 430 (1963), overruled in part by *Sykes*, *supra*. These rules reflect an equitable judgment that only where a prisoner is impeded or obstructed in complying with the State's established procedures will a federal habeas court excuse the prisoner from the usual sanction of default. See, *e. g.*, *Strickler* v. *Greene*, 527 U. S. 263, 289 (1999); *Reed*,

supra, at 16. Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney's errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim. From this it follows that, when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding, a prisoner may establish cause for a default of an ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland* v. *Washington*, 466 U. S. 668 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. Cf. *Miller-El* v. *Cockrell*, 537 U. S. 322 (2003) (describing standards for certificates of appealability to issue).

Most jurisdictions have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims. Some States, including Arizona, appoint counsel in every first collateral proceeding. See, *e. g.*, Alaska Stat. §18.85.100(c) (2010); Ariz. Rule Crim. Proc. 32.4(c)(2) (2011); Conn. Gen. Stat. § 51–296(a) (2011); Me. Rules Crim. Proc. 69, 70(c) (2010); N. C. Gen. Stat. Ann. § 7A–451(a)(2) (Lexis 2009); N. J. Ct. Rule 3:22–6(b) (2012); R. I. Gen. Laws § 10–9.1–5 (Lexis 1997); Tenn. Code Ann. § 8–14–205 (2011). Some States appoint counsel if the claims require an evidentiary hearing, as claims of ineffective assistance often do. See, *e. g.*, Ky. Rule Crim. Proc. 11.42(5) (2011); La. Code Crim.

Proc. Ann., Art. 930.7(C) (West 2008); Mich. Rule Crim. Proc. 6.505(A) (2011); S. C. Rule Civ. Proc. 71.1(d) (2011). Other States appoint counsel if the claims have some merit to them or the state habeas trial court deems the record worthy of further development. See, *e. g.*, Ark. Rule Crim. Proc. 37.3(b) (2011); Colo. Rule Crim. Proc. 35(b) (2011); Del. Super. Ct. Rule Crim. Proc. 61(e)(1) (2011); Ind. Rule Post-Conviction Remedies Proc. 1, § 9(a) (rev. 2011); Kan. Stat. Ann. § 22–4506 (2007); N. M. Dist. Ct. Rule Crim. Proc. 5–802 (2011); *Hust* v. *State*, 147 Idaho 682, 683–684, 214 P. 3d 668, 669–670 (2009); *Hardin* v. *Arkansas*, 350 Ark. 299, 301, 86 S. W. 3d 384, 385 (2002) *(per curiam); Jensen* v. *State*, 2004 ND 200, ¶13, 688 N. W. 2d 374, 378; *Wu* v. *United States*, 798 A. 2d 1083, 1089 (D. C. 2002); *Kostal* v. *People*, 167 Colo. 317, 447 P. 2d 536 (1968). It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, where that is so, the States may enforce a procedural default in federal habeas proceedings.

B

This limited qualification to *Coleman* does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles. Cf., *e. g.*, *Montejo* v. *Louisiana*, 556 U. S. 778, 792–793 (2009). *Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial. *Coleman* itself did not involve an occasion when an attorney erred in an initial-review collateral proceeding with respect to a claim of ineffective trial counsel; and in the 20 years since *Coleman* was decided, we have not held *Coleman* applies in circumstances like this one.

The holding here ought not to put a significant strain on state resources. When faced with the question whether there is cause for an apparent default, a State may answer

that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i. e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

This is but one of the differences between a constitutional ruling and the equitable ruling of this case. A constitutional ruling would provide defendants a freestanding constitutional claim to raise; it would require the appointment of counsel in initial-review collateral proceedings; it would impose the same system of appointing counsel in every State; and it would require a reversal in all state collateral cases on direct review from state courts if the States' system of appointing counsel did not conform to the constitutional rule. An equitable ruling, by contrast, permits States a variety of systems for appointing counsel in initial-review collateral proceedings. And it permits a State to elect between appointing counsel in initial-review collateral proceedings or not asserting a procedural default and raising a defense on the merits in federal habeas proceedings. In addition, state collateral cases on direct review from state courts are unaffected by the ruling in this case.

The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. See 501 U. S., at 754; *Carrier*, 477 U. S., at 488. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

In addition, the limited nature of the qualification to *Coleman* adopted here reflects the importance of the right to the effective assistance of trial counsel and Arizona's decision to

bar defendants from raising ineffective-assistance claims on direct appeal. Our holding here addresses only the constitutional claims presented in this case, where the State barred the defendant from raising the claims on direct appeal.

Arizona contends that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254, bars Martinez from asserting attorney error as cause for a procedural default. AEDPA refers to attorney error in collateral proceedings, but it does not speak to the question presented in this case. Section 2254(i) provides that "the ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief." "Cause," however, is not synonymous with "a ground for relief." A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. In this case, for example, Martinez's "ground for relief" is his ineffective-assistance-of-trial-counsel claim, a claim that AEDPA does not bar. Martinez relies on the ineffectiveness of his post-conviction attorney to excuse his failure to comply with Arizona's procedural rules, not as an independent basis for overturning his conviction. In short, while § 2254(i) precludes Martinez from relying on the ineffectiveness of his postconviction attorney as a "ground for relief," it does not stop Martinez from using it to establish "cause." *Holland* v. *Florida*, 560 U. S. 631, 650–651 (2010).

III

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

In this case Martinez's attorney in the initial-review collateral proceeding filed a notice akin to an *Anders* brief, in effect conceding that Martinez lacked any meritorious claim, including his claim of ineffective assistance at trial. See *Anders* v. *California*, 386 U. S. 738 (1967). Martinez argued before the federal habeas court that filing the *Anders* brief constituted ineffective assistance. The Court of Appeals did not decide whether that was so. Rather, it held that because Martinez did not have a right to an attorney in the initial-review collateral proceeding, the attorney's errors in the initial-review collateral proceeding could not establish cause for the failure to comply with the State's rules. Thus, the Court of Appeals did not determine whether Martinez's attorney in his first collateral proceeding was ineffective or whether his claim of ineffective assistance of trial counsel is substantial. And the court did not address the question of prejudice. These issues remain open for a decision on remand.

* * *

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I

A

Let me get this straight: Out of concern for the values of federalism; to preserve the ability of our States to provide prompt justice; and in light of our longstanding jurisprudence holding that there is no constitutional right to counsel in state collateral review; the Court, in what it portrays as an admirable exercise of judicial restraint, abstains from holding that there is a constitutional right to counsel in initial-review state habeas. After all, that would have

meant, in a case such as the one before us, that failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, would constitute cause for excusing procedural default. See *Strickland* v. *Washington*, 466 U. S. 668 (1984). Instead of taking that radical step, the Court holds that, *for equitable reasons*, in a case such as the one before us, failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, constitutes cause for excusing procedural default. The result, of course, is precisely the same.

Ah, but perhaps the explanation of why the Court's action today amounts to praiseworthy self-restraint is this: It pronounces this excuse from the usual rule of procedural default only in initial-review state habeas raising an ineffective-assistance-of-trial-counsel claim. But it could have limited its invention of a new constitutional right to collateral-review counsel in precisely the same fashion—and with precisely the same consequences. Moreover, no one really believes that the newly announced "equitable" rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of "newly discovered" prosecutorial misconduct, for example, see *Brady* v. *Maryland*, 373 U. S. 83 (1963), claims based on "newly discovered" exculpatory evidence or "newly discovered" impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel. The Court's soothing assertion, *ante*, at 17, that its holding "addresses only the constitutional claims presented in this case," insults the reader's intelligence.[1]

[1] The Court also seeks to restrict its holding to cases in which the State has "deliberately cho[sen]" to move the asserted claim "outside of the direct-appeal process," *ante*, at 13. That line lacks any principled basis, and will not last. Is there any relevant difference between cases in which

Moreover, even if today's holding could (against all logic) be restricted to ineffective-assistance-of-trial-counsel claims, it would have essentially the same practical consequences as a holding that collateral-review counsel is constitutionally required. Despite the Court's suggestion to the contrary, see *ante*, at 16, the rule it adopts calls into question the common state practice of not appointing counsel in all first collateral proceedings, see *ante*, at 14–15. It does not, to be sure, call into question the *lawfulness* of that practice; only its *sanity*. For if the prisoner goes through state collateral proceedings without counsel, and fails to raise an ineffective-assistance-of-trial-counsel claim which is, because of that failure, defaulted, the default will not preclude federal habeas review of the merits of that claim. And since ineffective assistance of trial counsel is a monotonously standard claim on federal habeas (has a duly convicted defendant *ever* been effectively represented?), whoever advises the State would himself be guilty of ineffective assistance if he did not counsel the appointment of state-collateral-review counsel in *all* cases—lest the failure to raise that claim in the state proceedings be excused and the State be propelled into federal habeas review of the adequacy of trial-court representation

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the State *says* that certain claims can only be brought on collateral review and cases in which those claims *by their nature* can only be brought on collateral review, since they do not manifest themselves until the appellate process is complete? Our cases establish that to constitute cause for failure to raise an issue on direct review, the excuse must be "an objective factor external to the defense." See *infra*, at 24. That the factual basis for a claim was not *available* until the collateral-review stage is no less such a factor than a State's *requiring* that a claim be brought on collateral review. See *Murray* v. *Carrier*, 477 U. S. 478, 488 (1986). The Court's asserted limitation makes sense *only if* the opinion means that a State has "deliberately cho[sen]" to move newly-arisen claims "outside of the direct-appeal process" if it fails to *reopen* the direct-appeal process in order to entertain such claims. Such a radical change in what we require of the States surely ought to be prescribed by language clearer than what today's opinion contains.

that occurred many years ago.[2] Which is to say that the Court's pretended avoidance of requiring States to appoint collateral-review counsel is a sham.[3]

Of course even the *appointment* of state-collateral-review counsel will not guarantee that the State's criminal proceeding can be concluded without years-long federal retrial. Appointment of counsel may, as I have said, avoid federal review of the adequacy of representation that occurred years ago, at the original trial. But since, under today's opinion, the condition for exclusion of federal habeas is the very same condition that would apply if appointment of state-collateral-review counsel were constitutionally required, it will remain to be determined in federal habeas review *whether the state-appointed counsel was effective.* Thus, as a consequence of today's decision the States will *always* be forced to litigate in federal habeas, for *all* defaulted ineffective-assistance-

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[2] The Court says that to establish cause a prisoner must demonstrate that the ineffective-assistance-of-trial-counsel claim is "substantial," which apparently means the claim has at least some merit. See *ante*, at 14. The Court does not explain where this substantiality standard comes from, and how it differs from the normal rule that a prisoner must demonstrate actual prejudice to avoid the enforcement of a procedural default, see *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991). But whatever the standard, examination of the adequacy of years-ago representation has been substituted for summary dismissal by reason of procedural default.

[3] The Court also claims, *ante*, at 16, that its "equitable" ruling, unlike a constitutional ruling, will not require "a reversal in all state collateral cases on direct review from state courts" where counsel has not been appointed. Surely the Court does not mean to suggest that an unconstitutional failure to appoint counsel on collateral review, like an unconstitutional failure to appoint counsel at trial, would require the entire conviction to be set aside. That is inconceivable. So either one of two things would happen: Either the reviewing state court would be able to inquire into prejudice (which is an improvement over having the federal habeas court make that inquiry, as the Court's "equitable" solution requires); or else the appellate state court will remand for a collateral proceeding with counsel (which is, as we have said, just what the Court's "equitable" ruling effectively requires anyway). So the Court's "equitable" ruling is no boon to the States.

of-trial-counsel claims (and who knows what other claims), either (1) the validity of the defaulted claim (where collateral-review counsel was not appointed), or (2) the effectiveness of collateral-review counsel (where collateral-review counsel was appointed). The Court notes that many States already provide for the appointment of counsel in first collateral challenges—as though this proves that what the Court forces the States to do today is eminently reasonable. But what the Court fails to point out is that currently, when state-appointed counsel does not raise an ineffective-assistance-of-trial-counsel claim, that is the end of the matter: The issue has been procedurally defaulted. By virtue of today's opinion, however, *all* those cases can (and where capital punishment is at issue assuredly *will*) proceed to federal habeas on the issue of whether state-appointed counsel was ineffective in failing to raise the ineffective-assistance-of-trial-counsel issue. That is the meaning of the Court's (supposedly comforting) statement:

> "It is likely that most of the attorneys appointed by the courts are qualified to perform, and do perform, according to prevailing professional norms; and, *where that is so*, the States may enforce a procedural default in federal habeas proceedings." *Ante*, at 15 (emphasis added).

To be more precise, the Court should have said "where that is so, and where federal habeas courts have finally rejected claims that it is not so, the States may enforce a procedural default in federal habeas proceedings."

I cannot possibly imagine the basis for the Court's confidence, *ante*, at 15–16, that all this will not put a significant strain on state resources. The *principal escape route* from federal habeas—existence of an "adequate and independent state ground"—has been closed.[4] Whether counsel ap-

[4] See N. King, F. Cheesman, & B. Ostrom, Final Technical Report: Habeas Litigation in U. S. District Courts 45–49 (2007) (documenting the percentage of habeas petitions that included claims dismissed for various

pointed for state collateral review raises the ineffective-assistance-of-trial-counsel claim *or not*, federal habeas review will proceed. In practical effect, that may not make much difference in noncapital cases (except for the squandering of state taxpayers' money): The defendant will stay in prison, continuing to serve his sentence, while federal habeas review grinds on. But in capital cases, it will effectively reduce the sentence, giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume. I *guarantee* that an assertion of ineffective assistance of trial counsel will be made in *all* capital cases from this date on, causing (because of today's holding) execution of the sentence to be deferred until either that claim, or the claim that appointed counsel was ineffective in failing to make that claim, has worked its way through the federal system.

B

The Court would have us believe that today's holding is no more than a "limited qualification" to *Coleman* v. *Thompson*, 501 U. S. 722 (1991). *Ante*, at 15. It is much more than that: a repudiation of the longstanding principle governing procedural default, which *Coleman* and other cases consistently applied. *Coleman* itself involved a habeas petitioner's contention that his attorney's failure to file a timely notice of appeal in his state habeas proceeding, which resulted in procedural default of the claims raised in that proceeding, was cause to excuse that default in federal habeas. 501 U. S., at 752. The petitioner in that case contended that whether a violation of his constitutional right to effective

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procedural reasons); Administrative Office of the United States Courts, Habeas Corpus Petitions Disposed of Procedurally During the 12-Month Period Ending September 30, 2011 (reporting that for appeals in noncapital state-prisoner habeas cases, procedural default accounted for the largest percentage of procedural dispositions, with the exception of the denial of a certificate of appealability) (available in Clerk of Court's case file).

counsel had occurred was of no consequence, so long as the attorney's conduct fell short of the effectiveness standard set forth in *Strickland*. See 501 U. S., at 753. Whereas *Coleman* flatly repudiated that claim as being inconsistent with our precedent, see *ibid.*, today's majority wholeheartedly embraces it, *ante*, at 14.

Rejection of the argument in *Coleman* was compelled by our jurisprudence pertaining to cause for excusing procedural default, and in particular *Murray* v. *Carrier*, 477 U. S. 478 (1986). See *Coleman*, *supra*, at 752–753. *Carrier* involved the failure of a defendant's attorney to raise a claim on direct appeal. 477 U. S., at 482. This failure did not constitute cause, we explained, because it was not an "objective factor *external* to the defense." *Id.*, at 488 (emphasis added). This external-factor requirement reflects the judgment that States should not be forced to undergo federal habeas review of a defaulted claim unless a factor not attributable to the prisoner obstructed his compliance with state procedures. See *id.*, at 487–488.

Although this externality requirement has been the North Star of our excuse-for-cause jurisprudence, today's opinion does not whisper its name—no doubt because it is impossible to say that Martinez's procedural default was caused by a factor external to his defense. *Coleman* and *Carrier* set forth in clear terms when it is that attorney error constitutes an external factor: Attorney error by itself does not, because when an attorney acts (or fails to act) in furtherance of the litigation, he is acting as the petitioner's agent. *Coleman*, *supra*, at 753; *Carrier*, *supra*, at 492. Any other rule would be inconsistent with our system of representative litigation, under which "each party is deemed bound by the acts of his lawyer-agent." *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 92 (1990) (internal quotation marks omitted). But when attorney error amounts to *constitutionally ineffective* assistance of counsel, that error is imputed to the State (for the State has failed to comply with the constitu-

tional requirement to provide effective counsel), rendering the error external to the petitioner. *Coleman*, *supra*, at 754; *Carrier*, *supra*, at 488. Accordingly, as Martinez himself appears to recognize, see Brief for Petitioner 22, our cases require that absent a determination that Arizona violated the Constitution by failing to provide effective counsel, attorney error cannot provide cause to excuse his procedural default. Rather than apply that rule here, the Court adopts the very approach *Coleman* explicitly addressed and rejected.

The Court essentially disclaims any need to give full consideration to the principle of *stare decisis* because *Coleman* did not involve an initial-review collateral proceeding for a claim of ineffective assistance of trial counsel. See *ante*, at 15. That is rather like saying that *Marbury* v. *Madison*, 1 Cranch 137 (1803), does not establish our authority to review the constitutionality of a new federal statute because it involved a different enactment. Just as the reasoning of *Marbury* was categorical, so was the reasoning of *Coleman* and *Carrier:* Attorney error is not an external factor constituting cause for excusing default unless the State has a constitutional obligation to provide effective counsel. Had the majority seriously considered the relevant *stare decisis* factors, see, *e. g.*, *Montejo* v. *Louisiana*, 556 U. S. 778, 792–793 (2009), it would have had difficulty justifying today's decision. Nor can it escape the demands of *stare decisis* by saying that our rules regarding the excuse of procedural default reflect an "equitable judgment" that is "elaborated in the exercise of the Court's discretion." *Ante*, at 13. Equity is not lawlessness, and discretion is not license to cast aside established jurisprudence reaffirmed this very Term. See *Maples* v. *Thomas*, 565 U. S. 266, 280 (2012) ("Negligence on the part of a prisoner's postconviction attorney does not qualify as 'cause'" (quoting *Coleman*, *supra*, at 753)). "'[C]ourts of equity must be governed by rules and precedents no less than courts of law.'" *Lonchar* v. *Thomas*, 517 U. S. 314, 323

(1996) (quoting *Missouri* v. *Jenkins*, 515 U. S. 70, 127 (1995) (THOMAS, J., concurring)).

Noticeably absent from the Court's equitable analysis, moreover, is any consideration of the very reason for a procedural-default rule: the comity and respect that federal courts must accord state-court judgments. See *Edwards* v. *Carpenter*, 529 U. S. 446, 451 (2000). The procedural-default doctrine reflects the understanding that federal review of defaulted claims may "circumvent the jurisdictional limits of direct review and 'undermine the State's interest in enforcing its laws.'" *Lee* v. *Kemna*, 534 U. S. 362, 388 (2002) (KENNEDY, J., dissenting) (quoting *Coleman*, 501 U. S., at 731). Unlike today's decision, *Carrier* and *Coleman* took account of the significant costs federal habeas review imposes on States, including the "reduction in the finality of litigation and the frustration of 'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Carrier*, *supra*, at 487 (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). Criminal conviction ought to be final before society has forgotten the crime that justifies it. When a case arrives at federal habeas, the state conviction and sentence at issue (never mind the underlying crime) are already a dim memory, on average more than six years old (seven years for capital cases).[5] I would adhere to the precedents that prevent a bad situation from becoming worse.

II

We granted certiorari on, and the parties addressed their arguments to, the following question:

> "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who

[5] See King, Cheesman, & Ostrom, Final Technical Report, at 21–22 (reporting the average interval between state judgment and federal habeas filing for a sample of federal habeas cases filed in the early-to-mid 2000's).

> has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim." Pet. for Cert. *i*.

While the Court's decision not to answer the question did not avoid the costs a constitutional holding would have imposed on States, it did avoid the Court's need to confront the established rule that there is no right to counsel in collateral proceedings. To avoid his procedural default, Martinez advocates in favor of an exception to this rule where the prisoner seeks the right to counsel in an initial-review collateral proceeding—an argument we have previously declined to address. See *Coleman*, *supra*, at 755.

The argument is quite clearly foreclosed by our precedent. In *Pennsylvania* v. *Finley*, 481 U. S. 551 (1987), and *Murray* v. *Giarratano*, 492 U. S. 1 (1989), we stated *unequivocally* that prisoners do not "have a constitutional right to counsel when mounting collateral attacks upon their convictions." *Finley*, *supra*, at 555. See also *Giarratano*, 492 U. S., at 10 (plurality opinion) ("[T]he rule of *Pennsylvania* v. *Finley* should apply no differently in capital cases than in noncapital cases"); *id.*, at 14 (KENNEDY, J., concurring in judgment) (indicating that the Constitution does not categorically require States to provide counsel to death-row inmates seeking state habeas review). Though *Finley* may have involved only claims that could have been raised on direct review, see 481 U. S., at 553; *Giarratano*, *supra*, at 24 (Stevens, J., dissenting), the Court was no doubt aware that States often limit "the collateral review process [to] issues that have not previously been litigated or argued on the direct appeal." Brief for Respondent in *Finley*, O. T. 1986, No. 85–2099, p. 11, n. 5. And *Giarratano*, which involved a class action filed under 42 U. S. C. § 1983, addressed the *general* assertion that the Constitution requires the appointment of counsel for collateral attacks on capital convictions. See 492 U. S., at 3–4

(plurality opinion). The Court rejected that assertion without qualification. The dissenting opinion, moreover, made the precise argument Martinez now asserts: Under state law "some claims [including ineffective assistance of trial counsel] ordinarily heard on direct review will be relegated to postconviction proceedings." *Id.*, at 24 (Stevens, J., dissenting). See also Brief for Respondents in *Giarratano*, O. T. 1988, No. 88–411, p. 29, n. 8 ("In [Virginia capital habeas] proceedings, Death Row inmates seek to assert claims that have not been, and could not have been, addressed on direct appeal . . . "). Thus, in announcing a *categorical* rule in *Finley*, see *Giarratano*, *supra*, at 12 (plurality opinion), and then reaffirming it in *Giarratano*, the Court knew full well that a collateral proceeding may present the first opportunity for a prisoner to raise a constitutional claim. I would follow that rule in this case and reject Martinez's argument that there is a constitutional right to counsel in initial-review collateral proceedings.

* * *

Far from avoiding the consequences a constitutional holding would have imposed on the States, today's holding as a practical matter requires States to appoint counsel in initial-review collateral proceedings—and, to boot, eliminates the pre-existing assurance of escaping federal habeas review for claims that appointed counsel fails to present. Despite the Court's protestations to the contrary, the decision is a radical alteration of our habeas jurisprudence that will impose considerable economic costs on the States and further impair their ability to provide justice in a timely fashion. The balance it strikes between the finality of criminal judgments and the need to provide for review of defaulted claims of ineffective assistance of trial counsel grossly underestimates both the frequency of such claims in federal habeas, and the incentives to argue (since it is a free pass to federal habeas) that appointed counsel was ineffective in failing to raise such

claims. The balance might have been close (though it would disregard our established jurisprudence) if the Court merely held that uncounseled failure to raise ineffective assistance of trial counsel would not constitute default. But in *adding* to that the rule that *counseled* failure to raise it may also provide an excuse, the Court creates a monstrosity. For these reasons, I respectfully dissent.

Syllabus

COLEMAN *v.* COURT OF APPEALS OF MARYLAND ET AL.

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

No. 10–1016. Argued January 11, 2012—Decided March 20, 2012

The Family and Medical Leave Act of 1993 (FMLA) entitles an employee to take up to 12 workweeks of unpaid leave per year for (A) the care of a newborn son or daughter; (B) the adoption or foster-care placement of a child; (C) the care of a spouse, son, daughter, or parent with a serious medical condition; and (D) the employee's own serious health condition when the condition interferes with the employee's ability to perform at work. 29 U. S. C. § 2612(a)(1). The FMLA also creates a private right of action for equitable relief and damages "against any employer (including a public agency) in any Federal or State court." § 2617(a)(2). For present purposes, subparagraphs (A), (B), and (C) are referred to as the family-care provisions, and subparagraph (D) as the self-care provision. In *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 730–732, this Court held that Congress could subject States to suit for violations of subparagraph (C) based on evidence of family-leave policies that discriminated on the basis of sex.

Petitioner filed suit, alleging that his employer, the Maryland Court of Appeals, an instrumentality of the State, violated the FMLA by denying him self-care leave. The Federal District Court dismissed the suit on sovereign immunity grounds. The Fourth Circuit affirmed, holding that unlike the family-care provision in *Hibbs*, the self-care provision was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination on the part of States.

Held: The judgment is affirmed.

626 F. 3d 187, affirmed.

JUSTICE KENNEDY, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded that suits against States under the self-care provision are barred by sovereign immunity. Pp. 35–44.

(a) Under the federal system, States, as sovereigns, are immune from damages suits, unless they waive that defense. See, *e. g.*, *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 72–73. Congress may also abrogate the States' immunity pursuant to its powers under § 5 of the Fourteenth Amendment, but it must make that intention "unmistakably clear in the language of the statute," *Hibbs*, *supra*, at 726. It did so in the FMLA.

Congress also "must tailor" legislation enacted under § 5 to "'remedy or prevent'" "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 639. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U. S. 507, 520. Pp. 35–37.

(b) The sex-based discrimination that supported allowing subparagraph (C) suits against States is absent with respect to the self-care provision. Petitioner's three arguments to the contrary are unpersuasive. Pp. 37–43.

(1) Petitioner maintains that the self-care provision addresses sex discrimination and sex stereotyping. But the provision, standing alone, is not a valid abrogation of the States' immunity from suit. At the time the FMLA was enacted, there was no evidence of such discrimination or stereotyping in sick-leave policies. Congress was concerned about the economic burdens imposed by illness-related job loss on employees and their families and about discrimination based on illness, not sex. Although the self-care provision offers some women a benefit by allowing them to take leave for pregnancy-related illnesses, the provision, as a remedy, is not congruent and proportional to any identified constitutional violations. When the FMLA was enacted, Congress had no evidence that States were excluding pregnancy-related illnesses from their leave policies. Pp. 37–39.

(2) Petitioner also argues that the self-care provision is a necessary adjunct to the family-care provision sustained in *Hibbs*. But his claim—that the provisions work in tandem to ensure the equal availability of total FMLA leave time to women and men despite their different leave-usage patterns—is unconvincing and does not comply with the requirements of *City of Boerne*. Also, there are no congressional findings of, or evidence on, how the self-care provision is necessary to the family-care provisions or how it reduces employer discrimination against women. Pp. 39–42.

(3) Finally, petitioner contends that the self-care provision helps single parents keep their jobs when they get ill. The fact that most single parents happen to be women demonstrates, at most, that the self-care provision was directed at remedying neutral leave restrictions that have a disparate effect on women. However, "[a]lthough disparate impact may be relevant evidence of . . . discrimination . . . such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny." *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 372–373. Because it is unlikely that many of the neutral leave policies affected by

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the self-care provision are unconstitutional, the scope of the self-care provision is out of proportion to its supposed remedial or preventive objectives. Pp. 42–43.

JUSTICE SCALIA adhered to his view that the Court should abandon the "congruence and proportionality" approach in favor of one that is properly tied to the text of § 5, which grants Congress the power "to enforce, by appropriate legislation," the other provisions of the Fourteenth Amendment. Outside the context of racial discrimination, Congress's § 5 power should be limited to the regulation of conduct that itself violates the Fourteenth Amendment and thus would not reach a State's failure to grant self-care leave to its employees. Pp. 44–45.

KENNEDY, J., announced the judgment of the Court and delivered an opinion, in which ROBERTS, C. J., and THOMAS and ALITO JJ., joined. THOMAS, J., filed a concurring opinion, *post*, p. 44. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 44. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, and in which SOTOMAYOR and KAGAN, JJ., joined as to all but footnote 1, *post*, p. 45.

Michael L. Foreman argued the cause for petitioner. With him on the briefs was *Edward Smith, Jr.*

John B. Howard, Jr., Deputy Attorney General of Maryland, argued the cause for respondents. With him on the brief were *Douglas F. Gansler*, Attorney General, and *William F. Brockman*, Acting Solicitor General.*

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*Briefs of *amici curiae* urging reversal were filed for the Constitutional Accountability Center by *Clifford M. Sloan*, *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans;* for the Lawyers' Committee for Civil Rights Under Law by *Jon Greenbaum* and *Jane Dolkart;* for the National Partnership for Women & Families et al. by *Judith L. Lichtman*, *Sarah Crawford*, *Jonathan J. Frankel*, and *Phillip Douglass;* and for Sen. Tom Harkin et al. by *Mark E. Haddad* and *Carter G. Phillips*.

A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, *Bill Cobb*, Deputy Attorney General, *Jonathan F. Mitchell*, Solicitor General, and *Sean D. Jordan*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *Thomas C. Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Samuel S. Olens* of Georgia, *Lawrence G. Wasden* of Idaho, *Gregory*

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

The question in this case is whether a state employee is allowed to recover damages from the state entity that employs him by invoking one of the provisions of a federal statute that, in express terms, seeks to abrogate the States' immunity from suits for damages. The statute in question is the Family and Medical Leave Act of 1993, 107 Stat. 6, 29 U. S. C. § 2601 *et seq.* The provision at issue requires employers, including state employers, to grant unpaid leave for self care for a serious medical condition, provided other statutory requisites are met, particularly requirements that the total amount of annual leave taken under all the Act's provisions does not exceed a stated maximum. § 2612(a)(1)(D). In agreement with every Court of Appeals to have addressed this question, this Court now holds that suits against States under this provision are barred by the States' immunity as sovereigns in our federal system. See 626 F. 3d 187 (CA4 2010) (case below); *Nelson* v. *University of Tex.*, 535 F. 3d 318 (CA5 2008); *Miles* v. *Bellfontaine Habilitation Center*, 481 F. 3d 1106 (CA8 2007) *(per curiam); Toeller* v. *Wisconsin Dept. of Corrections*, 461 F. 3d 871 (CA7 2006); *Touvell* v. *Ohio Dept. of Mental Retardation & Developmental Disabilities*, 422 F. 3d 392 (CA6 2005); *Brockman* v. *Wyoming Dept. of Family Servs.*, 342 F. 3d 1159 (CA10 2003); *Laro* v. *New Hampshire*, 259 F. 3d 1 (CA1 2001).

F. Zoeller of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Michael A. Delaney* of New Hampshire, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Linda L. Kelly* of Pennsylvania, *Alan Wilson* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming.

I

A

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 workweeks of unpaid leave per year. An employee may take leave under the FMLA for: (A) "the birth of a son or daughter . . . in order to care for such son or daughter," (B) the adoption or foster-care placement of a child with the employee, (C) the care of a "spouse, . . . son, daughter, or parent" with "a serious health condition," or (D) the employee's own serious health condition when the condition interferes with the employee's ability to perform at work. 29 U. S. C. §2612(a)(1). The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." §2617(a)(2). As noted, subparagraph (D) is at issue here.

This Court considered subparagraph (C) in *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721 (2003). Subparagraph (C), like (A) and (B), grants leave for reasons related to family care, and those three provisions are referred to here as the family-care provisions. *Hibbs* held that Congress could subject the States to suit for violations of subparagraph (C), §2612(a)(1)(C). That holding rested on evidence that States had family-leave policies that differentiated on the basis of sex and that States administered even neutral family-leave policies in ways that discriminated on the basis of sex. See *id.*, at 730–732. Subparagraph (D), the self-care provision, was not at issue in *Hibbs*.

B

Petitioner Daniel Coleman was employed by the Court of Appeals of the State of Maryland. When Coleman requested sick leave, he was informed he would be terminated if he did not resign. Coleman then sued the state court in the United States District Court for the District of Mary-

land, alleging, *inter alia*, that his employer violated the FMLA by failing to provide him with self-care leave.

The District Court dismissed the suit on the basis that the Maryland Court of Appeals, as an entity of a sovereign State, was immune from the suit for damages. The parties do not dispute the District Court's ruling that the Maryland Court of Appeals is an entity or instrumentality of the State for purposes of sovereign immunity. The District Court concluded the FMLA's self-care provision did not validly abrogate the State's immunity from suit. App. to Pet. for Cert. 15–20. The Court of Appeals for the Fourth Circuit affirmed, reasoning that, unlike the family-care provision at issue in *Hibbs*, the self-care provision was not directed at an identified pattern of gender-based discrimination and was not congruent and proportional to any pattern of sex-based discrimination on the part of States. 626 F. 3d 187. Certiorari was granted. 564 U. S. 1035 (2011).

II

A

A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense. See *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 72–73 (2000); *Alden* v. *Maine*, 527 U. S. 706 (1999). As an exception to this principle, Congress may abrogate the States' immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment. See, *e. g.*, *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976).

Congress must "mak[e] its intention to abrogate unmistakably clear in the language of the statute." *Hibbs*, 538 U. S., at 726. On this point the Act does express the clear purpose to abrogate the States' immunity. *Ibid.* ("The clarity of Congress' intent" to abrogate the States' immunity from suits for damages under the FMLA "is not fairly debatable"). Congress subjected any "public agency" to suit under the FMLA, 29 U. S. C. § 2617(a)(2), and a "public agency" is de-

fined to include both "the government of a State or political subdivision thereof" and "any agency of . . . a State, or a political subdivision of a State," §§ 203(x), 2611(4)(A)(iii).

The question then becomes whether the self-care provision and its attempt to abrogate the States' immunity are a valid exercise of congressional power under § 5 of the Fourteenth Amendment. Section 5 grants Congress the power "to enforce" the substantive guarantees of § 1 of the Amendment by "appropriate legislation." The power to enforce "'includes the authority both to remedy and to deter violation[s] of rights guaranteed'" by § 1. See *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 365 (2001) (quoting *Kimel*, *supra*, at 81). To ensure Congress' enforcement powers under § 5 remain enforcement powers, as envisioned by the ratifiers of the Amendment, rather than powers to redefine the substantive scope of § 1, Congress "must tailor" legislation enacted under § 5 to "'remedy or prevent'" "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid Postsecondary Ed. Expense Bd.* v. *College Savings Bank*, 527 U. S. 627, 639 (1999).

Whether a congressional Act passed under § 5 can impose monetary liability upon States requires an assessment of both the "'evil' or 'wrong' that Congress intended to remedy," *ibid.*, and the means Congress adopted to address that evil, see *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997). Legislation enacted under § 5 must be targeted at "conduct transgressing the Fourteenth Amendment's substantive provisions." *Florida Prepaid*, *supra*, at 639; see *Kimel*, *supra*, at 88; *City of Boerne*, 521 U. S., at 525. And "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520.

Under this analysis *Hibbs* permitted employees to recover damages from States for violations of subparagraph (C). In enacting the FMLA, Congress relied upon evidence of a well-documented pattern of sex-based discrimination in family-

leave policies. States had facially discriminatory leave policies that granted longer periods of leave to women than to men. 538 U. S., at 730–731. States also administered facially neutral family-leave policies in gender-biased ways. *Id.*, at 732. These practices reflected what Congress found to be a "pervasive sex-role stereotype that caring for family members is women's work," *id.*, at 731, a stereotype to which even this Court had succumbed in earlier times, *id.*, at 729. Faced with "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits," *Hibbs* concluded that requiring state employers to give all employees the opportunity to take family-care leave was "narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest." *Id.*, at 735, 738.

B

The same cannot be said for requiring the States to give all employees the opportunity to take self-care leave. Petitioner advances three arguments for allowing employees to recover damages from States that violate the FMLA's self-care provision: The self-care provision standing alone addresses sex discrimination and sex stereotyping; the provision is a necessary adjunct to the family-care provision sustained in *Hibbs;* and the provision eases the burden on single parents. But what the family-care provisions have to support them, the self-care provision lacks, namely, evidence of a pattern of state constitutional violations accompanied by a remedy drawn in narrow terms to address or prevent those violations.

1

Standing alone, the self-care provision is not a valid abrogation of the States' immunity from suit. When the FMLA was enacted, "ninety-five percent of full-time state- and local-government employees were covered by paid sick leave

plans and ninety-six percent of such employees likewise enjoyed short-term disability protection." Brief for State of Texas et al. as *Amici Curiae* 13–14 (hereinafter Texas Brief) (citing Bureau of Labor Statistics, U. S. Dept. of Labor, Employee Benefits in State and Local Governments 17–26 (1994) (hereinafter BLS Rept.)). The evidence did not suggest States had facially discriminatory self-care leave policies or that they administered neutral self-care leave policies in a discriminatory way. And there is scant evidence in the legislative history of a purported stereotype harbored by employers that women take self-care leave more often than men. Congress considered evidence that "men and women are out on medical leave approximately equally." H. R. Rep. No. 101–28, pt. 1, p. 15 (1989) (hereinafter H. R. Rep.). Nothing in the record shows employers formulated self-care leave policies based on a contrary view.

Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs. The legislative history of the self-care provision reveals a concern for the economic burdens on the employee and the employee's family resulting from illness-related job loss and a concern for discrimination on the basis of illness, not sex. See, *e. g.*, S. Rep. No. 103–3, pp. 11–12 (1993); H. R. Rep., at 23. In the findings pertinent to the self-care provision, the statute makes no reference to any distinction on the basis of sex. See 29 U. S. C. § 2601(a)(4) ("[T]here is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods"). By contrast, with regard to family care Congress invoked concerns related to gender. See § 2601(a)(5) ("[D]ue to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men").

It is true the self-care provision offers some women a benefit by allowing them to take leave for pregnancy-related illnesses; but as a remedy, the provision is not congruent and proportional to any identified constitutional violations. At the time of the FMLA's enactment, "ninety-five percent" of state employees had paid sick-leave plans at work, and "ninety-six percent" had short-term disability protection. Texas Brief 13–14 (citing BLS Rept. 17–26). State employees presumably could take leave for pregnancy-related illnesses under these policies, and Congress did not document any pattern of States excluding pregnancy-related illnesses from sick-leave or disability-leave policies. "Congress . . . said nothing about the existence or adequacy of state remedies." *Florida Prepaid*, 527 U. S., at 644. It follows that abrogating the States' immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed.

2

As an alternative justification for the self-care provision, it has been suggested that the provision is a necessary adjunct to the family-care provisions. Petitioner argues that employers may assume women are more likely to take family-care leave than men and that the FMLA therefore offers up to 12 weeks of leave for family care and self care combined. According to petitioner, when the self-care provision is coupled with the family-care provisions, the self-care provision could reduce the difference in the expected number of weeks of FMLA leave that different employees take for different reasons.

The fact that self-care leave could have this effect does not mean that it would. If, for example, women are expected to take 20 days of family-care leave per year and men to take 10, and women and men are each expected to take 5 days of self-care leave per year, the difference in the expected number of days of leave and cost to the employer remains the

same regardless of the availability of self-care leave. Congress made no findings, and received no specific testimony, to suggest the availability of self-care leave equalizes the expected amount of FMLA leave men and women will take. Even if women take family-care leave more often than men, men do not take self-care leave more often than women; and there is little evidence that employers assume they do. See H. R. Rep., at 15. Petitioner suggests that some women will be expected to take all 12 weeks of leave under the FMLA for family-care purposes, and therefore that any amount of self-care leave taken by men will diminish the difference in the amount of FMLA leave taken by men and women. But there is little evidence to support petitioner's assumption about the magnitude of women's expected FMLA leave for family-care purposes. And men are only expected to take five days of sick leave per year, see *ibid.*, so the self-care provision diminishes the difference in expected leave time by a maximum of five days. And that is only to the extent women use all their available FMLA leave for family-care reasons. Petitioner's overly complicated argument about how the self-care provision works in tandem with the family-care provisions is unconvincing and in the end does not comply with the clear requirements of *City of Boerne.*

In addition petitioner's first defense of the self-care provision contradicts his second defense of the provision. In the first defense, the Court is told employers assume women take more self-care leave than men. See Tr. of Oral Arg. 10–12. In the second defense, the Court is told the self-care provision provides an incentive to hire women that will counteract the incentives created by the family-care provisions because employers assume women take more family-care leave than men. But if the first defense is correct, the second defense is wrong. In other words, if employers assume women take self-care leave more often than men (the first defense), a self-care provision will not provide an incentive to hire women. To the contrary, the self-care pro-

vision would provide an incentive to discriminate against women.

There is "little support in the record for the concerns that supposedly animated" the self-care provision. *Florida Prepaid*, *supra*, at 639. Only supposition and conjecture support the contention that the self-care provision is necessary to make the family-care provisions effective. The evidence documented in support of the self-care provision is, to a large degree, unrelated to sex discrimination, or to the administration of the family-care provisions. See *supra*, at 38. Congress made no findings and did not cite specific or detailed evidence to show how the self-care provision is necessary to the family-care provisions or how it reduces an employer's incentives to discriminate against women. And "Congress . . . said nothing about the existence or adequacy of state" sick-leave policies. *Florida Prepaid*, *supra*, at 644; see *Garrett*, 531 U. S., at 373. Under this Court's precedents, more is required to subject unconsenting States to suits for damages, particularly where, as here, it is for violations of a provision (the self-care provision) that is a supposedly preventive step in aid of already preventive provisions (the family-care provisions). See *Florida Prepaid*, *supra*, at 642 ("[T]he legislative record still provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act"); *Kimel*, 528 U. S., at 88 ("One means by which we have made such a determination . . . is by examining the legislative record containing the reasons for Congress' action").

The "few fleeting references" to how self-care leave is inseparable from family-care leave fall short of what is required for a valid abrogation of States' immunity from suits for damages. *Florida Prepaid*, *supra*, at 644. These "isolated sentences clipped from floor debates" and testimony, *Kimel*, *supra*, at 89, are stated as conclusions, unsupported by evidence or findings about how the self-care provision interrelates to the family-care provisions to counteract

employers' incentives to discriminate against women. Congress must rely on more than abstract generalities to subject the States to suits for damages. Otherwise, Congress could choose to combat the purported effects of the family-care provisions by allowing employees to sue States that do not permit employees to take vacation time under the FMLA. There is nothing in particular about self-care leave, as opposed to leave for any personal reason, that connects it to gender discrimination. And when the issue, as here, is whether subparagraph (D) can abrogate a State's immunity from damages, there is no sufficient nexus, or indeed any demonstrated nexus, between self-care leave and gender discrimination by state employers. Documented discrimination against women in the general workplace is a persistent, unfortunate reality, and, we must assume, a still prevalent wrong. An explicit purpose of the Congress in adopting the FMLA was to improve workplace conditions for women. See 29 U. S. C. §§ 2601(b)(4), (5). But States may not be subject to suits for damages based on violations of a comprehensive statute unless Congress has identified a specific pattern of constitutional violations by state employers. See *City of Boerne*, 521 U. S., at 532.

3

Petitioner's last defense of the self-care provision is that the provision helps single parents retain their jobs when they become ill. This, however, does not explain how the provision remedies or prevents constitutional violations. The fact that most single parents happen to be women, see, *e. g.*, S. Rep. No. 103–3, at 7, demonstrates, at most, that the self-care provision was directed at remedying employers' neutral leave restrictions which have a disparate effect on women. "Although disparate impact may be relevant evidence of . . . discrimination . . . such evidence alone is insufficient [to prove a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny." *Garrett*, *supra*, at 372–373; see *Tuan Anh Nguyen*

v. *INS*, 533 U. S. 53, 82–83 (2001) (O'Connor, J., dissenting); *Washington* v. *Davis*, 426 U. S. 229, 239 (1976). To the extent, then, that the self-care provision addresses neutral leave policies with a disparate impact on women, it is not directed at a pattern of constitutional violations. Because, moreover, it is "unlikely that many of the [neutral leave policies] . . . affected by" the self-care provision are unconstitutional, "the scope of the [self-care provision is] out of proportion to its supposed remedial or preventive objectives." *Kimel*, *supra*, at 82; see *City of Boerne*, *supra*, at 519.

Of course, a State need not assert its Eleventh Amendment immunity from suits for damages. See, *e. g.*, *Sossamon* v. *Texas*, 563 U. S. 277, 284 (2011) ("A State . . . may choose to waive its immunity in federal court at its pleasure"). Discrimination against women is contrary to the public policy of the State of Maryland, see, *e. g.*, Maryland's Fair Employment Practices Act, Md. State Govt. Code Ann. §20–606 (Lexis 2009), and the State has conceded that the Act is good social policy, see Tr. of Oral Arg. 35. If the State agrees with petitioner that damages liability for violations of the self-care provision is necessary to combat discrimination against women, the State may waive its immunity or create a parallel state-law cause of action.

* * *

As a consequence of our constitutional design, money damages are the exception when sovereigns are defendants. See, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 29 (1981). Subjecting States to suits for damages pursuant to §5 requires more than a theory for why abrogating the States' immunity aids in, or advances, a stated congressional purpose. To abrogate the States' immunity from suits for damages under §5, Congress must identify a pattern of constitutional violations and tailor a remedy congruent and proportional to the documented violations. It failed to do so when it allowed employees to sue

States for violations of the FMLA's self-care provision. The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the plurality's opinion holding that Congress did not validly abrogate the States' immunity from suit for money damages for violations of the self-care provision of the Family and Medical Leave Act of 1993 (FMLA), 29 U. S. C. § 2612(a)(1)(D). As the plurality explains, this case is distinguishable from *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721 (2003), which held that Congress validly abrogated the States' immunity from suit for violations of the FMLA's family-care provision, § 2612(a)(1)(C). *Ante*, at 37. I write separately only to reiterate my view that *Hibbs* was wrongly decided because the family-care provision is not sufficiently linked to a demonstrated pattern of unconstitutional discrimination by the States. See 538 U. S., at 745–754 (KENNEDY, J., joined by SCALIA and THOMAS, JJ., dissenting); *Tennessee* v. *Lane*, 541 U. S. 509, 565–566 (2004) (THOMAS, J., dissenting). The self-care provision at issue in this case is even further removed from any such pattern.

JUSTICE SCALIA, concurring in the judgment.

The plurality's opinion seems to me a faithful application of our "congruence and proportionality" jurisprudence. So does the opinion of the dissent. That is because the varying outcomes we have arrived at under the "congruence and proportionality" test make no sense. Which in turn is because that flabby test is "a standing invitation to judicial arbitrariness and policy-driven decisionmaking," *Tennessee* v. *Lane*, 541 U. S. 509, 557–558 (2004) (SCALIA, J., dissenting). Moreover, in the process of applying (or seeming to apply) the test, we must scour the legislative record in search of evidence that supports the congressional action. See *ante*, at 37–43; *post*, at 59–64 (GINSBURG, J., dissenting). This grad-

ing of Congress's homework is a task we are ill suited to perform and ill advised to undertake.

I adhere to my view that we should instead adopt an approach that is properly tied to the text of § 5, which grants Congress the power "to *enforce*, by appropriate legislation," the other provisions of the Fourteenth Amendment. (Emphasis added.) As I have explained in greater detail elsewhere, see *Lane*, *supra*, at 558–560, outside of the context of racial discrimination (which is different for *stare decisis* reasons), I would limit Congress's § 5 power to the regulation of conduct that *itself* violates the Fourteenth Amendment. Failing to grant state employees leave for the purpose of self-care—or any other purpose, for that matter—does not come close.

Accordingly, I would affirm the judgment of the Court of Appeals.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, and with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join as to all but footnote 1, dissenting.

Section 1 of the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 5 grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." Congress' § 5 enforcement power includes the authority to remedy and deter violations of § 1's substantive guarantees by prohibiting conduct "not itself forbidden by the Amendment's text." *Kimel* v. *Florida Bd. of Regents*, 528 U. S. 62, 81 (2000). "In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 727–728 (2003).

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to 12 weeks of job-secured leave during any 12-month period: (A) to care for a newborn son

or daughter; (B) to care for a newly adopted son or daughter; (C) to care for a spouse, child, or parent with a serious health condition; or (D) because the employee has a serious health condition that makes her unable to perform the functions of her position. 29 U. S. C. § 2612(a)(1).

Even accepting this Court's view of the scope of Congress' power under § 5 of the Fourteenth Amendment, I would hold that the self-care provision, § 2612(a)(1)(D), validly enforces the right to be free from gender discrimination in the workplace.[1]

I

Section 5 legislation "must be targeted at conduct transgressing the Fourteenth Amendment's substantive provisions," *ante*, at 36 (internal quotation marks omitted), "[a]nd '[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Ibid.* (quoting *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997)). The first step of the now-familiar *Boerne* inquiry calls for identification of the constitutional right Congress sought to enforce. See, *e. g.*, *Tennessee* v. *Lane*, 541 U. S. 509, 522 (2004). The FMLA's self-care provision, Maryland asserts, trains not on the right to be free from gender discrimination, but on an "equal protection right to be free from irrational state employment discrimination based on a medical condition." Brief for Respondents 14. The plurality agrees, concluding that the self-

[1] I remain of the view that Congress can abrogate state sovereign immunity pursuant to its Article I Commerce Clause power. See *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 100 (1996) (Souter, J., dissenting). Beyond debate, 29 U. S. C. § 2612(a)(1)(D) is valid Commerce Clause legislation. See *infra*, at 64–65. I also share the view that Congress can abrogate state immunity pursuant to § 5 of the Fourteenth Amendment where Congress could reasonably conclude that legislation "constitutes an appropriate way to enforce [a] basic equal protection requirement." *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356, 377 (2001) (BREYER, J., dissenting) (internal quotation marks omitted).

care provision reveals "a concern for discrimination on the basis of illness, not sex." *Ante*, at 38. In so declaring, the plurality undervalues the language, purpose, and history of the FMLA, and the self-care provision's important role in the statutory scheme. As well, the plurality underplays the main theme of our decision in *Hibbs*: "The FMLA aims to protect the right to be free from gender-based discrimination in the workplace." 538 U. S., at 728.

I begin with the text of the statute, which repeatedly emphasizes gender discrimination. One of the FMLA's stated purposes is to "entitle employees to take reasonable leave," 29 U. S. C. §2601(b)(2), "in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons (including maternity-related disability) and for compelling family reasons, on a gender-neutral basis," §2601(b)(4). Another identified aim is "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection Clause]." §2601(b)(5). "[E]mployment standards that apply to one gender only," Congress expressly found, "have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender." §2601(a)(6).

The FMLA's purpose and legislative history reinforce the conclusion that the FMLA, in its entirety, is directed at sex discrimination. Indeed, the FMLA was originally envisioned as a way to guarantee—without singling out women or pregnancy—that pregnant women would not lose their jobs when they gave birth. The self-care provision achieves that aim.

A brief history is in order. In his 1982 congressional campaign, then-candidate Howard Berman pledged to introduce legislation similar to the California law challenged in *California Fed. Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272

(1987). S. Wisensale, Family Leave Policy: The Political Economy of Work and Family in America 134 (2001) (hereinafter Wisensale). California's law, enacted in 1978, made it unlawful for an employer to refuse to grant female employees disabled by pregnancy or childbirth up to four months' unpaid, job-protected leave. See 1978 Cal. Stats. ch. 1321, § 1, now codified at Cal. Govt. Code Ann. § 12945(a)(1) (West Supp. 2012).

The California law sharply divided women's rights advocates. "Equal-treatment" feminists asserted it violated the Pregnancy Discrimination Act's (PDA) commitment to treating pregnancy the same as other disabilities.[2] It did so by requiring leave only for disability caused by pregnancy and childbirth, thereby treating pregnancy as *sui generis*. See Brief for American Civil Liberties Union et al. as *Amici Curiae* in *California Fed.*, O. T. 1985, No. 85–494, pp. 5–10. "Equal-opportunity" feminists disagreed, urging that the California law was consistent with the PDA because it remedied the discriminatory burden that inadequate leave policies placed on a woman's right to procreate. See Brief for Coalition for Reproductive Equality in the Workplace et al. as *Amici Curiae* in *id.*, at 2–6. See also Williams, Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N. Y. U. Rev. L. & Soc. Change 325, 326–328 (1984–1985) (hereinafter Williams) (discussing disagreement).

While *California Fed.* moved through the lower federal courts, equal-treatment feminists began work on a gender-

[2] Enacted as an addition to the section defining terms used in Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act of 1978 (PDA) provides: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." 92 Stat. 2076, 42 U. S. C. § 2000e(k).

neutral leave model, which eventually became the FMLA. See Ross, Legal Aspects of Parental Leave, in Parental Leave and Child Care 97 (J. Hyde & M. Essex eds. 1991) (hereinafter Ross). Then-Congressman Berman met with the Women's Legal Defense Fund's Donna Lenhoff, a drafter of the first FMLA bill. *Id.*, at 114–115, n. 27; Wisensale 136.[3] They agreed that any national bill would focus not only on pregnancy, but on equal treatment for all workers. Ross 114–115, n. 27. See also *Kazmier* v. *Widmann*, 225 F. 3d 519, 547 (CA5 2000) (Dennis, J., dissenting) ("Perceiving that enacting the PDA had not achieved the intended result of preventing discrimination against either women or men in the granting of leave time in that the States felt it necessary to affirmatively grant pregnancy leave to women and not men, in 1985 Congress began considering the issue of family and medical leave.").

Though this Court, in *California Fed.*, eventually upheld California's pregnancy-only leave policy as not preempted by the PDA, equal-treatment feminists continued to believe that viewing pregnancy as *sui generis* perpetuated widespread discrimination against women.[4] They therefore maintained

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[3] Lenhoff advanced The Parental and Disability Act of 1985, introduced by Rep. Patricia Schroeder. See S. Wisensale, Family Leave Policy: The Political Economy of Work and Family in America 136–138 (2001). She was later named Vice Chair of the Commission on Leave, created by the FMLA to study family and medical leave policies. See 29 U. S. C. §§ 2631–2632; U. S. Commission on Family and Medical Leave, A Workable Balance: Report to Congress on Family and Medical Leave Policies 210 (Apr. 30, 1996).

[4] For example, in addition to mandating pregnancy leave, the California statute allowed employers to discriminate against pregnant workers. Employers could refuse to select a pregnant woman for a training program if she would not finish the program at least three months before giving birth. See 1978 Cal. Stats. ch. 1321, § 1. The law limited pregnancy-disability leave to six weeks, § 1, and provided that women were to receive paid disability benefits for only three weeks after childbirth, § 2, even if a particular woman remained disabled beyond the three-week period, and even if a man received paid disability benefits throughout his disabil-

their commitment to gender-neutral leave. See Joint Hearing on H. R. 925 before the Subcommittee on Civil Service and the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 100th Cong., 1st Sess., 36 (1987) (hereinafter 1987 House Hearing) (statement of Prof. Eleanor Holmes Norton, Georgetown University Law Center) ("[If *California Fed.*] becomes the model, employers will provide something for women affected by pregnancy that they are not required to provide for other employees. This gives fodder to those who seek to discriminate against women in employment. . . . In the *[California Fed.]* case, I would have preferred the interpretation urged by the [equal-treatment feminists].").

Congress agreed. See *infra*, at 58–59. Adhering to equal-treatment feminists' aim, the self-care provision, 29 U. S. C. §2612(a)(1)(D), prescribes comprehensive leave for women disabled during pregnancy or while recuperating from childbirth—without singling out pregnancy or childbirth. See S. Rep. No. 101–77, p. 32 (1989) (A "significant benefit of the temporary medical leave provided by this legislation is the form of protection it offers women workers who bear children. Because the bill treats all employees who are temporarily unable to work due to serious health conditions in the same fashion, it does not create the risk of discrimination against pregnant women posed by legislation which provides job protection only for pregnancy-related disability. Legislation solely protecting pregnant women gives

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ity. Finally, although it prohibited employers from refusing to *promote* a woman because of pregnancy, it did not forbid refusing to *hire* a woman on that basis. See §1. See also Brief for National Organization for Women et al. as *Amici Curiae* in *California Fed. Sav. & Loan Assn.* v. *Guerra*, O. T. 1985, No. 85–494, pp. 14–15. These provisions were all expressly made inapplicable to employers covered by Title VII, "[i]n the event Congress enacts legislation amending Title VII . . . to prohibit sex discrimination on the basis of pregnancy," namely, the PDA. See 1978 Cal. Stats. ch. 1321, §4.

employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect."). In view of this history, it is impossible to conclude that "nothing in particular about self-care leave . . . connects it to gender discrimination." *Ante*, at 42.

II

A

Boerne next asks "whether Congress had evidence of a pattern of constitutional violations on the part of the States." *Hibbs*, 538 U. S., at 729. See also *Boerne*, 521 U. S., at 530–532. Beyond question, Congress had evidence of a well-documented pattern of workplace discrimination against pregnant women. Section 2612(a)(1)(D) can therefore "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.*, at 532.

Although the PDA proscribed blatant discrimination on the basis of pregnancy, see 42 U. S. C. §§ 2000e(k), 2000e–2, *supra*, at 48, n. 2, the Act is fairly described as a necessary, but not a sufficient, measure. FMLA hearings conducted between 1986 and 1993 included illustrative testimony from women fired after becoming pregnant or giving birth. For example, Beverly Wilkenson was granted seven weeks of leave upon the birth of her child. On the eve of her return to work, a superior informed her that her job had been eliminated. He stated: "Beverly, the best thing for you to do is stay home and take care of your baby and collect your unemployment." Hearing on H. R. 770 before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 101st Cong., 1st Sess., 12 (1989) (hereinafter 1989 House Hearing) (statement of Beverly Wilkenson). See also S. Rep. No. 102–68, p. 27 (1991) (hereinafter 1991 Senate Report) (describing Ms. Wilkenson's testimony). Similarly, Linda Pillsbury was notified that she no longer had a job three weeks after her daughter

was born.[5] Three secretaries at the same workplace were also forced out of their jobs when they returned to work within weeks of giving birth. See Hearings on S. 249 before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 2, pp. 16, 23 (1987) (hereinafter 1987 Senate Hearings) (statement of Linda Pillsbury).

These women's experiences, Congress learned, were hardly isolated incidents. A spokeswoman for the Mayor's Commission on Women's Affairs in Chicago testified: "The lack of uniform parental and medical leave policies in the workplace has created an environment where discrimination is rampant. Very often we are contacted by women workers who are at risk of losing their jobs or have lost them because they are pregnant, [or have] given birth." *Id.*, at 170 (statement of Peggy Montes). See also Joint Hearing on The Parental and Medical Leave Act of 1986 before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 110, n. 18 (1986) (hereinafter 1986 House Hearing) (statement of Women's Legal Defense Fund) ("[W]omen who are temporarily unable to work due to pregnancy, child-birth, and related medical conditions such as morning sickness, threatened miscarriage, or complications arising from childbirth, often lose their jobs because of the inadequacy of their employers' leave policies."); 1991 Senate Report 28 (recording that an Atlanta-based job counseling hotline received approximately 100 calls each year from women who were fired, harassed, or forced out of their jobs due to pregnancy or maternity-disability leave); 139 Cong. Rec. 1826 (1993) (remarks of Sen. Edward Kennedy) ("[W]omen who are pregnant are discriminated

[5] The medical recovery period for a normal childbirth is four to eight weeks. See *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U. S. 721, 731, n. 4 (2003).

against as a general rule in our society and have difficulty retaining their jobs."). As summarized by the American Bar Association:

> "Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be." 1989 House Hearing 248 (American Bar Association Background Report). See also *Hibbs*, 538 U. S., at 736 (quoting same language).

"Many pregnant women have been fired when their employer refused to provide an adequate leave of absence," Congress had ample cause to conclude. See H. R. Rep. No. 99–699, pt. 2, p. 22 (1986). Pregnancy, Congress also found, has a marked impact on women's earnings. One year after childbirth, mothers' earnings fell to $1.40 per hour less than those of women who had not given birth. See 1991 Senate Report 28. See also 1989 House Hearing 356–357 (Report of 9to5, National Association of Working Women (citing same study)).

Congress heard evidence tying this pattern of discrimination to the States. A 50-state survey by the Yale Bush Center Infant Care Leave Project concluded that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees." *Hibbs*, 538 U. S., at 730, n. 3 (quoting 1986 House Hearing 33 (statement of Meryl Frank)). Roughly 28% of women employed in the public sector did not receive eight weeks of job-protected medical leave to recover from childbirth. See 1987 Senate Hearings, pt. 1, pp. 31, 35, 39 (statement of James T. Bond, National Council of Jewish Women). A South Carolina state legislator testified: "[I]n

South Carolina, as well as in other states . . . no unemployment compensation is paid to a woman who is necessarily absent from her place of employment because of pregnancy or maternity." See *id.*, pt. 2, p. 361 (statement of Rep. Irene Rudnick). According to an employee of the State of Georgia, if state employees took leave, it was held against them when they were considered for promotions: "It is common practice for my Department to compare the balance sheets of workers who have and have not used [leave] benefits in determining who should and should not be promoted." Hearing on H. R. 2 before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 102d Cong., 1st Sess., 36 (1991) (statement of Robert E. Dawkins). See also *id.*, at 33 (One type of leave for Georgia state employees "boils down to whether your supervisor wants you to come back or not."). In short, Congress had every reason to believe that a pattern of workplace discrimination against pregnant women existed in public-sector employment, just as it did in the private sector.

B

"[A] state's refusal to provide pregnancy leave to its employees," Maryland responds, is "not unconstitutional." Brief for Respondents 23 (citing *Geduldig* v. *Aiello*, 417 U. S. 484, 495 (1974)). *Aiello*'s footnote 20 proclaimed that discrimination on the basis of pregnancy is not discrimination on the basis of sex. In my view, this case is a fit occasion to revisit that conclusion. Footnote 20 reads:

> "The dissenting opinion to the contrary, this case is . . . a far cry from cases like *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.

> While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . .
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U. S., at 496–497, n. 20.

First, "[a]s an abstract statement," it is "simply false" that "a classification based on pregnancy is gender neutral." *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 327 (1993) (Stevens, J., dissenting). Rather, discriminating on the basis of pregnancy "[b]y definition . . . discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male." *General Elec. Co.* v. *Gilbert*, 429 U. S. 125, 161–162 (1976) (Stevens, J., dissenting). See also Issacharoff & Rosenblum, Women and the Workplace: Accommodating the Demands of Pregnancy, 94 Colum. L. Rev. 2154, 2180 (1994) ("[I]t is precisely because pregnancy is a condition unique to women that the exclusion of pregnancy from disability coverage is a sex-based classification . . . .").

This reality is well illustrated by the facts of *Aiello*. The California disability-insurance program at issue granted disability benefits for virtually any conceivable work disability, including those arising from cosmetic surgery, skiing accidents, and alcoholism. See Brief for Equal Employment Opportunity Commission as *Amicus Curiae* in *Aiello*, O. T. 1973, No. 73–640, p. 7. It also compensated men for disabilities caused by ailments and procedures that affected men alone: for example, vasectomies, circumcision, and prostatectomies. See Brief for American Civil Liberties Union et al.

as *Amici Curiae* in *id.*, at 17–18. Only pregnancy was excluded from the definition of disability. See Cal. Un. Ins. Code Ann. § 2626 (West 1972); *Aiello*, 417 U. S., at 489. As Justice Brennan insightfully concluded in dissent, "a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered . . . . Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." *Id.*, at 501.

Second, pregnancy provided a central justification for the historic discrimination against women this Court chronicled in *Hibbs*. See 538 U. S., at 729 ("[A] proper discharge of [a woman's] maternal functions—having in view not merely her own health, but the well-being of the race—justif[ies] legislation to protect her from the greed as well as the passion of man." (quoting *Muller* v. *Oregon*, 208 U. S. 412, 422 (1908); 2d and 3d alterations in *Hibbs*)). See also Siegel, Employment Equality Under the Pregnancy Discrimination Act of 1978, 94 Yale L. J. 929, 942 (1985) (Pregnancy is "a biological difference central to the definition of gender roles, one traditionally believed to render women unfit for employment."). Relatedly, discrimination against pregnant employees was often "based not on the pregnancy itself but on predictions concerning the future behavior of the pregnant woman when her child was born or on views about what her behavior should be." Williams 355. See also S. Rep. No. 95–331, p. 3 (1977) ("[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace.").

In sum, childbearing is not only a biological function unique to women. It is also inextricably intertwined with employers' "stereotypical views about women's commitment to work and their value as employees." *Hibbs*, 538 U. S., at 736. Because pregnancy discrimination is inevitably sex discrimination, and because discrimination against women is

tightly interwoven with society's beliefs about pregnancy and motherhood, I would hold that *Aiello* was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex.

C

Boerne's third step requires "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Ante*, at 36 (quoting 521 U. S., at 520). Section 2612(a)(1)(D), I would conclude, is an appropriate response to pervasive discriminatory treatment of pregnant women. In separating self-care leave for the physical disability following childbirth, § 2612(a)(1)(D), which affects only women, from family-care leave for parenting a newborn baby, § 2612(a)(1)(A), for which men and women are equally suited, Congress could attack gender discrimination and challenge stereotypes of women as lone childrearers. Cf. *Hibbs*, 538 U. S., at 731 (States' extended "maternity" leaves, far exceeding a woman's physical disability following childbirth, were attributable "to the pervasive sex-role stereotype that caring for family members is women's work.").

It would make scant sense to provide job-protected leave for a woman to care for a newborn, but not for her recovery from delivery, a miscarriage, or the birth of a stillborn baby. And allowing States to provide no pregnancy-disability leave at all, given that only women can become pregnant, would obviously "exclude far more women than men from the workplace." *Id.*, at 738.

The plurality's statement that Congress lacked "widespread evidence of sex discrimination . . . in the administration of sick leave," *ante*, at 38, misses the point. So too does the plurality's observation that state employees likely "could take leave for pregnancy-related illnesses"—presumably severe morning sickness, toxemia, etc.—under paid sick-leave plans, *ante*, at 39. Congress heard evidence that existing sick-leave plans were inadequate to ensure that women were

not fired when they needed to take time out to recover their strength and stamina after childbirth. The self-care provision responds to that evidence by requiring employers to allow leave for "ongoing pregnancy, miscarriages, . . . the need for prenatal care, childbirth, and recovery from childbirth." S. Rep. No. 103–3, p. 29 (1993).

That § 2612(a)(1)(D) entitles all employees to up to 12 weeks of unpaid, job-protected leave for a serious health condition, rather than singling out pregnancy or childbirth, does not mean that the provision lacks the requisite congruence and proportionality to the identified constitutional violations. As earlier noted, *supra,* at 50–51, Congress made plain its rationale for the prescription's broader compass: Congress sought to ward off the unconstitutional discrimination it believed would attend a pregnancy-only leave requirement. Under the caption "Equal protection and nondiscrimination," Congress explained:

> "The FMLA addresses the basic leave needs of all employees. . . . This is an important principle reflected in the bill.
>
> "A law providing special protection to women . . . , in addition to being inequitable, runs the risk of causing discriminatory treatment. Employers might be less inclined to hire women . . . . For example, legislation addressing the needs of pregnant women only might encourage discriminatory hiring practices against women of child bearing age. Legislation addressing the needs of all workers equally does not have this effect. By addressing the serious leave needs of all employees, the FMLA avoids providing employers the temptation to discriminate [against women].
>
> . . . . .
>
> "The legislation is [thus] based not only on the Commerce Clause, but also on the guarantees of equal protection . . . embodied in the Fourteenth Amendment."

H. R. Rep. No. 102–135, pt. 1, pp. 27–28 (1991) (hereinafter 1991 House Report).

Congress' concern was solidly grounded in workplace realities. After this Court upheld California's pregnancy-only leave policy in *California Fed.*, Don Butler, President of the Merchants and Manufacturers Association, one of the plaintiffs in that case, told National Public Radio reporter Nina Totenberg that, as a result of the decision, "many employers will be prone to discriminate against women in hiring and hire males instead." 1987 House Hearing 36. Totenberg replied, "But that is illegal, too"—to which Butler responded, "Well, that is illegal, but try to prove it." *Ibid.*

Finally, as in *Hibbs*, it is important to note the moderate cast of the FMLA, in particular, the considerable limitations Congress placed on §§2612(a)(1)(A)–(D)'s leave requirement. See 538 U. S., at 738–739. FMLA leave is unpaid. It is limited to employees who have worked at least one year for the employer and at least 1,250 hours during the past year. §§2611(2)(A), 2612(d)(1). High-ranking employees, including state elected officials and their staffs, are not within the Act's compass. §§203(e)(2)(C), 2611(3). Employees must provide advance notice of foreseeable leaves. §2612(e). Employers may require a doctor's certification of a serious health condition. §2613(a). And, if an employer violates the FMLA, the employees' recoverable damages are "strictly defined and measured by actual monetary losses." *Hibbs*, 538 U. S., at 740 (citing §§2617(a)(1)(A)(i)–(iii)). The self-care provision, I would therefore hold, is congruent and proportional to the injury to be prevented.

III

But even if *Aiello* senselessly holds sway, and impedes the conclusion that §2612(a)(1)(D) is an appropriate response to the States' unconstitutional discrimination against pregnant

women,[6] I would nevertheless conclude that the FMLA is valid §5 legislation. For it is a meet response to "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of [parental and family-care] leave benefits." *Hibbs*, 538 U. S., at 735. See also *id.*, at 729–731, and n. 5 (Congress adduced evidence "of a pattern of constitutional violations on the part of the States" in granting parental and family-care leave).

Requiring States to provide gender-neutral parental and family-care leave alone, Congress was warned, would promote precisely the type of workplace discrimination Congress sought to reduce. The "pervasive sex-role stereotype that caring for family members is women's work," *id.*, at 731, Congress heard, led employers to regard required parental and family-care leave as a woman's benefit. Carol Ball,

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[6] Notably, the plurality does not cite or discuss *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), perhaps embarrassed by that opinion's widely criticized conclusion that discrimination based on pregnancy does not involve "discrimination based upon gender as such," *id.*, at 496, n. 20. See *supra*, at 54–57; E. Chemerinsky, Constitutional Law 759 (3d ed. 2006) ("It is hard to imagine a clearer sex-based distinction" than the one at issue in *Aiello*); Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women's L. J. 1, 31 (1985) ("*[Aiello]* results in unequal treatment of similarly situated women and men who have engaged respectively in reproductive conduct [and wish to continue working]. It should be overruled."); Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 983–984 (1984) ("Criticizing *[Aiello]* has . . . become a cottage industry. Over two dozen law review articles have condemned both the Court's approach and the result. . . . Even the principal scholarly defense of *[Aiello]* admits that the Court was wrong in refusing to recognize that the classification was sex-based . . . ."); Karst, The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 54, n. 304 (1977) ("[T]he constitutional sport of *[Aiello]* and last Term's even sillier statutory counterpart, *General Elec. Co.* v. *Gilbert*, 429 U. S. 125 (1976), with their Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon, are good candidates for early retirement. These decisions are textbook examples of the effects of underrepresentation on "legislative" insensitivity. Imagine what the presence of even one woman Justice would have meant to the Court's conferences.").

speaking on behalf of the U. S. Chamber of Commerce, testified that she did not think "there are going to be many men that take up . . . parental leave." See Hearing on S. 345 before the Subcommittee on Children, Family, Drugs, and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 1st Sess., 39 (1989). She frankly admitted that she herself would choose to hire a man over an equally qualified woman if parental leave was required by law. *Id.*, at 30.

Others similarly testified that mandating gender-neutral parental leave would lead to discrimination against women. A representative of the National Federation of Independent Business stated: "Requiring employers to provide parental leave benefits creates clear pressures for subtle discrimination based on . . . sex. When choosing between two equally qualified candidates, an employer may be more likely to hire the candidate least likely to take the leave. It is the wage levels and jobs of women of childbearing years which are most at risk in such a situation." Hearing on H. R. 1 before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 103d Cong., 1st Sess., 95 (1993). See also 1989 House Hearing 169 (statement of Cynthia Simpler, American Society for Personnel Administration) ("Since working women will be viewed as the most likely candidates for parental leave, hidden discrimination will occur if this bill becomes law. Women of childbearing age will be viewed as risks, potentially disrupting operations through an untimely leave.").

Conversely—unlike perceptions surrounding who takes parental and family-care leave—Congress was told that men and women take medical leave approximately equally. According to one study, male workers missed an average of 4.9 days of work per year due to illness or injury; female workers missed 5.1 days. See 1991 House Report, pt. 1, p. 28. "[T]he incidence of serious medical conditions that would be covered by medical leave under the bill," Congress deter-

mined, "is virtually the same for men and women. Employers will find that women and men will take medical leave with equal frequency." *Ibid.* "[P]arental and medical leave," Congress was thus alerted, "are inseparable":

> "In the words of the old song, 'You can't have one without the other.'
>
> . . . . .
>
> "Adoption of parental leave protections without medical leave would . . . encourage discrimination against women of child-bearing age, who constitute approximately 73 percent of all the women in the labor force.
>
> "Employers would tend to hire men, who are much less likely to claim [the parental leave] benefit. . . .
>
> "Parental leave without medical leave would be the modern version of protective labor laws." 1986 House Hearing 33–34 (statement of Irene Natividad, National Women's Political Caucus).

Congress therefore had good reason to conclude that the self-care provision—which men no doubt would use—would counter employers' impressions that the FMLA would otherwise install female leave. Providing for self-care would thus reduce employers' corresponding incentive to discriminate against women in hiring and promotion. In other words, "[t]he availability of self-care leave to men serves to blunt the force of stereotypes of women as primary caregivers by increasing the odds that men and women will invoke the FMLA's leave provisions in near-equal numbers." See Brief for National Partnership for Women & Families et al. as *Amici Curiae* 26. As Judge Lipez explained:

> "If Congress had drawn a line at leave for caring for other family members, there is greater likelihood that the FMLA would have been perceived as further reason to avoid granting employment opportunities to women. Heretofore, women have provided most of the child and elder care, and legislation that focused on these duties

> could have had a deleterious impact because of the prevalent notion that women take more advantage of such leave policies. The inclusion of personal medical leave in the scheme, unrelated to any need to care for another person, undermines the assumption that women are the only ones taking leave because men, presumably, are as likely as women to get sick." *Laro* v. *New Hampshire*, 259 F. 3d 1, 21 (CA1 2001) (dissenting opinion).

Senator Barbara Boxer advanced a similar point. Responding to assertions that the FMLA would lead employers to discriminate against women, Senator Boxer stated: "[T]o say that women will not be hired by business is a specious argument . . . . Men also get sick. They get cancer. They get heart disease. They have ailments. And this bill applies to men and women." 139 Cong. Rec. 1697 (1993). See also 1987 Senate Hearings, pt. 2, p. 536 (statement of Prof. Susan Deller Ross, Georgetown University Law Center) ("I just think it's wrong that there will be a perception that this is something that only women will take and they are, therefore, more expensive. Both men and women have medical conditions . . . .").

The plurality therefore gets it wrong in concluding that "[o]nly supposition and conjecture support the contention that the self-care provision is necessary to make the family-care provisions effective." *Ante*, at 41. Self-care leave, I would hold, is a key part of Congress' endeavor to make it feasible for women to work and have families. See 1991 Senate Report 25–26 ("This legislation is essential if the nation is to address the dramatic changes that have occurred in the American workforce in recent years. . . . The once-typical American family, where the father worked for pay and the mother stayed at home with the children, is vanishing. . . . Today, more than one-half of all mothers with infants under one year of age work outside the home. That figure has doubled since 1970 . . . . By the year 2000, about three out of every four American children will have mothers in the

workforce."). By reducing an employer's perceived incentive to avoid hiring women, § 2612(a)(1)(D) lessens the risk that the FMLA as a whole would give rise to the very sex discrimination it was enacted to thwart. The plurality offers no legitimate ground to dilute the force of the Act.

IV

Two additional points. First, this Court reached a different conclusion than the one I reach here in *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U. S. 356 (2001), and *Kimel*, 528 U. S. 62. In those cases, as we observed in *Hibbs*, we reviewed statutes targeting disability and age discrimination, respectively. Neither disability nor age is a suspect classification under this Court's Equal Protection Clause jurisprudence; States may discriminate on the basis of disability or age as long as the classification is rationally related to a legitimate state interest. See *Garrett*, 531 U. S., at 366–367; *Kimel*, 528 U. S., at 83–84. Therefore, for the statutes to be responsive to or designed to prevent unconstitutional discrimination, Congress needed to rely on a pattern of irrational state discrimination on the basis of disability or age. See *Garrett*, 531 U. S., at 368; *Kimel*, 528 U. S., at 89. Here, however, Congress homed in on gender discrimination, which triggers heightened review. See *United States* v. *Virginia*, 518 U. S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an exceedingly persuasive justification for that action." (internal quotation marks omitted)). "[I]t was [therefore] easier for Congress to show a pattern of state constitutional violations." *Hibbs*, 538 U. S., at 736.

Finally, the plurality's opinion does not authorize state employers to violate the FMLA, although it does block injured employees from suing for monetary relief. The self-care provision remains valid Commerce Clause legislation, Maryland concedes, and consequently binds the States, as well as the private sector. Tr. of Oral Arg. 25; Brief for Respond-

ents 32–33. An employee wrongly denied self-care leave, Maryland also acknowledges, may, pursuant to *Ex parte Young*, 209 U. S. 123 (1908), seek injunctive relief against the responsible state official. See Brief for Respondents 33. Moreover, the U. S. Department of Labor may bring an action against a State for violating the self-care provision and may recover monetary relief on an employee's behalf. 29 U. S. C. §§ 2617(b)(2)–(3), (d).

V

The plurality pays scant attention to the overarching aim of the FMLA: to make it feasible for women to work while sustaining family life. Over the course of eight years, Congress considered the problem of workplace discrimination against women, and devised the FMLA to reduce sex-based inequalities in leave programs. Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work. The self-care provision is a key part of that endeavor, and, in my view, a valid exercise of congressional power under § 5 of the Fourteenth Amendment. I would therefore reverse the judgment of the U. S. Court of Appeals for the Fourth Circuit.

Syllabus

MAYO COLLABORATIVE SERVICES, DBA MAYO MEDICAL LABORATORIES, ET AL. *v.* PROMETHEUS LABORATORIES, INC.

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

No. 10–1150. Argued December 7, 2011—Decided March 20, 2012

Although "laws of nature, natural phenomena, and abstract ideas" are not patentable subject matter under § 101 of the Patent Act, *Diamond* v. *Diehr*, 450 U. S. 175, 185, "an *application* of a law of nature . . . to a known structure or process may [deserve] patent protection," *id.*, at 187. But to transform an unpatentable law of nature into a patent-eligible application of such a law, a patent must do more than simply state the law of nature while adding the words "apply it." See, *e. g.*, *Gottschalk* v. *Benson*, 409 U. S. 63, 71–72. It must limit its reach to a particular, inventive application of the law.

Respondent, Prometheus Laboratories, Inc. (Prometheus), is the sole and exclusive licensee of the two patents at issue, which concern the use of thiopurine drugs to treat autoimmune diseases. When ingested, the body metabolizes the drugs, producing metabolites in the bloodstream. Because patients metabolize these drugs differently, doctors have found it difficult to determine whether a particular patient's dose is too high, risking harmful side effects, or too low, and so likely ineffective. The patent claims here set forth processes embodying researchers' findings that identify correlations between metabolite levels and likely harm or ineffectiveness with precision. Each claim recites (1) an "administering" step—instructing a doctor to administer the drug to his patient—(2) a "determining" step—telling the doctor to measure the resulting metabolite levels in the patient's blood—and (3) a "wherein" step—describing the metabolite concentrations above which there is a likelihood of harmful side effects and below which it is likely that the drug dosage is ineffective, and informing the doctor that metabolite concentrations above or below these thresholds "indicate a need" to decrease or increase (respectively) the drug dosage.

Petitioners Mayo Collaborative Services and Mayo Clinic Rochester (Mayo) bought and used diagnostic tests based on Prometheus' patents. But in 2004 Mayo announced that it intended to sell and market its own, somewhat different, diagnostic test. Prometheus sued Mayo contending that Mayo's test infringed its patents. The District Court found that the test infringed the patents but granted summary judgment to

Mayo, reasoning that the processes claimed by the patents effectively claim natural laws or natural phenomena—namely, the correlations between thiopurine metabolite levels and the toxicity and efficacy of thiopurine drugs—and therefore are not patentable. The Federal Circuit reversed, finding the processes to be patent eligible under the Circuit's "machine-or-transformation test." On remand from this Court for reconsideration in light of *Bilski* v. *Kappos*, 561 U. S. 593, which clarified that the "machine-or-transformation test" is not a definitive test of patent eligibility, *id.*, at 603–604, the Federal Circuit reaffirmed its earlier conclusion.

Held: Prometheus' process is not patent eligible. Pp. 77–92.

(a) Because the laws of nature recited by Prometheus' patent claims—the relationships between concentrations of certain metabolites in the blood and the likelihood that a thiopurine drug dosage will prove ineffective or cause harm—are not themselves patentable, the claimed processes are not patentable unless they have additional features that provide practical assurance that the processes are genuine applications of those laws rather than drafting efforts designed to monopolize the correlations. The three additional steps in the claimed processes here are not themselves natural laws but neither are they sufficient to transform the nature of the claims. The "administering" step simply identifies a group of people who will be interested in the correlations, namely, doctors who used thiopurine drugs to treat patients suffering from autoimmune disorders. Doctors had been using these drugs for this purpose long before these patents existed. And a "prohibition against patenting abstract ideas 'cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.'" *Bilski*, *supra*, at 610–611. The "wherein" clauses simply tell a doctor about the relevant natural laws, adding, at most, a suggestion that they should consider the test results when making their treatment decisions. The "determining" step tells a doctor to measure patients' metabolite levels, through whatever process the doctor wishes to use. Because methods for making such determinations were well known in the art, this step simply tells doctors to engage in well-understood, routine, conventional activity previously engaged in by scientists in the field. Such activity is normally not sufficient to transform an unpatentable law of nature into a patent-eligible application of such a law. *Parker* v. *Flook*, 437 U. S. 584, 590. Finally, considering the three steps as an ordered combination adds nothing to the laws of nature that is not already present when the steps are considered separately. Pp. 77–80.

(b) A more detailed consideration of the controlling precedents reinforces this conclusion. Pp. 80–87.

(1) *Diehr* and *Flook*, the cases most directly on point, both addressed processes using mathematical formulas that, like laws of nature, are not themselves patentable. In *Diehr* the overall process was patent eligible because of the way the additional steps of the process integrated the equation into the process as a whole. 450 U. S., at 187. These additional steps transformed the process into an inventive application of the formula. But in *Flook* the additional steps of the process did not limit the claim to a particular application, and the particular chemical processes at issue were all "well known," to the point where, putting the formula to the side, there was no "inventive concept" in the claimed application of the formula. 437 U. S., at 594. Here, the claim presents a case for patentability that is weaker than *Diehr*'s patent-eligible claim and no stronger than *Flook*'s unpatentable one. The three steps add nothing specific to the laws of nature other than what is well-understood, routine, conventional activity, previously engaged in by those in the field. Pp. 80–82.

(2) Further support for the view that simply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable is provided in *O'Reilly* v. *Morse*, 15 How. 62, 114–115; *Neilson* v. *Harford*, Webster's Patent Cases 295, 371; *Bilski*, *supra*, at 611, 612; and *Benson*, *supra*, at 64, 65, 67. Pp. 82–85.

(3) This Court has repeatedly emphasized a concern that patent law not inhibit future discovery by improperly tying up the use of laws of nature and the like. See, *e. g.*, *Benson*, 409 U. S., at 67, 68. Rewarding with patents those who discover laws of nature might encourage their discovery. But because those laws and principles are "the basic tools of scientific and technological work," *id.*, at 67, there is a danger that granting patents that tie up their use will inhibit future innovation, a danger that becomes acute when a patented process is no more than a general instruction to "apply the natural law," or otherwise forecloses more future invention than the underlying discovery could reasonably justify. The patent claims at issue implicate this concern. In telling a doctor to measure metabolite levels and to consider the resulting measurements in light of the correlations they describe, they tie up his subsequent treatment decision regardless of whether he changes his dosage in the light of the inference he draws using the correlations. And they threaten to inhibit the development of more refined treatment recommendations that combine Prometheus' correlations with later discoveries. This reinforces the conclusion that the processes at issue are not patent eligible, while eliminating any temptation to depart from case law precedent. Pp. 85–87.

Syllabus

(c) Additional arguments supporting Prometheus' position—that the process is patent eligible because it passes the "machine-or-transformation test"; that, because the particular laws of nature that the claims embody are narrow and specific, the patents should be upheld; that the Court should not invalidate these patents under § 101 because the Patent Act's other validity requirements will screen out overly broad patents; and that a principle of law denying patent coverage here will discourage investment in discoveries of new diagnostic laws of nature—do not lead to a different conclusion. Pp. 87–92.

628 F. 3d 1347, reversed.

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

Stephen M. Shapiro argued the cause for petitioners. With him on the briefs were *Timothy S. Bishop*, *Jeffrey W. Sarles*, *Charles Rothfeld*, *Jonathan Singer*, *John Dragseth*, *Deanna Reichel*, and *Eugene Volokh*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae*. With him on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Mark R. Freeman*, *Scott R. McIntosh*, *Kelsi Brown Corkran*, *Raymond T. Chen*, *Thomas W. Krause*, and *Scott C. Weidenfeller*.

Richard P. Bress argued the cause for respondent. With him on the brief were *J. Scott Ballenger*, *Maximilian A. Grant*, *Matthew J. Moore*, and *Gabriel K. Bell*.*

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *Daniel B. Ravicher*, *Stacy Canan*, and *Michael Schuster;* for the American Civil Liberties Union by *Sandra S. Park*, *Christopher A. Hansen*, *Lenora M. Lapidus*, and *Steven R. Shapiro;* for the American College of Medical Genetics et al. by *Katherine J. Strandburg;* for ARUP Laboratories, Inc., et al. by *Kathleen M. Sullivan* and *Brian Cannon;* and for the Cato Institute et al. by *Ilya Shapiro*, *James W. Harper*, *Sam Kazman*, and *Manuel S. Klausner*.

Briefs of *amici curiae* urging affirmance were filed for the American Intellectual Property Law Association by *Denise W. DeFranco*, *David S. Forman*, and *William G. Barber;* for the Association of University Technology Managers by *Donald R. Ware* and *Barbara A. Fiacco;* for the Biotechnology Industry Organization by *Jeffrey P. Kushan* and *Eric A. Shumsky;* for Genomic Health, Inc., et al. by *Edward R. Reines;* for the

JUSTICE BREYER delivered the opinion of the Court.

Section 101 of the Patent Act defines patentable subject matter. It says:

> "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U. S. C. § 101.

The Court has long held that this provision contains an important implicit exception. "[L]aws of nature, natural phenomena, and abstract ideas" are not patentable. *Diamond* v. *Diehr*, 450 U. S. 175, 185 (1981); see also *Bilski* v. *Kappos*, 561 U. S. 593, 601 (2010); *Diamond* v. *Chakrabarty*, 447 U. S.

Intellectual Property Amicus Brief Clinic of the University of New Hampshire School of Law by *Ann M. McCrackin;* for the Intellectual Property Law Association of Chicago by *Meredith Martin Addy* and *Charles Shifley;* for the Intellectual Property Owners Association by *Gary M. Hoffman*, *Kenneth W. Brothers*, *Douglas K. Norman*, and *Kevin H. Rhodes;* for the Juhasz Law Firm, P. C., by *Paul R. Juhasz;* for Myriad Genetics, Inc., by *Gregory A. Castanias* and *Jay Z. Zhang;* for the National Venture Capital Association by *Lynn H. Pasahow*, *Michael J. Shuster*, and *Carolyn Chang;* for Novartis Corp. by *Evan A. Young;* for the Pharmaceutical Research and Manufacturers of America by *Harry J. Roper*, *Paul M. Smith*, and *Elaine J. Goldenberg;* and for SAP America, Inc., by *Erika H. Arner* and *Jeffrey A. Berkowitz.*

Briefs of *amici curiae* were filed for the Association Internationale pour la Protection de la Propriété Intellectuelle et al. by *Peter C. Schechter* and *Richard P. Beem;* for CONNECT et al. by *Douglas E. Olson*, *Ned Israelsen*, and *Timothy N. Tardibono;* for Health Law, Policy, and Ethics Scholars by *Mark S. Davies* and *Michael K. Gottlieb;* for Microsoft Corp. et al. by *Matthew D. McGill* and *William G. Jenks;* for the New York Intellectual Property Law Association by *Ronald M. Daignault*, *Matthew B. McFarlane*, *Anthony F. LoCicero*, and *Charles R. Macedo;* for Nine Law Professors by *Joshua D. Sarnoff;* for Roche Molecular Systems, Inc., et al. by *Seth P. Waxman*, *Mark C. Fleming*, *Kevin A. Marks*, *Blair Elizabeth Taylor*, *Jeffrey A. Lamken*, and *Sonali S. Srivastava;* and for Verizon Communications, Inc., et al. by *Michael K. Kellogg*, *John Thorne*, and *Paul H. Roeder.*

303, 309 (1980); *Le Roy* v. *Tatham*, 14 How. 156, 175 (1853); *O'Reilly* v. *Morse*, 15 How. 62, 112–120 (1854); cf. *Neilson* v. *Harford*, Webster's Patent Cases 295, 371 (1841) (English case discussing same). Thus, the Court has written that "a new mineral discovered in the earth or a new plant found in the wild is not patentable subject matter. Likewise, Einstein could not patent his celebrated law that $E=mc^2$; nor could Newton have patented the law of gravity. Such discoveries are 'manifestations of . . . nature, free to all men and reserved exclusively to none.'" *Chakrabarty*, *supra*, at 309 (quoting *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127, 130 (1948)).

"Phenomena of nature, though just discovered, mental processes, and abstract intellectual concepts are not patentable, as they are the basic tools of scientific and technological work." *Gottschalk* v. *Benson*, 409 U. S. 63, 67 (1972). And monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it.

The Court has recognized, however, that too broad an interpretation of this exclusionary principle could eviscerate patent law. For all inventions at some level embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas. Thus, in *Diehr* the Court pointed out that "'a process is not unpatentable simply because it contains a law of nature or a mathematical algorithm.'" 450 U. S., at 187 (quoting *Parker* v. *Flook*, 437 U. S. 584, 590 (1978)). It added that "an *application* of a law of nature or mathematical formula to a known structure or process may well be deserving of patent protection." *Diehr*, *supra*, at 187. And it emphasized Justice Stone's similar observation in *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U. S. 86 (1939):

> "'While a scientific truth, or the mathematical expression of it, is not a patentable invention, a novel and useful structure created with the aid of knowledge of scien-

> tific truth may be.'" 450 U. S., at 188 (quoting *Mackay Radio*, *supra*, at 94).

See also *Funk Brothers*, *supra*, at 130 ("If there is to be invention from [a discovery of a law of nature], it must come from the application of the law of nature to a new and useful end").

Still, as the Court has also made clear, to transform an unpatentable law of nature into a patent-eligible *application* of such a law, one must do more than simply state the law of nature while adding the words "apply it." See, *e. g.*, *Benson*, *supra*, at 71–72.

The case before us lies at the intersection of these basic principles. It concerns patent claims covering processes that help doctors who use thiopurine drugs to treat patients with autoimmune diseases determine whether a given dosage level is too low or too high. The claims purport to apply natural laws describing the relationships between the concentration in the blood of certain thiopurine metabolites and the likelihood that the drug dosage will be ineffective or induce harmful side effects. We must determine whether the claimed processes have transformed these unpatentable natural laws into patent-eligible applications of those laws. We conclude that they have not done so and that therefore the processes are not patentable.

Our conclusion rests upon an examination of the particular claims before us in light of the Court's precedents. Those cases warn us against interpreting patent statutes in ways that make patent eligibility "depend simply on the draftsman's art" without reference to the "principles underlying the prohibition against patents for [natural laws]." *Flook*, *supra*, at 593. They warn us against upholding patents that claim processes that too broadly pre-empt the use of a natural law. *Morse*, *supra*, at 112–120; *Benson*, *supra*, at 71–72. And they insist that a process that focuses upon the use of a natural law also contain other elements or a combination of elements, sometimes referred to as an "inventive concept,"

sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the natural law itself. *Flook*, *supra*, at 594; see also *Bilski*, 561 U. S., at 610–611 ("[T]he prohibition against patenting abstract ideas 'cannot be circumvented by attempting to limit the use of the formula to a particular technological environment' or adding 'insignificant postsolution activity' " (quoting *Diehr*, *supra*, at 191–192)).

We find that the process claims at issue here do not satisfy these conditions. In particular, the steps in the claimed processes (apart from the natural laws themselves) involve well-understood, routine, conventional activity previously engaged in by researchers in the field. At the same time, upholding the patents would risk disproportionately tying up the use of the underlying natural laws, inhibiting their use in the making of further discoveries.

I

A

The patents before us concern the use of thiopurine drugs in the treatment of autoimmune diseases, such as Crohn's disease and ulcerative colitis. When a patient ingests a thiopurine compound, his body metabolizes the drug, causing metabolites to form in his bloodstream. Because the way in which people metabolize thiopurine compounds varies, the same dose of a thiopurine drug affects different people differently, and it has been difficult for doctors to determine whether for a particular patient a given dose is too high, risking harmful side effects, or too low, and so likely ineffective.

At the time the discoveries embodied in the patents were made, scientists already understood that the levels in a patient's blood of certain metabolites, including, in particular, 6-thioguanine and its nucleotides (6–TG) and 6-methyl-mercaptopurine (6–MMP), were correlated with the likelihood that a particular dosage of a thiopurine drug

could cause harm or prove ineffective. See U. S. Patent No. 6,355,623, col. 8, ll. 37–40, 2 App. 10 ("Previous studies suggested that measurement of [6-mercaptopurine (6–MP)] metabolite levels can be used to predict clinical efficacy and tolerance to azathioprine or 6–MP" (citing Cuffari, Théorêt, Latour, & Seidman, 6-Mercaptopurine Metabolism in Crohn's Disease: Correlation With Efficacy and Toxicity, 39 Gut 401 (1996))). But those in the field did not know the precise correlations between metabolite levels and likely harm or ineffectiveness. The patent claims at issue here set forth processes embodying researchers' findings that identified these correlations with some precision.

More specifically, the patents—U. S. Patent No. 6,355,623 ('623 patent) and U. S. Patent No. 6,680,302 ('302 patent)—embody findings that concentrations in a patient's blood of 6–TG or of 6–MMP metabolite beyond a certain level (400 and 7,000 picomoles (pmol) per 8×10^8 red blood cells, respectively) indicate that the dosage is likely too high for the patient, while concentrations in the blood of 6–TG metabolite lower than a certain level (about 230 pmol per 8×10^8 red blood cells) indicate that the dosage is likely too low to be effective.

The patent claims seek to embody this research in a set of processes. Like the Federal Circuit we take as typical claim 1 of the '623 patent, which describes one of the claimed processes as follows:

> "A method of optimizing therapeutic efficacy for treatment of an immune-mediated gastrointestinal disorder, comprising:
>
> "(a) administering a drug providing 6-thioguanine to a subject having said immune-mediated gastrointestinal disorder; and
>
> "(b) determining the level of 6-thioguanine in said subject having said immune-mediated gastrointestinal disorder,

> "wherein the level of 6-thioguanine less than about 230 pmol per 8×10^8 red blood cells indicates a need to increase the amount of said drug subsequently administered to said subject and
>
> "wherein the level of 6-thioguanine greater than about 400 pmol per 8×10^8 red blood cells indicates a need to decrease the amount of said drug subsequently administered to said subject." '623 patent, col. 20, ll. 10–25, 2 App. 16.

For present purposes we may assume that the other claims in the patents do not differ significantly from claim 1.

B

Respondent, Prometheus Laboratories, Inc. (Prometheus), is the sole and exclusive licensee of the '623 and '302 patents. It sells diagnostic tests that embody the processes the patents describe. For some time petitioners, Mayo Clinic Rochester and Mayo Collaborative Services (collectively Mayo), bought and used those tests. But in 2004 Mayo announced that it intended to begin using and selling its own test—a test using somewhat higher metabolite levels to determine toxicity (450 pmol per 8×10^8 for 6–TG and 5,700 pmol per 8×10^8 for 6–MMP). Prometheus then brought this action claiming patent infringement.

The District Court found that Mayo's test infringed claim 7 of the '623 patent. App. to Pet. for Cert. 110a–115a. In interpreting the claim, the court accepted Prometheus' view that the toxicity-risk-level numbers in Mayo's test and the claim were too similar to render the tests significantly different. The number Mayo used (450) was too close to the number the claim used (400) to matter given appropriate margins of error. *Id.*, at 98a–107a. The District Court also accepted Prometheus' view that a doctor using Mayo's test could violate the patent even if he did not actually alter his treatment decision in the light of the test. In doing so, the court construed the claim's language, "indicates a need to

decrease" (or "to increase"), as not limited to instances in which the doctor actually decreases (or increases) the dosage level where the test results suggest that such an adjustment is advisable. *Id.*, at 107a–109a; see also Brief for Respondent i (describing claimed processes as methods "for improving . . . treatment . . . by using individualized metabolite measurements *to inform* the calibration of . . . dosages of . . . thiopurines" (emphasis added)).

Nonetheless the District Court ultimately granted summary judgment in Mayo's favor. The court reasoned that the patents effectively claim natural laws or natural phenomena—namely, the correlations between thiopurine metabolite levels and the toxicity and efficacy of thiopurine drug dosages—and so are not patentable. App. to Pet. for Cert. 50a–83a.

On appeal, the Federal Circuit reversed. It pointed out that in addition to these natural correlations, the claimed processes specify the steps of (1) "administering a [thiopurine] drug" to a patient and (2) "determining the [resulting metabolite] level." These steps, it explained, involve the transformation of the human body or of blood taken from the body. Thus, the patents satisfied the Circuit's "machine or transformation test," which the court thought sufficient to "confine the patent monopoly within rather definite bounds," thereby bringing the claims into compliance with § 101. *Prometheus Labs., Inc.* v. *Mayo Collaborative Services*, 581 F. 3d 1336, 1345, 1346–1347 (2009) (internal quotation marks omitted).

Mayo filed a petition for certiorari. We granted the petition, vacated the judgment, and remanded the case for reconsideration in light of *Bilski*, 561 U. S. 593, which clarified that the "machine-or-transformation test" is not a definitive test of patent eligibility, but only an important and useful clue, *id.*, at 603–604. On remand the Federal Circuit reaffirmed its earlier conclusion. It thought that the "machine-

or-transformation test," understood merely as an important and useful clue, nonetheless led to the "clear and compelling conclusion . . . that the . . . claims . . . do not encompass laws of nature or preempt natural correlations." 628 F. 3d 1347, 1355 (2010). Mayo again filed a petition for certiorari, which we granted.

II

Prometheus' patents set forth laws of nature—namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm. Claim 1, for example, states that *if* the levels of 6–TG in the blood (of a patient who has taken a dose of a thiopurine drug) exceed about 400 pmol per $8{\times}10^8$ red blood cells, *then* the administered dose is likely to produce toxic side effects. While it takes a human action (the administration of a thiopurine drug) to trigger a manifestation of this relation in a particular person, the relation itself exists in principle apart from any human action. The relation is a consequence of the ways in which thiopurine compounds are metabolized by the body—entirely natural processes. And so a patent that simply describes that relation sets forth a natural law.

The question before us is whether the claims do significantly more than simply describe these natural relations. To put the matter more precisely, do the patent claims add *enough* to their statements of the correlations to allow the processes they describe to qualify as patent-eligible processes that *apply* natural laws? We believe that the answer to this question is no.

A

If a law of nature is not patentable, then neither is a process reciting a law of nature, unless that process has additional features that provide practical assurance that the process is more than a drafting effort designed to monopolize the law of nature itself. A patent, for example, could not

simply recite a law of nature and then add the instruction "apply the law." Einstein, we assume, could not have patented his famous law by claiming a process consisting of simply telling linear accelerator operators to refer to the law to determine how much energy an amount of mass has produced (or vice versa). Nor could Archimedes have secured a patent for his famous principle of flotation by claiming a process consisting of simply telling boat builders to refer to that principle in order to determine whether an object will float.

What else is there in the claims before us? The process that each claim recites tells doctors interested in the subject about the correlations that the researchers discovered. In doing so, it recites an "administering" step, a "determining" step, and a "wherein" step. These additional steps are not themselves natural laws but neither are they sufficient to transform the nature of the claim.

First, the "administering" step simply refers to the relevant audience, namely, doctors who treat patients with certain diseases with thiopurine drugs. That audience is a preexisting audience; doctors used thiopurine drugs to treat patients suffering from autoimmune disorders long before anyone asserted these claims. In any event, the "prohibition against patenting abstract ideas 'cannot be circumvented by attempting to limit the use of the formula to a particular technological environment.'" *Bilski*, *supra*, at 610–611 (quoting *Diehr*, 450 U. S., at 191–192).

Second, the "wherein" clauses simply tell a doctor about the relevant natural laws, at most adding a suggestion that he should take those laws into account when treating his patient. That is to say, these clauses tell the relevant audience about the laws while trusting them to use those laws appropriately where they are relevant to their decisionmaking (rather like Einstein telling linear accelerator operators about his basic law and then trusting them to use it where relevant).

Third, the "determining" step tells the doctor to determine the level of the relevant metabolites in the blood, through whatever process the doctor or the laboratory wishes to use. As the patents state, methods for determining metabolite levels were well known in the art. '623 patent, col. 9, ll. 12–65, 2 App. 11. Indeed, scientists routinely measured metabolites as part of their investigations into the relationships between metabolite levels and efficacy and toxicity of thiopurine compounds. '623 patent, col. 8, ll. 37–40, *id.*, at 10. Thus, this step tells doctors to engage in well-understood, routine, conventional activity previously engaged in by scientists who work in the field. Purely "conventional or obvious" "[pre]-solution activity" is normally not sufficient to transform an unpatentable law of nature into a patent-eligible application of such a law. *Flook*, 437 U. S., at 590; see also *Bilski*, 561 U. S., at 610–611 ("[T]he prohibition against patenting abstract ideas 'cannot be circumvented by' . . . adding 'insignificant postsolution activity'" (quoting *Diehr*, 450 U. S., at 191–192)).

Fourth, to consider the three steps as an ordered combination adds nothing to the laws of nature that is not already present when the steps are considered separately. See *id.*, at 188 ("[A] new combination of steps in a process may be patentable even though all the constituents of the combination were well known and in common use before the combination was made"). Anyone who wants to make use of these laws must first administer a thiopurine drug and measure the resulting metabolite concentrations, and so the combination amounts to nothing significantly more than an instruction to doctors to apply the applicable laws when treating their patients.

The upshot is that the three steps simply tell doctors to gather data from which they may draw an inference in light of the correlations. To put the matter more succinctly, the claims inform a relevant audience about certain laws of nature; any additional steps consist of well-understood, routine,

conventional activity already engaged in by the scientific community; and those steps, when viewed as a whole, add nothing significant beyond the sum of their parts taken separately. For these reasons we believe that the steps are not sufficient to transform unpatentable natural correlations into patentable applications of those regularities.

B

1

A more detailed consideration of the controlling precedents reinforces our conclusion. The cases most directly on point are *Diehr* and *Flook*, two cases in which the Court reached opposite conclusions about the patent eligibility of processes that embodied the equivalent of natural laws. The *Diehr* process (held patent eligible) set forth a method for molding raw, uncured rubber into various cured, molded products. The process used a known mathematical equation, the Arrhenius equation, to determine when (depending upon the temperature inside the mold, the time the rubber had been in the mold, and the thickness of the rubber) to open the press. It consisted in effect of the steps of: (1) continuously monitoring the temperature on the inside of the mold, (2) feeding the resulting numbers into a computer, which would use the Arrhenius equation to continuously recalculate the mold-opening time, and (3) configuring the computer so that at the appropriate moment it would signal "a device" to open the press. *Diehr*, 450 U. S., at 177–179.

The Court pointed out that the basic mathematical equation, like a law of nature, was not patentable. But it found the overall process patent eligible because of the way the additional steps of the process integrated the equation into the process as a whole. Those steps included "installing rubber in a press, closing the mold, constantly determining the temperature of the mold, constantly recalculating the appropriate cure time through the use of the formula and a digital computer, and automatically opening the press at the

proper time." *Id.*, at 187. It nowhere suggested that all these steps, or at least the combination of those steps, were in context obvious, already in use, or purely conventional. And so the patentees did not "seek to pre-empt the use of [the] equation," but sought "only to foreclose from others the use of that equation in conjunction with all of the other steps in their claimed process." *Ibid.* These other steps apparently added to the formula something that in terms of patent law's objectives had significance—they transformed the process into an inventive application of the formula.

The process in *Flook* (held not patentable) provided a method for adjusting "alarm limits" in the catalytic conversion of hydrocarbons. Certain operating conditions (such as temperature, pressure, and flow rates), which are continuously monitored during the conversion process, signal inefficiency or danger when they exceed certain "alarm limits." The claimed process amounted to an improved system for updating those alarm limits through the steps of: (1) measuring the current level of the variable, *e. g.*, the temperature; (2) using an apparently novel mathematical algorithm to calculate the current alarm limits; and (3) adjusting the system to reflect the new alarm-limit values. 437 U. S., at 585–587.

The Court, as in *Diehr*, pointed out that the basic mathematical equation, like a law of nature, was not patentable. But it characterized the claimed process as doing nothing other than "provid[ing] a[n unpatentable] formula for computing an updated alarm limit." *Flook*, *supra*, at 586. Unlike the process in *Diehr*, it did not "explain how the variables used in the formula were to be selected, nor did the [claim] contain any disclosure relating to chemical processes at work or the means of setting off an alarm or adjusting the alarm limit." *Diehr*, *supra*, at 192, n. 14; see also *Flook*, 437 U. S., at 586. And so the other steps in the process did not limit the claim to a particular application. Moreover, "[t]he chemical processes involved in catalytic conversion of

hydrocarbons[,] . . . the practice of monitoring the chemical process variables, the use of alarm limits to trigger alarms, the notion that alarm limit values must be recomputed and readjusted, and the use of computers for 'automatic monitoring-alarming'" were all "well known," to the point where, putting the formula to the side, there was no "inventive concept" in the claimed application of the formula. *Id.*, at 594. "[P]ost-solution activity" that is purely "conventional or obvious," the Court wrote, "can[not] transform an unpatentable principle into a patentable process." *Id.*, at 589, 590.

The claim before us presents a case for patentability that is weaker than the (patent-eligible) claim in *Diehr* and no stronger than the (unpatentable) claim in *Flook*. Beyond picking out the relevant audience, namely, those who administer doses of thiopurine drugs, the claim simply tells doctors to: (1) measure (somehow) the current level of the relevant metabolite, (2) use particular (unpatentable) laws of nature (which the claim sets forth) to calculate the current toxicity/inefficacy limits, and (3) reconsider the drug dosage in light of the law. These instructions add nothing specific to the laws of nature other than what is well-understood, routine, conventional activity, previously engaged in by those in the field. And since they are steps that must be taken in order to apply the laws in question, the effect is simply to tell doctors to apply the law somehow when treating their patients. The process in *Diehr* was not so characterized; that in *Flook* was characterized in roughly this way.

2

Other cases offer further support for the view that simply appending conventional steps, specified at a high level of generality, to laws of nature, natural phenomena, and abstract ideas cannot make those laws, phenomena, and ideas patentable. This Court has previously discussed in detail an English case, *Neilson*, which involved a patent claim that posed

a legal problem very similar to the problem now before us. The patent applicant there asserted a claim

> "for the improved application of air to produce heat in fires, forges, and furnaces, where a blowing apparatus is required. [The invention] was to be applied as follows: The blast or current of air produced by the blowing apparatus was to be passed from it into an air-vessel or receptacle made sufficiently strong to endure the blast; and through or from that vessel or receptacle by means of a tube, pipe, or aperture into the fire, the receptacle be kept artificially heated to a considerable temperature by heat externally applied." *Morse*, 15 How., at 114–115.

The English court concluded that the claimed process did more than simply instruct users to use the principle that hot air promotes ignition better than cold air, since it explained how the principle could be implemented in an inventive way. Baron Parke wrote (for the court):

> "It is very difficult to distinguish [Neilson's claim] from the specification of a patent for a principle, and this at first created in the minds of some of the court much difficulty; but after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this—by interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which was before of cold air, in a heated state to the furnace." *Neilson* v. *Harford*, Webster's Patent Cases, at 371.

Thus, the claimed process included not only a law of nature but also several unconventional steps (such as inserting the receptacle, applying heat to the receptacle externally, and blowing the air into the furnace) that confined the claims to a particular, useful application of the principle.

In *Bilski* the Court considered claims covering a process for hedging risks of price changes by, for example, contracting to purchase commodities from sellers at a fixed price, reflecting the desire of sellers to hedge against a drop in prices, while selling commodities to consumers at a fixed price, reflecting the desire of consumers to hedge against a price increase. One claim described the process; another reduced the process to a mathematical formula. 561 U. S., at 599. The Court held that the described "concept of hedging" was "an unpatentable abstract idea." *Id.*, at 611. The fact that some of the claims limited hedging to use in commodities and energy markets and specified that "well-known random analysis techniques [could be used] to help establish some of the inputs into the equation" did not undermine this conclusion, for "*Flook* established that limiting an abstract idea to one field of use or adding token postsolution components did not make the concept patentable." *Id.*, at 612.

Finally, in *Benson* the Court considered the patentability of a mathematical process for converting binary-coded decimal numerals into pure binary numbers on a general purpose digital computer. The claims "purported to cover any use of the claimed method in a general-purpose digital computer of any type." 409 U. S., at 64, 65. The Court recognized that "'a novel and useful structure created with the aid of knowledge of scientific truth'" might be patentable. *Id.*, at 67 (quoting *Mackay Radio*, 306 U. S., at 94). But it held that simply implementing a mathematical principle on a physical machine, namely, a computer, was not a patentable application of that principle. For the mathematical formula had "no substantial practical application except in connection

with a digital computer." *Benson*, *supra*, at 71. Hence the claim (like the claims before us) was overly broad; it did not differ significantly from a claim that just said "apply the algorithm."

3

The Court has repeatedly emphasized this last mentioned concern, a concern that patent law not inhibit further discovery by improperly tying up the future use of laws of nature. Thus, in *Morse* the Court set aside as unpatentable Samuel Morse's general claim for "'the use of the motive power of the electric or galvanic current . . . however developed, for making or printing intelligible characters, letters, or signs, at any distances,'" 15 How., at 86 (history of the case). The Court explained:

> "For aught that we now know some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any part of the process or combination set forth in the plaintiff's specification. His invention may be less complicated—less liable to get out of order—less expensive in construction, and in its operation. But yet if it is covered by this patent the inventor could not use it, nor the public have the benefit of it without the permission of this patentee." *Id.*, at 113.

Similarly, in *Benson* the Court said that the claims before it were "so abstract and sweeping as to cover both known and unknown uses of the [mathematical formula]." 409 U. S., at 67, 68. In *Bilski* the Court pointed out that to allow "petitioners to patent risk hedging would pre-empt use of this approach in all fields." 561 U. S., at 612. And in *Flook* the Court expressed concern that the claimed process was simply "a formula for computing an updated alarm limit," which might "cover a broad range of potential uses." 437 U. S., at 586.

These statements reflect the fact that, even though rewarding with patents those who discover new laws of nature and the like might well encourage their discovery, those laws and principles, considered generally, are "the basic tools of scientific and technological work." *Benson*, *supra*, at 67. And so there is a danger that the grant of patents that tie up their use will inhibit future innovation premised upon them, a danger that becomes acute when a patented process amounts to no more than an instruction to "apply the natural law," or otherwise forecloses more future invention than the underlying discovery could reasonably justify. See generally Lemley, Risch, Sichelman, & Wagner, Life After *Bilski*, 63 Stan. L. Rev. 1315 (2011) (hereinafter Lemley) (arguing that § 101 reflects this kind of concern); see also C. Bohannan & H. Hovenkamp, Creation Without Restraint: Promoting Liberty and Rivalry in Innovation 112 (2012) ("One problem with [process] patents is that the more abstractly their claims are stated, the more difficult it is to determine precisely what they cover. They risk being applied to a wide range of situations that were not anticipated by the patentee"); W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 305–306 (2003) (The exclusion from patent law of basic truths reflects "both . . . the enormous potential for rent seeking that would be created if property rights could be obtained in them and . . . the enormous transaction costs that would be imposed on would-be users [of those truths]").

The laws of nature at issue here are narrow laws that may have limited applications, but the patent claims that embody them nonetheless implicate this concern. They tell a treating doctor to measure metabolite levels and to consider the resulting measurements in light of the statistical relationships they describe. In doing so, they tie up the doctor's subsequent treatment decision whether that treatment does, or does not, change in light of the inference he has drawn

using the correlations. And they threaten to inhibit the development of more refined treatment recommendations (like that embodied in Mayo's test) that combine Prometheus' correlations with later discovered features of metabolites, human physiology, or individual patient characteristics. The "determining" step too is set forth in highly general language covering all processes that make use of the correlations after measuring metabolites, including later discovered processes that measure metabolite levels in new ways.

We need not, and do not, now decide whether were the steps at issue here less conventional, these features of the claims would prove sufficient to invalidate them. For here, as we have said, the steps add nothing of significance to the natural laws themselves. Unlike, say, a typical patent on a new drug or a new way of using an existing drug, the patent claims do not confine their reach to particular applications of those laws. The presence here of the basic underlying concern that these patents tie up too much future use of laws of nature simply reinforces our conclusion that the processes described in the patents are not patent eligible, while eliminating any temptation to depart from case law precedent.

III

We have considered several further arguments in support of Prometheus' position. But they do not lead us to adopt a different conclusion. First, the Federal Circuit, in upholding the patent eligibility of the claims before us, relied on this Court's determination that "[t]ransformation and reduction of an article 'to a different state or thing' is *the clue* to the patentability of a process claim that does not include particular machines." *Benson*, *supra*, at 70–71 (emphasis added); see also *Bilski*, *supra*, at 602–603; *Diehr*, 450 U. S., at 184; *Flook*, *supra*, at 588, n. 9; *Cochrane* v. *Deener*, 94 U. S. 780, 788 (1877). It reasoned that the claimed processes are therefore patent eligible, since they involve transforming the

human body by administering a thiopurine drug and transforming the blood by analyzing it to determine metabolite levels. 628 F. 3d, at 1356–1357.

The first of these transformations, however, is irrelevant. As we have pointed out, the "administering" step simply helps to pick out the group of individuals who are likely interested in applying the law of nature. See *supra*, at 78. And the second step could be satisfied without transforming the blood, should science develop a totally different system for determining metabolite levels that did not involve such a transformation. See *supra*, at 87. Regardless, in stating that the "machine-or-transformation" test is an "*important and useful clue*" to patentability, we have neither said nor implied that the test trumps the "la[w] of nature" exclusion. *Bilski*, 561 U. S., at 603 (emphasis added). That being so, the test fails here.

Second, Prometheus argues that, because the particular laws of nature that its patent claims embody are narrow and specific, the patents should be upheld. Thus, it encourages us to draw distinctions among laws of nature based on whether or not they will interfere significantly with innovation in other fields now or in the future. Brief for Respondent 42–46; see also Lemley 1342–1344 (making similar argument).

But the underlying functional concern here is a *relative* one: how much future innovation is foreclosed relative to the contribution of the inventor. See *supra*, at 86. A patent upon a narrow law of nature may not inhibit future research as seriously as would a patent upon Einstein's law of relativity, but the creative value of the discovery is also considerably smaller. And, as we have previously pointed out, even a narrow law of nature (such as the one before us) can inhibit future research. See s*upra*, at 86–87.

In any event, our cases have not distinguished among different laws of nature according to whether or not the princi-

ples they embody are sufficiently narrow. See, *e. g.*, *Flook*, 437 U. S. 584 (holding narrow mathematical formula unpatentable). And this is understandable. Courts and judges are not institutionally well suited to making the kinds of judgments needed to distinguish among different laws of nature. And so the cases have endorsed a bright-line prohibition against patenting laws of nature, mathematical formulas, and the like, which serves as a somewhat more easily administered proxy for the underlying "building-block" concern.

Third, the Government argues that virtually any step beyond a statement of a law of nature itself should transform an unpatentable law of nature into a potentially patentable application sufficient to satisfy § 101's demands. Brief for United States as *Amicus Curiae*. The Government does not necessarily believe that claims that (like the claims before us) extend just minimally beyond a law of nature should receive patents. But in its view, other statutory provisions—those that insist that a claimed process be novel, 35 U. S. C. § 102, that it not be obvious in light of prior art, § 103, and that it be "full[y], clear[ly], concise[ly], and exact[ly]" described, § 112—can perform this screening function. In particular, it argues that these claims likely fail for lack of novelty under § 102.

This approach, however, would make the "law of nature" exception to § 101 patentability a dead letter. The approach is therefore not consistent with prior law. The relevant cases rest their holdings upon §101, not later sections. *Bilski*, *supra; Diehr*, *supra; Flook*, *supra; Benson*, 409 U. S. 63. See also H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952) ("A person may have 'invented' a machine or a manufacture, which may include anything under the sun that is made by man, *but it is not necessarily patentable under section 101* unless the conditions of the title are fulfilled" (emphasis added)).

We recognize that, in evaluating the significance of additional steps, the § 101 patent-eligibility inquiry and, say, the § 102 novelty inquiry might sometimes overlap. But that need not always be so. And to shift the patent-eligibility inquiry entirely to these later sections risks creating significantly greater legal uncertainty, while assuming that those sections can do work that they are not equipped to do.

What role would laws of nature, including newly discovered (and "novel") laws of nature, play in the Government's suggested "novelty" inquiry? Intuitively, one would suppose that a newly discovered law of nature is novel. The Government, however, suggests in effect that the novelty of a component law of nature may be disregarded when evaluating the novelty of the whole. See Brief for United States as *Amicus Curiae* 27. But §§ 102 and 103 say nothing about treating laws of nature as if they were part of the prior art when applying those sections. Cf. *Diehr*, 450 U. S., at 188 (patent claims "must be considered as a whole"). And studiously ignoring *all* laws of nature when evaluating a patent application under §§ 102 and 103 would "make all inventions unpatentable because all inventions can be reduced to underlying principles of nature which, once known, make their implementation obvious." *Id.*, at 189, n. 12. See also Eisenberg, Wisdom of the Ages or Dead-Hand Control? Patentable Subject Matter for Diagnostic Methods After *In re Bilski*, 3 Case W. Res. J. L. Tech. & Internet 1, 54–55 (2012); 2 D. Chisum, Patents § 5.03[3] (2005).

Section 112 requires only a "written description of the invention . . . in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same." It does not focus on the possibility that a law of nature (or its equivalent) that meets these conditions will nonetheless create the kind of risk that underlies the law of nature exception, namely, the risk that a patent on the law

would significantly impede future innovation. See Lemley 1329–1332 (outlining differences between §§ 101 and 112); Eisenberg, *supra*, at 59–61 (similar). Compare Risch, Everything Is Patentable, 75 Tenn. L. Rev. 591 (2008) (defending a minimalist approach to § 101), with Lemley (reflecting Risch's change of mind).

These considerations lead us to decline the Government's invitation to substitute §§ 102, 103, and 112 inquiries for the better established inquiry under § 101.

Fourth, Prometheus, supported by several *amici*, argues that a principle of law denying patent coverage here will interfere significantly with the ability of medical researchers to make valuable discoveries, particularly in the area of diagnostic research. That research, which includes research leading to the discovery of laws of nature, is expensive; it "ha[s] made the United States the world leader in this field"; and it requires protection. Brief for Respondent 52.

Other medical experts, however, argue strongly against a legal rule that would make the present claims patent eligible, invoking policy considerations that point in the opposite direction. The American Medical Association, the American College of Medical Genetics, the American Hospital Association, the American Society of Human Genetics, the Association of American Medical Colleges, the Association for Molecular Pathology, and other medical organizations tell us that if "claims to exclusive rights over the body's natural responses to illness and medical treatment are permitted to stand, the result will be a vast thicket of exclusive rights over the use of critical scientific data that must remain widely available if physicians are to provide sound medical care." Brief for American College of Medical Genetics et al. as *Amici Curiae* 7; see also App. to Brief for Association Internationale pour la Protection de la Propriété Intellectuelle et al. as *Amici Curiae* A6, A16 (methods of medical treatment are not patentable in most of Western Europe).

We do not find this kind of difference of opinion surprising. Patent protection is, after all, a two-edged sword. On the one hand, the promise of exclusive rights provides monetary incentives that lead to creation, invention, and discovery. On the other hand, that very exclusivity can impede the flow of information that might permit, indeed spur, invention, by, for example, raising the price of using the patented ideas once created, requiring potential users to conduct costly and time-consuming searches of existing patents and pending patent applications, and requiring the negotiation of complex licensing arrangements. At the same time, patent law's general rules must govern inventive activity in many different fields of human endeavor, with the result that the practical effects of rules that reflect a general effort to balance these considerations may differ from one field to another. See Bohannan & Hovenkamp, Creation Without Restraint, at 98–100.

In consequence, we must hesitate before departing from established general legal rules lest a new protective rule that seems to suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in crafting more finely tailored rules where necessary. Cf. 35 U. S. C. §§ 161–164 (special rules for plant patents). We need not determine here whether, from a policy perspective, increased protection for discoveries of diagnostic laws of nature is desirable.

* * *

For these reasons, we conclude that the patent claims at issue here effectively claim the underlying laws of nature themselves. The claims are consequently invalid. And the Federal Circuit's judgment is reversed.

It is so ordered.

Syllabus

ROBERTS *v.* SEA-LAND SERVICES, INC., ET AL.

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

No. 10–1399. Argued January 11, 2012—Decided March 20, 2012

The Longshore and Harbor Workers' Compensation Act (LHWCA) creates a comprehensive scheme to pay compensation for an eligible employee's disability or death resulting from injury occurring upon the navigable waters of the United States. Benefits for most types of disabilities are capped at twice the national average weekly wage for the fiscal year in which an injured employee is "newly awarded compensation." 33 U. S. C. § 906(c). The LHWCA requires employers to pay benefits voluntarily, without formal administrative proceedings. Typically, employers pay benefits without contesting liability, so no compensation orders are issued. However, if an employer controverts liability, or an employee contests his employer's actions with respect to his benefits, the dispute proceeds to the Department of Labor's Office of Workers' Compensation Programs (OWCP) to be resolved, if possible, through informal procedures. An informal disposition may result in a compensation order. If not resolved informally, the dispute is referred to an administrative law judge (ALJ), who conducts a hearing and issues a compensation order.

In fiscal year 2002, petitioner Roberts was injured at an Alaska marine terminal while working for respondent Sea-Land Services, Inc. Sea-Land (except for six weeks in 2003) voluntarily paid Roberts benefits until fiscal year 2005. Roberts then filed an LHWCA claim, and Sea-Land controverted. In fiscal year 2007, an ALJ awarded Roberts benefits at the fiscal year 2002 statutory maximum rate. Roberts sought reconsideration, contending that the award should have been set at the higher statutory maximum rate for fiscal year 2007, when, he argued, he was "newly awarded compensation" by order of the ALJ. The ALJ denied his motion, and the Department of Labor's Benefits Review Board affirmed, concluding that the pertinent maximum rate is determined by the date disability commences. The Ninth Circuit affirmed.

Held: An employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf. Pp. 100–113.

Syllabus

(a) Roberts contends that the statutory term "awarded compensation" means "awarded compensation in a formal order," while Sea-Land and the Director, OWCP, maintain that it means "statutorily entitled to compensation because of disability." Although § 906 can be interpreted either way, only Sea-Land and the Director's interpretation makes § 906 a working part of the statutory scheme. Under Roberts' interpretation, no employee receiving voluntary payments has been "awarded compensation," so none is subject to an identifiable maximum rate of compensation. That result is incompatible with the LHWCA's design. Section 906(b)(1) caps compensation at twice the applicable national average weekly wage, as determined by the Secretary of Labor. Section 906(b)(3), in turn, directs the Secretary to determine that wage before each fiscal year begins, at which time it becomes the "applicable national average weekly wage" for the coming fiscal year. And § 906(c), in its turn, provides that the Secretary's determination shall apply to those "newly awarded compensation" during such fiscal year. Through a series of cross-references, the three provisions work together to cap disability benefits. By its terms, and subject to one express exception, § 906(b)(1) specifies that the cap applies globally, to all disability claims. Because all three provisions interlock, the cap functions as Congress intended only if § 906(c) also applies globally, to all such cases. Roberts' interpretation would give § 906(c) no application in the many cases in which no formal orders issue.

Using the national average weekly wage for the fiscal year in which an employee becomes disabled coheres with the LHWCA's administrative structure. An employer must be able to calculate the cap in order to pay benefits within 14 days of notice of an employee's disability, see § 914(b), and in order to certify to the Department of Labor whether the maximum rate is being paid. Similarly, an OWCP claims examiner must verify the compensation rate in light of the applicable cap. It is difficult to see how an employer or claims examiner can use a national average weekly wage other than the one in effect at the time an employee becomes disabled. Moreover, applying the national average weekly wage for the fiscal year in which an employee becomes disabled advances the LHWCA's purpose to compensate disability, defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury." § 902(10). It also avoids disparate treatment of similarly situated employees; Roberts' reading would permit two employees who earn the same salary and suffer the same injury on the same day to receive different maximum compensation rates based on the happenstance of their obtaining orders in different fiscal years.

Finally, applying the national average weekly wage for the fiscal year in which disability commences discourages gamesmanship in the claims process. If the fiscal year in which an order issues were to determine the cap, the fact that the national average wage rises each year with inflation would be unduly significant. Roberts' rule would reward employees who receive voluntary payments with windfalls for initiating unnecessary administrative proceedings to secure a higher rate, while simultaneously punishing employers who have complied fully with their statutory obligations to make voluntary payments. Pp. 100–107.

(b) Roberts' counterarguments are unconvincing. First, although the LHWCA sometimes uses "award" to mean "award in a formal order," the presumption that identical words used in different parts of the same Act are intended to have the same meaning readily yields whenever, as here, the variation in the word's use in the LHWCA reasonably warrants the conclusion that it was employed in different parts of the Act with different intent. See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595.

Second, Roberts argues that, because this Court has refused to read the statutory phrase "person entitled to compensation" in § 933(g) to mean "person awarded compensation," *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 477, the converse must also be true: "[A]warded compensation" in § 906(c) cannot mean "entitled to compensation." But *Cowart*'s reasoning does not work in reverse. *Cowart* did not construe § 906(c) or "award," see *id.*, at 478–479, and it did not hold that the groups of "employees entitled to compensation" and "employees awarded compensation" were mutually exclusive, see *id.*, at 477.

Finally, Roberts contends that his interpretation furthers the LHWCA's purpose of providing employees with prompt compensation by encouraging employers to avoid delay and expedite administrative proceedings. But his remedy would also punish employers who voluntarily pay benefits at the proper rate from the time of their employees' injuries, because they would owe benefits under the higher cap applicable in any future fiscal year when their employees chose to file claims. The more measured deterrent to employer delay is interest that accrues from the date an unpaid benefit came due. Pp. 107–112.

625 F. 3d 1204, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, ALITO, and KAGAN, JJ., joined. GINSBURG, J., filed an opinion concurring in part and dissenting in part, *post*, p. 113.

Joshua T. Gillelan II argued the cause for petitioner. With him on the briefs were *Michael F. Pozzi* and *Charles Robinowitz.*

Joseph R. Palmore argued the cause for the federal respondent. With him on the brief were *Solicitor General Verrilli, Deputy Solicitor General Kneedler,* and *M. Patricia Smith. Peter D. Keisler* argued the cause for respondent Sea-Land Services, Inc. With him on the brief were *Carter G. Phillips, Eric D. McArthur,* and *Frank B. Hugg.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), ch. 509, 44 Stat. 1424, as amended, 33 U. S. C. § 901 *et seq.*, caps benefits for most types of disability at twice the national average weekly wage for the fiscal year in which an injured employee is "newly awarded compensation." § 906(c). We hold that an employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf.

I

A

The LHWCA "is a comprehensive scheme to provide compensation 'in respect of disability or death of an employee . . . if the disability or death results from an injury occurring upon the navigable waters of the United States.'" *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, 294 (1995) (quoting § 903(a)). An employee's compensation depends on the severity of his disability and his preinjury pay. A totally disabled employee, for example, is entitled to two-thirds of his preinjury average weekly wage as long as he remains disabled. §§ 908(a)–(b), 910.

**Jeffrey R. White* filed a brief for the American Association for Justice as *amicus curiae* urging reversal.

Section 906, however, sets a cap on compensation.[1] Disability benefits "shall not exceed" twice "the applicable national average weekly wage." § 906(b)(1). The national average weekly wage—"the national average weekly earnings of production or nonsupervisory workers on private non-agricultural payrolls," § 902(19)—is recalculated by the Secretary of Labor each fiscal year. § 906(b)(3). For most types of disability, the "applicable" national average weekly wage is the figure for the fiscal year in which a beneficiary is "newly awarded compensation," and the cap remains constant as long as benefits continue. § 906(c).[2]

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[1] Section 906 provides, in pertinent part:

"(b) Maximum rate of compensation

"(1) Compensation for disability or death (other than compensation for death required . . . to be paid in a lump sum) shall not exceed an amount equal to 200 per centum of the applicable national average weekly wage, as determined by the Secretary under paragraph (3).

. . . . . .

"(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. . . .

"(c) Applicability of determinations

"Determinations under subsection (b)(3) . . . with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period."

[2] For those "currently receiving compensation for permanent total disability or death benefits," § 906(c), the cap is adjusted each fiscal year—and typically increases, in step with the usual inflation-driven rise in the national average weekly wage. See Dept. of Labor, Division of Longshore and Harbor Workers' Compensation (DLHWC), NAWW Information, online at http://www.dol.gov/owcp/dlhwc/NAWWinfo.htm (all Internet materials as visited Mar. 16, 2012, and available in Clerk of Court's case file). Section 906(c)'s "currently receiving compensation" clause is not at issue here.

Consistent with the central bargain of workers' compensation regimes—limited liability for employers; certain, prompt recovery for employees—the LHWCA requires that employers pay benefits voluntarily, without formal administrative proceedings. Once an employee provides notice of a disabling injury, his employer must pay compensation "periodically, promptly, and directly . . . without an award, except where liability to pay compensation is controverted." § 914(a). In general, employers pay benefits without contesting liability. See *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U. S. 529, 532 (1983). In the mine run of cases, therefore, no compensation orders issue.

If an employer controverts, or if an employee contests his employer's actions with respect to his benefits, the dispute advances to the Department of Labor's Office of Workers' Compensation Programs (OWCP). See 20 CFR §§ 702.251–702.262 (2011). The OWCP district directors "are empowered to amicably and promptly resolve such problems by informal procedures." § 702.301. A district director's informal disposition may result in a compensation order. § 702.315(a). In practice, however, "many pending claims are amicably settled through voluntary payments without the necessity of a formal order." *Intercounty Constr. Corp.* v. *Walter*, 422 U. S. 1, 4, n. 4 (1975). If informal resolution fails, the district director refers the dispute to an administrative law judge (ALJ). See 20 CFR §§ 702.316, 702.331–702.351. An ALJ's decision after a hearing culminates in the entry of a compensation order. 33 U. S. C. §§ 919(c)–(e).[3]

[3] In fiscal year 1971, only 209 cases out of the 17,784 in which compensation was paid resulted in orders. Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 757–758 (1972). Congress enacted § 906's predecessor provision, which included the "newly awarded compensation" clause, in 1972. Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, § 5, 86 Stat. 1253.

B

In fiscal year 2002, petitioner Dana Roberts slipped and fell on a patch of ice while employed at respondent Sea-Land Services' marine terminal in Dutch Harbor, Alaska. Roberts injured his neck and shoulder and did not return to work. On receiving notice of his disability, Sea-Land (except for a 6-week period in 2003) voluntarily paid Roberts benefits absent a compensation order until fiscal year 2005. When Sea-Land discontinued voluntary payments, Roberts filed an LHWCA claim, and Sea-Land controverted. In fiscal year 2007, after a hearing, an ALJ awarded Roberts benefits at the statutory maximum rate of $966.08 per week. This was twice the national average weekly wage for fiscal year 2002, the fiscal year when Roberts became disabled.

Roberts moved for reconsideration, arguing that the "applicable" national average weekly wage was the figure for fiscal year 2007, the fiscal year when he was "newly awarded compensation" by the ALJ's order. The latter figure would have entitled Roberts to $1,114.44 per week. The ALJ denied reconsideration, and the Department of Labor's Benefits Review Board (or BRB) affirmed, concluding that "the pertinent maximum rate is determined by the date the disability commences." App. to Pet. for Cert. 20. The Ninth Circuit affirmed in relevant part, holding that an employee "is 'newly awarded compensation' within the meaning of [§ 906(c)] when he first becomes entitled to compensation." *Roberts* v. *Director, OWCP*, 625 F. 3d 1204, 1208 (2010) *(per curiam)*. We granted certiorari, 564 U. S. 1066 (2011), to resolve a conflict among the Circuits with respect to the time when a beneficiary is "newly awarded compensation," and now affirm.[4]

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[4] Compare 625 F. 3d 1204 (time of entitlement) with *Wilkerson* v. *Ingalls Shipbuilding, Inc.*, 125 F. 3d 904 (CA5 1997) (time of order), and *Boroski* v. *DynCorp Int'l*, 662 F. 3d 1197 (CA11 2011) (same).

II

Roberts contends that "awarded compensation" means "awarded compensation in a formal order." Sea-Land, supported by the Director, OWCP, responds that "awarded compensation" means "statutorily entitled to compensation because of disability." The text of § 906(c), standing alone, admits of either interpretation. But "our task is to fit, if possible, all parts into an harmonious whole." *FTC* v. *Mandel Brothers, Inc.*, 359 U. S. 385, 389 (1959). Only the interpretation advanced by Sea-Land and the Director makes § 906 a working part of the statutory scheme; supplies an administrable rule that results in equal treatment of similarly situated beneficiaries; and avoids gamesmanship in the claims process. In light of these contextual and structural considerations, we hold that an employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits under the Act, no matter whether, or when, a compensation order issues on his behalf.

A

We first consider "whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 340 (1997). The LHWCA does not define "awarded," but in construing the Act, as with any statute, "'we look first to its language, giving the words used their ordinary meaning.'" *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Compensation Programs*, 519 U. S. 248, 255 (1997) (quoting *Moskal* v. *United States*, 498 U. S. 103, 108 (1990)). At first blush, Roberts' position is appealing. In ordinary usage, "award" most often means "give by judicial decree" or "assign after careful judgment." Webster's Third New International Dictionary 152 (2002); see also, *e. g.*, Black's Law Dictionary 157 (9th ed. 2009) ("grant by formal process or by judicial decree").

But "award" can also mean "grant," or "confer or bestow upon." Webster's Third New International Dictionary, at 152; see also *ibid.* (1971 ed.) (same). The LHWCA "grants" benefits to disabled employees, and so can be said to "award" compensation by force of its entitlement-creating provisions. Indeed, this Court has often said that statutes "award" entitlements. See, *e. g.*, *Astrue* v. *Ratliff*, 560 U. S. 586, 591 (2010) (referring to "statutes that award attorney's fees to a prevailing party"); *Barber* v. *Thomas*, 560 U. S. 474, 493 (2010) (appendix to majority opinion) (statute "awards" good-time credits to federal prisoners); *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 271 (1988) (Ohio statute "awards a tax credit"); *Pacific Employers Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 500 (1939) (California workers' compensation statute "award[s] compensation for injuries to an employee"); see also, *e. g.*, *Connecticut* v. *Doehr*, 501 U. S. 1, 28 (1991) (Rehnquist, C. J., concurring in part and concurring in judgment) ("Materialman's and mechanic's lien statutes award an interest in real property to workers"). Similarly, this Court has described an employee's survivors as "having been 'newly awarded' death benefits" by virtue of the employee's death, without any reference to a formal order. *Director, Office of Workers' Compensation Programs* v. *Rasmussen*, 440 U. S. 29, 44, n. 16 (1979) (quoting § 906(c)'s predecessor provision, 33 U. S. C. § 906(d) (1976 ed.)).

In short, the text of § 906(c), in isolation, is indeterminate.

B

Statutory language, however, "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). In the context of the LHWCA's comprehensive, reticulated regime for worker benefits—in which § 906

plays a pivotal role—"awarded compensation" is much more sensibly interpreted to mean "statutorily entitled to compensation because of disability." [5]

1

Section 906 governs compensation in all LHWCA cases. As explained above, see *supra*, at 98, the LHWCA requires employers to pay benefits voluntarily, and in the vast majority of cases, that is just what occurs. Under Roberts' interpretation of § 906(c), no employee receiving voluntary payments has been "awarded compensation," so none is subject to an identifiable maximum rate of compensation. That

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[5] JUSTICE GINSBURG's view, not advanced by any party, is that an employee is "awarded compensation" when his employer "voluntarily pays compensation or is officially ordered to do so." *Post*, at 115 (opinion concurring in part and dissenting in part). But reading "awarded compensation" as synonymous with "receiving compensation" is further from the ordinary meaning of "award" than the Court's approach: A person who slipped and fell on a negligently maintained sidewalk would not say that she had been "awarded money damages" if the business responsible for the sidewalk voluntarily paid her hospital bills. Cf. *post*, at 115–116.

Moreover, if Congress had intended "awarded compensation" to mean "receiving compensation," it could have said so—as, in fact, it did in § 906(c)'s parallel clause, which pertains to beneficiaries "currently receiving compensation for permanent total disability or death." See nn. 1–2, *supra*. JUSTICE GINSBURG's reading denies effect to Congress' textual shift, and therefore "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004).

Nor is JUSTICE GINSBURG's reliance on a single sentence of legislative history persuasive. See *post*, at 116–117. True, a Senate Committee Report described those "newly awarded compensation" as those "who begin receiving compensation." S. Rep. No. 92–1125, p. 18 (1972). But a subsequent House Committee Report did not. Cf. H. R. Rep. No. 92–1441, p. 15 (1972) (statute provides a "method for determining maximum and minimum compensation (to be applicable to persons currently receiving compensation as well as those newly awarded compensation)"). The legislative materials are a wash.

result is incompatible with the Act's design. Section 906(b)(1) caps "[c]ompensation for disability or death (other than compensation for death required . . . to be paid in a lump sum)" at twice "the applicable national average weekly wage, as determined by the Secretary under paragraph (3)." Section 906(b)(3), in turn, directs the Secretary to "determine" the national average weekly wage before each fiscal year begins on October 1 and provides that "[s]uch determination shall be the applicable national average weekly wage" for the coming fiscal year. And § 906(c), in its turn, provides that "[d]eterminations under subsection (b)(3) . . . with respect to" a fiscal year "shall apply to . . . those newly awarded compensation during such" fiscal year. Through a series of cross-references, the three provisions work together to cap disability benefits.

By its terms, and subject to one express exception, § 906(b)(1) specifies that the cap applies globally, to all disability claims. But all three provisions interlock, so the cap functions as Congress intended only if § 906(c) also applies globally, to all such cases. See, *e. g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000) ("A court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme' " (quoting *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 569 (1995))). If Roberts' interpretation were correct, § 906(c) would have no application at all in the many cases in which no formal orders issue, because employers make voluntary payments or the parties reach informal settlements. We will not construe § 906(c) in a manner that renders it "entirely superfluous in all but the most unusual circumstances." *TRW Inc.* v. *Andrews*, 534 U. S. 19, 29 (2001).

Recognizing this deficiency in his reading of § 906(c), Roberts proposes that orders issue in every case, so that employers can lock in the caps in effect at the time their employees become disabled. This is a solution in search of a problem. Under settled LHWCA practice, orders are rare. Roberts' interpretation would set needless administrative

machinery in motion and would disrupt the congressionally preferred system of voluntary compensation and informal dispute resolution. The incongruity of Roberts' proposal is highlighted by his inability to identify a vehicle for the entry of an order in an uncontested case. Section 919(c), on which Roberts relies, applies only if an employee has filed a claim. Likewise, 20 CFR § 702.315(a) applies only in the case of a claim or an employer's notice of controversion. See § 702.301. We doubt that an employee will file a claim for the sole purpose of assisting his employer in securing a lower cap. And we will not read § 906(c) to compel an employer to file a baseless notice of controversion. Cf. 33 U. S. C. §§ 928(a), (d) (providing for assessment of attorney's fees and costs against employers who controvert unsuccessfully). Roberts suggests that employers could threaten to terminate benefits in order to induce their employees to file claims, and thus initiate the administrative process. Construing any workers' compensation regime to encourage gratuitous confrontation between employers and employees strikes us as unsound.

2

Using the national average weekly wage for the fiscal year in which an employee becomes disabled coheres with the LHWCA's administrative structure. Section 914(b) requires an employer to pay benefits within 14 days of notice of an employee's disability. To do so, an employer must be able to calculate the cap. An employer must also notify the Department of Labor of voluntary payments by filing a form that indicates, *inter alia*, whether the "maximum rate is being paid." Dept. of Labor, Form LS–206, Payment of Compensation Without Award (rev. Aug. 2011), online at http://www.dol.gov/owcp/dlhwc/ls-206.pdf. On receipt of this form, an OWCP claims examiner must verify the rate of compensation in light of the applicable cap. See Dept. of Labor, Longshore (DLHWC) Procedure Manual § 2–n201(3)(b)(3) (hereinafter Longshore Procedure Manual), on-

line at http://www.dol.gov/owcp/dlhwc/lspm/lspm2-201.htm. It is difficult to see how an employer can apply or certify a national average weekly wage other than the one in effect at the time an employee becomes disabled. An employer is powerless to predict when an employee might file a claim, when a compensation order might issue, or what the national average weekly wage will be at that later time. Likewise for a claims examiner.[6]

Moreover, applying the national average weekly wage for the fiscal year in which an employee becomes disabled advances the LHWCA's purpose to compensate disability, defined as "incapacity because of injury to earn the wages which the employee was receiving *at the time of injury*." 33 U. S. C. § 902(10) (emphasis added). Just as the LHWCA takes "the average weekly wage of the injured employee at the time of the injury" as the "basis upon which to compute compensation," § 910, it is logical to apply the national average weekly wage for the same point in time. Administrative practice has long treated the time of injury as the relevant date. See, *e. g.*, Dept. of Labor, Longshore Act Coverage and Benefits, Pamphlet LS–560 (rev. Dec. 2003) ("Compensation payable under the Act may not exceed 200% of

[6] JUSTICE GINSBURG's approach is either easily circumvented or unworkable. For example, JUSTICE GINSBURG determines that Roberts is entitled to the fiscal year 2002 maximum rate from March 11, 2002, to July 15, 2003, because Sea-Land was making voluntary payments during that time. *Post*, at 118. But Sea-Land was paying Roberts $933.82 per week, less than the $966.08 that the ALJ found Roberts was entitled to receive. Compare App. to Pet. for Cert. 101 with *id.*, at 107, Order ¶1. If any voluntary payment suffices, regardless of an employee's actual entitlement, then an employer can hedge against a later finding of liability by paying the smallest amount to which the Act might entitle an employee but controverting liability as to the remainder. See, *e. g.*, *R. M.* v. *Sabre Personnel Assoc., Inc.*, 41 BRBS 727, 730 (2007). An employer who controverts is not subject to the Act's delinquency penalty. See 33 U. S. C. § 914(e). Perhaps JUSTICE GINSBURG gives Sea-Land the benefit of the doubt because its voluntary payments were close to Roberts' actual entitlement. But if that is so, then how close is close enough?

the national average weekly wage, applicable at the time of injury"), online at http://www.dol.gov/owcp/dlhwc/LS-560pam.htm; Dept. of Labor, Workers' Compensation Under the Longshoremen's Act, Pamphlet LS–560 (rev. Nov. 1979) (same); see also, *e. g.*, Dept. of Labor, LHWCA Bulletin No. 11–01, p. 2 (2010) (national average weekly wage for particular fiscal year applies to "disability incurred during" that fiscal year).[7]

Applying the national average weekly wage at the time of onset of disability avoids disparate treatment of similarly situated employees. Under Roberts' reading, two employees who earn the same salary and suffer the same injury on the same day could be entitled to different rates of compensation based on the happenstance of their obtaining orders in different fiscal years. We can imagine no reason why Congress would have intended, by choosing the words "newly awarded compensation," to differentiate between employees based on such an arbitrary criterion.

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[7] Roberts accurately notes that in some cases, the time of injury and the time of onset of disability differ. We have observed that "the LHWCA does not compensate physical injury alone but the disability produced by that injury." *Metropolitan Stevedore Co.* v. *Rambo*, 515 U. S. 291, 297 (1995). From that principle, lower courts have rightly concluded that when dates of injury and onset of disability diverge, the latter is the relevant date for determining the applicable national average weekly wage. See, *e. g.*, *Service Employees Int'l, Inc.* v. *Director, OWCP*, 595 F. 3d 447, 456 (CA2 2010); *Kubin* v. *Pro-Football, Inc.*, 29 BRBS 117 (1995) *(per curiam)*.

Likewise, in a small group of cases—those in which disability lasts more than 3 but less than 15 days—the time of onset of disability and the time of entitlement will differ. See § 906(a) ("No compensation shall be allowed for the first three days of the disability . . . *Provided, however*, That in case the injury results in disability of more than fourteen days the compensation shall be allowed from the date of the disability"). In these cases, the relevant date is that on which disability and entitlement coincide: the fourth day after the onset of disability.

3

Finally, using the national average weekly wage for the fiscal year in which disability commences discourages gamesmanship in the claims process. If the fiscal year in which an order issues were to determine the cap, the fact that the national average weekly wage typically rises every year with inflation, see n. 2, *supra*, would become unduly significant. Every employee affected by the cap would seek the entry of a compensation order in a later fiscal year. Even an employee who has been receiving compensation at the proper rate for years would be well advised to file a claim for greater benefits in order to obtain an order at a later time. Likewise, an employee might delay the adjudicatory process to defer the entry of an order. And even in an adjudicated case where an employer is found to have paid benefits at the proper rate, an ALJ would adopt the later fiscal year's national average weekly wage, making the increased cap retroactively applicable to all of the employer's payments. Roberts candidly acknowledges that his position gives rise to such perverse incentives. See Tr. of Oral Arg. 58–59. We decline to adopt a rule that would reward employees with windfalls for initiating unnecessary administrative proceedings, while simultaneously punishing employers who have complied fully with their statutory obligations.

III

We find Roberts' counterarguments unconvincing.

A

First, Roberts observes that some provisions of the LHWCA clearly use "award" to mean "award in a formal order," and contends that the same must be true of "awarded compensation" in § 906(c). We agree that the Act sometimes uses "award" as Roberts urges. Section 914(a), for example, refers to the payment of compensation "to the person enti-

tled thereto, without an award," foreclosing the equation of "entitlement" and "award" that we adopt with respect to § 906(c) today.[8] But the presumption that "identical words used in different parts of the same act are intended to have the same meaning . . . readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 595 (2004) (internal quotation marks omitted); see also, *e. g., United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001). Here, we find the presumption overcome because several provisions of the Act would make no sense if "award" were read as Roberts proposes. Those provisions confirm today's holding because they too, in context, use "award" to denote a statutory entitlement to compensation because of disability.

For example, § 908(c)(20) provides that "[p]roper and equitable compensation not to exceed $7,500 shall be awarded for serious disfigurement." Roberts argues that § 908(c)(20) "necessarily contemplates administrative action to fix the amount of the liability and direct its payment." Reply Brief for Petitioner 11. In Roberts' view, no disfigured employee may receive benefits without invoking the administrative claims process. That argument, however, runs counter to § 908's preface, which directs that "[c]ompensation for disability shall be paid to the employee," and to § 914(a), which

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[8] Other LHWCA provisions, read in context, also use award to mean "award in a formal order." For example, §§ 913(a) and 928(b), like § 914(a), refer to the payment of compensation "without an award." And the LHWCA distinguishes between voluntary payments and those due under an order for purposes of punishing employer delinquency. Compare § 914(e) (10 percent penalty for late payment of "compensation payable without an award") with § 914(f) (20 percent penalty for late payment of "compensation, payable under the terms of an award").

requires the payment of compensation "without an award." It is also belied by employers' practice of paying § 908(c)(20) benefits voluntarily. See, *e. g.*, *Williams-McDowell* v. *Newport News Shipbuilding & Dry Dock Co.*, No. 99–0627 etc., 2000 WL 35928576, *1 (BRB, Mar. 15, 2000) *(per curiam)*; *Evans* v. *Bergeron Barges, Inc.*, No. 98–1641, 1999 WL 35135283, *1 (BRB, Sept. 3, 1999) *(per curiam)*. In light of the LHWCA's interest in prompt payment and settled practice, "awarded" in § 908(c)(20) can only be better read, as in § 906(c), to refer to a disfigured employee's entitlement to benefits.

Likewise, § 908(d)(1) provides that if an employee who is receiving compensation for a scheduled disability[9] dies before receiving the full amount of compensation to which the schedule entitles him, "the total amount of the award unpaid at the time of death shall be payable to or for the benefit of his survivors." See also § 908(d)(2). Roberts' interpretation of "award" would introduce an odd gap: Only survivors of those employees who were receiving schedule benefits pursuant to orders—not survivors of employees who were receiving voluntary payments—would be entitled to the unpaid balances due their decedents. There is no reason why Congress would have chosen to distinguish between survivors in this manner. And the Benefits Review Board has quite sensibly interpreted § 908(d) to mean that "an employee has a vested interest in benefits which accrue during his lifetime, and, after he dies, his estate is entitled to those benefits, regardless of when an award is made." *Wood* v.

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[9] Sections 908(c)(1) to (20) set forth a "schedule" of particular injuries that entitle an employee "to receive two-thirds of his average weekly wages for a specific number of weeks, regardless of whether his earning capacity has actually been impaired." *Potomac Elec. Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U. S. 268, 269 (1980). For example, an employee who loses an arm is entitled to two-thirds of his average weekly wage for 312 weeks. § 908(c)(1).

Ingalls Shipbuilding, Inc., 28 BRBS 27, 36 (1994) *(per curiam)*.[10]

Finally, § 933(b) provides: "For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board." Unless award may mean something other than "award in a compensation order," this specific definition would be unnecessary. Roberts contends that this provision, enacted in 1984, "was indeed 'unnecessary' " in light of *Pallas Shipping*. Brief for Petitioner 29; see 461 U. S., at 534 ("The term 'compensation order' in the LHWCA refers specifically to an administrative

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[10] Roberts' interpretation also would afford unwarranted significance to the entry of an order in other circumstances, resulting in arbitrary distinctions within other classes of beneficiaries. For example, § 908(c)(22) provides that if an employee suffers from more than one scheduled disability, the "awards" for each "shall run consecutively." Under Roberts' interpretation, § 908(c)(22) would require consecutive payments only for employees who were receiving scheduled disability benefits pursuant to orders; those receiving voluntary payments presumably would be entitled to concurrent payments. See §§ 914(a)–(b). That result would conflict with § 908(c)(22)'s text, which states that consecutive payments must be made "[i]n any case" involving multiple scheduled disabilities. See, *e. g.*, *Thornton* v. *Northrop Grumman Shipbuilding, Inc.*, 44 BRBS 111 (2010) *(per curiam)*.

Similarly, § 910(h)(1) sets out two formulas for increasing benefits for pre-1972 disability or death in light of the higher rates Congress provided in the 1972 LHWCA amendments. The first applies to those receiving compensation at the then-applicable maximum rate; the second applies to those "awarded compensation . . . at less than the maximum rate." See Dept. of Labor, OWCP Bulletin No. 10–73, Adjustment of Compensation for Total Permanent Disability or Death Prior to LS/HW Amendments of 1972, pp. 2–4 (1973). Roberts' interpretation would make the second formula applicable only to beneficiaries receiving less than the maximum rate pursuant to orders, not to all such beneficiaries. Again, there is no reason to believe that Congress intended this distinction, nor has OWCP applied it. See *ibid.* (prescribing a "uniform" method for computing the increase in all "[c]ases being compensated at less than the maximum rate," with no reference to the existence of an order).

award of compensation following proceedings with respect to the claim"). Roberts' argument offends the canon against superfluity and neglects that § 933(b) defines the term "award," whereas *Pallas Shipping* defines the term "compensation order." Moreover, Congress' definition of "award," which tracks Roberts' preferred interpretation, was carefully limited to § 933(b). Had Congress intended to adopt a universal definition of "award," it could have done so in § 902, the LHWCA's glossary. Read in light of the "duty to give effect, if possible, to every clause and word of a statute," *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001) (internal quotation marks omitted), § 933(b) debunks Roberts' argument that the Act always uses "award" to mean "award in a formal order" and confirms that "award" has other meanings.

B

Next, Roberts notes that this Court has refused to read the statutory phrase "person entitled to compensation" in § 933(g) to mean "person awarded compensation." See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 477 (1992) ("[A] person entitled to compensation need not be receiving compensation or have had an adjudication in his favor"). In Roberts' view, the converse must also be true: "[A]warded compensation" in § 906(c) cannot mean "entitled to compensation." But *Cowart*'s reasoning does not work in reverse. *Cowart* did not construe § 906(c) or the term "award," but relied on the uniform meaning of the phrase "person entitled to compensation" in the LHWCA. See *id.*, at 478–479. As just explained, the LHWCA contains no uniform meaning of the term "award." Moreover, *Cowart* did not hold that the groups of "employees entitled to compensation" and "employees awarded compensation" were mutually exclusive. The former group includes the latter: The entry of a compensation order is a sufficient but not necessary condition for membership in the former. See *id.*, at 477.

C

Finally, Roberts contends that his interpretation furthers the LHWCA's purpose of providing employees with prompt compensation by encouraging employers to avoid delay and expedite administrative proceedings. But Roberts' remedy would also punish employers who voluntarily pay benefits at the proper rate from the time of their employees' injuries. These employers would owe benefits under the higher cap applicable in any future fiscal year when their employees chose to file claims. And Roberts' remedy would offer no relief at all to the many beneficiaries entitled to less than the statutory maximum rate.

The more measured deterrent to employer tardiness is interest that "accrues from the date a benefit came due, rather than from the date of the ALJ's award." *Matulic* v. *Director, OWCP*, 154 F. 3d 1052, 1059 (CA9 1998). The Director has long taken the position that "interest is a necessary and inherent component of 'compensation' because it ensures that the delay in payment of compensation does not diminish the amount of compensation to which the employee is entitled." *Sproull* v. *Director, OWCP*, 86 F. 3d 895, 900 (CA9 1996); see also, *e. g., Strachan Shipping Co.* v. *Wedemeyer*, 452 F. 2d 1225, 1229 (CA5 1971). Moreover, "[t]imely [c]ontroversion does not relieve the responsible party from paying interest on unpaid compensation." Longshore Procedure Manual §8–201, online at http://www.dol.gov/owcp/dlhwc/lspm/lspm8-201.htm. Indeed, the ALJ awarded Roberts interest "on each unpaid installment of compensation from the date the compensation became due." App. to Pet. for Cert. 108, Order ¶5.[11]

[11] Thus, as under JUSTICE GINSBURG's approach, an employer who controverts still "runs the risk" of greater liability if an ALJ awards an employee compensation at some point subsequent to the onset of disability. See *post*, at 117.

* * *

We hold that an employee is "newly awarded compensation" when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf.[12] The judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

JUSTICE GINSBURG, concurring in part and dissenting in part.

Section 6 of the Longshore and Harbor Workers' Compensation Act (LHWCA or Act) defines the maximum disability benefit an injured worker may receive under the Act. Specifically, § 6 states that an injured employee may receive, at most, twice the national average weekly wage for the fiscal year in which the employee is "newly awarded compensation." 33 U. S. C. § 906(c). The Court granted review in this case to answer the following question: When is an employee "newly awarded compensation"?

Petitioner Dana Roberts contends that an employee is "newly awarded compensation" in the year she receives a formal compensation award. For the reasons cogently explained by the majority, that argument is untenable. See *ante*, at 100–111. Unlike the Court, however, I do not regard as reasonable respondent Sea-Land Services' view that an employee is "newly awarded compensation" in the year she becomes "statutorily entitled to compensation." *Ante*, at 100 (internal quotation marks omitted). Applying the common meaning of the verb "award" and recognizing the Act's distinction between benefits paid voluntarily, and those paid

[12] Because "newly awarded compensation," read in context, is unambiguous, we do not reach respondents' argument that the Director's interpretation of § 906(c) is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

pursuant to a compensation order, see *ante*, at 97–98, I would hold that an injured worker is "newly awarded compensation" when (1) the employer voluntarily undertakes to pay benefits to the employee, or (2) an administrative law judge (ALJ), the Benefits Review Board (BRB), or a reviewing court orders the employer to pay such benefits.

I

In determining the meaning of a statutory phrase, "we look first to its language, giving the words used their ordinary meaning." *Moskal* v. *United States*, 498 U. S. 103, 108 (1990) (internal quotation marks and citation omitted). As the Court acknowledges, *ante*, at 100, the verb "award" ordinarily means "to give by judicial decree" or "[to] assign after careful judgment." Webster's Third New International Dictionary 152 (2002). See also Black's Law Dictionary 157 (9th ed. 2009) (defining the verb "award" as "[t]o grant by formal process or by judicial decree"). Giving "award" this usual meaning, an employee is "newly awarded compensation," if not voluntarily paid, in the fiscal year in which payment is directed by administrative order or judicial decree.

Under the LHWCA, the Court recognizes, an employee is provided compensation voluntarily or in contested proceedings. See *ante*, at 98. Most commonly, an employer pays compensation voluntarily after receiving an employee's notice of disabling injury. See *Pallas Shipping Agency, Ltd.* v. *Duris*, 461 U. S. 529, 532 (1983); 33 U. S. C. § 912 (describing the form, content, and timing of the necessary notice and requiring employers to designate a representative to receive the notice); § 914(b). If an employer declines to pay compensation voluntarily, an injured employee can file a claim with the Department of Labor's Office of Workers' Compensation Programs (OWCP). For employees with valid claims, OWCP proceedings culminate with an administrative or court decision ordering the employer to pay

benefits. § 919(c). Thus, an injured worker is given—or "awarded"—compensation through one of two means contemplated by the Act: either the employer voluntarily pays compensation or is officially ordered to do so. Logically, then, the worker is "newly awarded compensation" when one of those two events occurs.

The Court does not take this approach. After acknowledging that it is not relying on the typical meaning of the word "award," see *ante*, at 100, the Court adopts Sea-Land's view that "awarded compensation" is synonymous with "[became] statutorily entitled to benefits," *ante*, at 113. As a result, a person is "newly awarded compensation" in the year in which she becomes entitled to benefits—*i. e.*, in the year the employee "first becomes disabled." *Ibid.* Such a reading is plausible, the Court asserts, because "this Court has often said that statutes 'award' entitlements." *Ante*, at 101 (citing cases).

I do not dispute that statutes are often characterized as "awarding" relief to persons falling within their compass. But "a statute must be read in [its] context." *Ibid.* (quoting *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989)). Section 906 does not address *whether* the LHWCA, as a general matter, "awards" disability benefits to injured longshore workers. Rather, it concerns a more specific question: *When* has a *particular employee* been "newly awarded compensation." In that context, equating "awarded compensation" with "statutorily entitled to compensation" is not plausible. A person covered by the Act would not likely say he was "awarded compensation" the moment he became disabled, if, in fact, his employer contests liability. Only after some entity—the employer, an ALJ, the BRB, or a reviewing court—recognizes the employee's right to compensation would he comprehend that he had been "awarded compensation." To borrow THE CHIEF JUSTICE's example: No person who slips and injures herself on a negligently maintained sidewalk would tell her friends the next

day, "Guess what, I was newly awarded money damages yesterday." See Tr. of Oral Arg. 28.

The inconsistency between the Court's interpretation of "newly awarded compensation" and my reading of the phrase is best illustrated by contextual example. Assume an employee is injured in 2002 and the employer refuses to pay compensation voluntarily. Then, five years later, an ALJ finds in favor of the employee and orders the employer to pay benefits to the employee. Under the Court's view, the employee was "newly awarded compensation" in 2002, even though the employee did not receive a penny—and the employer was not obligated to pay a penny—until 2007. Only the most strained interpretation of "newly awarded" could demand that result.[1]

The Court's view, moreover, does not fit the Act's design. As explained *supra*, at 114–115, the Act envisions that an eligible employee will begin receiving benefits in either of two ways. The Court's interpretation disregards this design, assuming instead that all employees are awarded benefits in the same way: by the Act at the time they become disabled.

Section 906(c)'s legislative history further confirms that Congress intended "newly awarded compensation" to have its commonsense meaning. In describing § 906, the Senate Committee on Labor and Public Welfare reported:

> "[Section 906(c)] states that determinations of national average weekly wage made with respect to a [fiscal year]

[1] As the Court notes, the maximum rate for a given fiscal year applies to two groups of injured workers: those who are "newly awarded compensation during such [year]," and those who are "currently receiving compensation for permanent total disability or death benefits during such [year]." 33 U. S. C. § 906(c). *Ante*, at 102, n. 5. Contrary to the Court's charge, I do not read "newly awarded compensation" as synonymous with "currently receiving compensation." See *ibid.* An injured worker who is "currently receiving compensation" in a given fiscal year was "newly awarded compensation" in a previous year. My interpretation therefore gives "effect to Congress' textual shift," *ibid.*: It identifies two distinct groups of workers who are entitled to a given year's maximum rate.

> apply to employees or survivors currently receiving compensation for permanent total disability or death benefits, as well as those *who begin receiving compensation for the first time* during the [fiscal year]." S. Rep. No. 92–1125, p. 18 (1972) (emphasis added).

Congress therefore believed an injured worker is "newly awarded compensation" in the year in which she "begin[s] receiving compensation for the first time." *Ibid.* Again, an employee begins receiving compensation either when an employer voluntarily agrees to pay the employee benefits or when an ALJ, the BRB, or a court orders the employer to do so. See *supra*, at 114–115. When the employer resists payment, the employee will not necessarily begin receiving compensation in the year in which she becomes disabled.

Finally, interpreting "newly awarded compensation" to mean awarded through an employer's voluntary decision or an official order is consistent with the Act's goal of encouraging employers to pay legitimate claims promptly. See 33 U. S. C. § 914(a) (requiring employers to pay compensation "periodically, promptly, and directly"); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 498 (1992) (Blackmun, J., dissenting) ("[T]he Act presumes that employers, as a rule, will promptly recognize their LHWCA obligations and commence payments immediately."). Under my interpretation, an employer who chooses to contest a valid claim, rather than to pay the claim voluntarily, runs the risk that it may ultimately have to pay the injured employee a higher maximum benefit. For example, if an employer refuses to pay benefits to a worker injured in 2012, and an ALJ issues an order awarding compensation to the employee in 2015, the fiscal year 2015 maximum rate would apply to the employee's claim. Had the employer voluntarily begun paying benefits in 2012, on the other hand, the 2012 maximum rate would apply. Under the Court's reading, by contrast, an employer pays the prevailing rate for the year the employee became

disabled, regardless of whether the employer in fact pays benefits immediately or years down the road.[2]

II

In this case, Roberts was injured on February 24, 2002, and stopped working two weeks later. App. to Pet. for Cert. 4. Sea-Land and its insurer paid benefits to Roberts from March 11, 2002, until July 15, 2003. *Id.*, at 101. Sea-Land then resumed paying benefits on September 1, 2003, and continued to pay Roberts compensation until May 17, 2005, when it ceased making payments for good. *Ibid.* After Roberts filed a complaint with the OWCP, an ALJ, in October 2006, concluded that Roberts was entitled to compensation from March 11, 2002, onwards. *Id.*, at 107–108.

Applying my interpretation of § 906, Roberts was newly awarded compensation three times: in March 2002 when Sea-Land voluntarily began paying benefits; in September 2003 when Sea-Land resumed making payments after it had stopped in July 2003; and in October 2006 when an ALJ ordered Sea-Land to pay benefits to Roberts for the uncompensated weeks in 2003 and from May 2005 onwards. Roberts was therefore entitled to the fiscal year 2002 maximum rate from March 11, 2002, until July 15, 2003; the fiscal year 2003 maximum rate from September 1, 2003, until May 17, 2005; and the fiscal year 2007 rate[3] going forward and for all uncompensated weeks covered by the ALJ's order.[4]

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[2] Employers may have a particularly strong financial incentive to postpone paying claims that implicate § 906. That section applies only to injured workers who qualify for the maximum rate of compensation under the Act—*i. e.*, to those claimants who are owed the largest possible benefit.

[3] For § 906 purposes, a year runs from October 1 to September 30. See 33 U. S. C. § 906(b)(3). The 2007 maximum rate therefore applies to all employees "newly awarded compensation" between October 1, 2006, and September 30, 2007.

[4] The Court asserts that an employer could "easily circumven[t]" my approach by making voluntary payments to an injured worker that are substantially below the employee's "actual entitlement." *Ante*, at 105,

* * *

For the foregoing reasons, I would reverse the Ninth Circuit's judgment and hold that an employee is "newly awarded compensation" when her employer either voluntarily agrees to pay compensation to her or is officially ordered to do so.

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n. 6. The prospect that an employer could successfully execute, or would even attempt, such a strategy is imaginary. Employers who make voluntary payments to employees are required to file a report with the Department of Labor describing the nature of the employee's injury and stating the amount of the payments made. See *ante*, at 104; 33 U. S. C. § 930(a). The employer must also submit the results of a medical evaluation of the employee's condition. Dept. of Labor, Longshore (DLHWC) Procedure Manual § 2–201(2)(b) (hereinafter Longshore Procedure Manual), online at http://www.dol.gov/owcp/dlhwc/lspm/lspm2-201.htm (as visited Mar. 14, 2012, and in Clerk of Court's case file). Upon receiving the employer's report, a Department of Labor claims examiner verifies "the compensation rate for accuracy" and must follow up with the employer "[i]f the compensation rate appears low." *Id.*, § 2–201(3)(b)(1). The chances are slim that a claims examiner would validate a substantial underpayment. Employers who underpay benefits, moreover, are subject to a penalty equal to 10% of the amount of the underpayment. See 33 U. S. C. § 914(e); Longshore Procedure Manual § 8–202(3)(c) ("If partial payments are made by the employer, the [10% penalty] appl[ies] . . . to the difference between the amount owed and the amount paid."), http://www.dol.gov/owcp/dlhwc/lspm/lspm8-202.htm. Employers would thus risk paying more, not less, were they to attempt to "circumven[t]" my approach by deliberately undercompensating injured workers. And while it is true that an employer who controverts an employee's right to compensation does not have to pay the 10% penalty, see *ante*, at 105, n. 6, the Act does not permit an employer to pay any amount it likes and controvert the remainder. See 33 U. S. C. § 914(a) (requiring employers either to pay benefits in full or to controvert "liability to pay compensation" at all).

Syllabus

SACKETT ET VIR *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

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

No. 10–1062. Argued January 9, 2012—Decided March 21, 2012

The Clean Water Act prohibits "the discharge of any pollutant by any person," 33 U. S. C. § 1311, without a permit, into "navigable waters," § 1344. Upon determining that a violation has occurred, the Environmental Protection Agency (EPA) may either issue a compliance order or initiate a civil enforcement action. § 1319(a)(3). The resulting civil penalty may not "exceed [$37,500] per day for each violation." § 1319(d). The Government contends that the amount doubles to $75,000 when the EPA prevails against a person who has been issued a compliance order but has failed to comply.

The Sacketts, petitioners here, received a compliance order from the EPA, which stated that their residential lot contained navigable waters and that their construction project violated the Act. The Sacketts sought declarative and injunctive relief in the Federal District Court, contending that the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U. S. C. § 706(2)(A), and that it deprived them of due process in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction. The Ninth Circuit affirmed, concluding that the Clean Water Act precluded preenforcement judicial review of compliance orders and that such preclusion did not violate due process.

Held: The Sacketts may bring a civil action under the APA to challenge the issuance of the EPA's order. Pp. 125–131.

(a) The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U. S. C. § 704. The compliance order here has all the hallmarks of APA finality. Through it, the EPA "determined" "rights or obligations," *Bennett* v. *Spear*, 520 U. S. 154, 178, requiring the Sacketts to restore their property according to an Agency-approved plan and to give the EPA access. Also, "legal consequences . . . flow" from the order, *ibid.*, which, according to the Government's litigating position, exposes the Sacketts to double penalties in future enforcement proceedings. The order also severely limits their ability to obtain a permit for their fill from the Army Corps of Engineers, see 33 U. S. C. § 1344; 33 CFR § 326.3(e)(1)(iv). Further, the order's issuance marks the "consummation" of the Agency's

decisionmaking process, *Bennett*, *supra*, at 178, for the EPA's findings in the compliance order were not subject to further Agency review. The Sacketts also had "no other adequate remedy in a court," 5 U. S. C. § 704. A civil action brought by the EPA under 33 U. S. C. § 1319 ordinarily provides judicial review in such cases, but the Sacketts cannot initiate that process. And each day they wait, they accrue additional potential liability. Applying to the Corps of Engineers for a permit and then filing suit under the APA if that permit is denied also does not provide an adequate remedy for the EPA's action. Pp. 125–128.

(b) The Clean Water Act is not a statute that "preclude[s] judicial review" under the APA, 5 U. S. C. § 701(a)(1). The APA creates a "presumption favoring judicial review of administrative action." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 349. While this presumption "may be overcome by inferences of intent drawn from the statutory scheme as a whole," *ibid.*, the Government's arguments do not support an inference that the Clean Water Act's statutory scheme precludes APA review. Pp. 128–131.

622 F. 3d 1139, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court. GINSBURG, J., *post*, p. 131, and ALITO, J., *post*, p. 132, filed concurring opinions.

Damien M. Schiff argued the cause for petitioners. With him on the briefs were *M. Reed Hopper* and *Leslie R. Weatherhead.*

Malcolm L. Stewart argued the cause for respondents. With him on the brief were *Solicitor General Verrilli, Acting Assistant Attorney General Dreher, Ginger D. Anders, Lisa E. Jones, Aaron P. Avila, Jennifer Scheller Neumann, Carol S. Holmes, Ankur K. Tohan,* and *Steven M. Neugeboren.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *John J. Burns,* Attorney General of Alaska, and *Ruth Hamilton Heese, Michael G. Mitchell,* and *Cameron M. Leonard,* Senior Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Thomas C. Horne* of Arizona, *John W. Suthers* of Colorado, *David M. Louie* of Hawaii, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *Alan Wilson* of South Carolina, *Kenneth T. Cuccinelli II* of Virginia, and *Gregory A. Phillips* of Wyoming; for the American Civil Rights Union by *Peter*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether Michael and Chantell Sackett may bring a civil action under the Administrative Procedure Act, 5 U. S. C. § 500 *et seq.*, to challenge the issuance by the Environmental Protection Agency (EPA) of an administrative compliance order under § 309 of the Clean Water Act, 33 U. S. C. § 1319. The order asserts that the Sacketts' property is subject to the Act, and that they have violated its provisions by placing fill material on the property; and on this basis it directs them immediately to restore the property pursuant to an EPA work plan.

I

The Clean Water Act prohibits, among other things, "the discharge of any pollutant by any person," § 1311, without a permit, into the "navigable waters," § 1344—which the Act

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J. Ferrara; for the American Farm Bureau Federation et al. by *Mark T. Stancil* and *Ellen Steen;* for the American Petroleum Institute et al. by *Virginia S. Albrecht*, *Deidre G. Duncan*, *Ryan A. Shores*, *Karma B. Brown*, *Peter Tolsdorf*, *Nick Goldstein*, *Douglas T. Nelson*, and *Ralph W. Holmen;* for the Center for Constitutional Jurisprudence et al. by *John Eastman*, *Anthony T. Caso*, and *Edwin Meese III;* for the Chamber of Commerce of the United States of America by *Daryl Joseffer*, *Adam Conrad*, *Robin S. Conrad*, and *Rachel Brand;* for the Competitive Enterprise Institute by *Theodore L. Garrett*, *Mark W. Mosier*, *Matthew J. Berns*, *Sam Kazman*, and *Hans Bader;* for General Electric Co. by *Kathleen M. Sullivan*, *Donald W. Fowler*, *Eric G. Lasker*, *Thomas H. Hill*, and *Jonathan Massey;* for the Institute for Justice by *William R. Maurer;* for the Mountain States Legal Foundation by *Steven J. Lechner;* for the National Association of Home Builders et al. by *Thomas J. Ward*, *Jeffrey B. Augello*, *Holli J. Feichko*, *Duane Desiderio*, and *John J. McDermott;* for the National Association of Manufacturers by *Martin S. Kaufman* and *Quentin Riegel;* and for the Wet Weather Partnership et al. by *F. Paul Calamita.*

Christopher J. Wright, *Timothy J. Simeone*, and *Lawrence M. Levine* filed a brief for the Natural Resources Defense Council et al. as *amici curiae* urging affirmance.

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

defines as "the waters of the United States," § 1362(7). If the EPA determines that any person is in violation of this restriction, the Act directs the Agency either to issue a compliance order or to initiate a civil enforcement action. § 1319(a)(3). When the EPA prevails in a civil action, the Act provides for "a civil penalty not to exceed [$37,500] per day for each violation." [1] § 1319(d). And according to the Government, when the EPA prevails against any person who has been issued a compliance order but has failed to comply, that amount is increased to $75,000—up to $37,500 for the statutory violation and up to an additional $37,500 for violating the compliance order.

The particulars of this case flow from a dispute about the scope of "the navigable waters" subject to this enforcement regime. Today we consider only whether the dispute may be brought to court by challenging the compliance order—we do not resolve the dispute on the merits. The reader will be curious, however, to know what all the fuss is about. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), we upheld a regulation that construed "the navigable waters" to include "freshwater wetlands," *id.*, at 124, themselves not actually navigable, that were adjacent to navigable-in-fact waters. Later, in *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159 (2001), we held that an abandoned sand and gravel pit, which "seasonally ponded" but which was not adjacent to open water, *id.*, at 164, was not part of the navigable waters. Then most recently, in *Rapanos* v. *United States*, 547 U. S. 715 (2006), we considered whether a wetland not adjacent

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[1] The original statute set a penalty cap of $25,000 per violation per day. The Federal Civil Penalties Inflation Adjustment Act of 1990, 104 Stat. 890, note following 28 U. S. C. § 2461, as amended by the Debt Collection Improvement Act of 1996, § 3720E, 110 Stat. 1321–373, note following 28 U. S. C. § 2461, p. 1314 (Amendment), authorizes the EPA to adjust that maximum penalty for inflation. On the basis of that authority, the Agency has raised the cap to $37,500. See 74 Fed. Reg. 626, 627 (2009).

to navigable-in-fact waters fell within the scope of the Act. Our answer was no, but no one rationale commanded a majority of the Court. In his separate opinion, THE CHIEF JUSTICE expressed the concern that interested parties would lack guidance "on precisely how to read Congress' limits on the reach of the Clean Water Act" and would be left "to feel their way on a case-by-case basis." *Id.*, at 758 (concurring opinion).

The Sacketts are interested parties feeling their way. They own a $^{2}/_{3}$-acre residential lot in Bonner County, Idaho. Their property lies just north of Priest Lake, but is separated from the lake by several lots containing permanent structures. In preparation for constructing a house, the Sacketts filled in part of their lot with dirt and rock. Some months later, they received from the EPA a compliance order. The order contained a number of "Findings and Conclusions," including the following:

> "1.4 [The Sacketts' property] contains wetlands within the meaning of 33 C. F. R. § 328.4(8)(b); the wetlands meet the criteria for jurisdictional wetlands in the 1987 'Federal Manual for Identifying and Delineating Jurisdictional Wetlands.'
>
> "1.5 The Site's wetlands are adjacent to Priest Lake within the meaning of 33 C. F. R. § 328.4(8)(c). Priest Lake is a 'navigable water' within the meaning of section 502(7) of the Act, 33 U. S. C. § 1362(7), and 'waters of the United States' within the meaning of 40 C. F. R. § 232.2.
>
> "1.6 In April and May, 2007, at times more fully known to [the Sacketts, they] and/or persons acting on their behalf discharged fill material into wetlands at the Site. [They] filled approximately one half acre.
>
> . . . . .
>
> "1.9 By causing such fill material to enter waters of the United States, [the Sacketts] have engaged, and are continuing to engage, in the 'discharge of pollutants' from a

> point source within the meaning of sections 301 and 502(12) of the Act, 33 U. S. C. §§ 1311 and 1362(12).
>
> . . . . . .
>
> "1.11 [The Sacketts'] discharge of pollutants into waters of the United States at the Site without [a] permit constitutes a violation of section 301 of the Act, 33 U. S. C. § 1311." App. 19–20.

On the basis of these findings and conclusions, the order directs the Sacketts, among other things, "immediately [to] undertake activities to restore the Site, in accordance with [an EPA-created] Restoration Work Plan" and to "provide and/or obtain access to the Site . . . [and] access to all records and documentation related to the conditions at the Site . . . to EPA employees and/or their designated representatives." *Id.*, at 21–22, ¶¶2.1, 2.7.

The Sacketts, who do not believe that their property is subject to the Act, asked the EPA for a hearing, but that request was denied. They then brought this action in the United States District Court for the District of Idaho, seeking declaratory and injunctive relief. Their complaint contended that the EPA's issuance of the compliance order was "arbitrary [and] capricious" under the Administrative Procedure Act (APA), 5 U. S. C. § 706(2)(A), and that it deprived them of "life, liberty, or property, without due process of law," in violation of the Fifth Amendment. The District Court dismissed the claims for want of subject-matter jurisdiction, and the United States Court of Appeals for the Ninth Circuit affirmed, 622 F. 3d 1139 (2010). It concluded that the Act "preclude[s] pre-enforcement judicial review of compliance orders," *id.*, at 1144, and that such preclusion does not violate the Fifth Amendment's due process guarantee, *id.*, at 1147. We granted certiorari. 564 U. S. 1052 (2011).

II

The Sacketts brought suit under Chapter 7 of the APA, which provides for judicial review of "final agency action for which there is no other adequate remedy in a court." 5

U. S. C. § 704. We consider first whether the compliance order is final agency action. There is no doubt it is agency action, which the APA defines as including even a "failure to act." §§ 551(13), 701(b)(2). But is it *final?* It has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA "'determined'" "'rights or obligations.'" *Bennett* v. *Spear*, 520 U. S. 154, 178 (1997) (quoting *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71 (1970)). By reason of the order, the Sacketts have the legal obligation to "restore" their property according to an Agency-approved Restoration Work Plan, and must give the EPA access to their property and to "records and documentation related to the conditions at the Site." App. 22, ¶2.7. Also, "'legal consequences . . . flow'" from issuance of the order. *Bennett*, *supra*, at 178 (quoting *Marine Terminal*, *supra*, at 71). For one, according to the Government's current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding.[2] It also severely limits the Sacketts' ability to obtain a permit for their fill from the Army Corps of Engineers, see 33 U. S. C. § 1344. The Corps' regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so "is clearly appropriate." 33 CFR § 326.3(e)(1)(iv) (2011).[3]

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[2] We do not decide today that the Government's position is correct, but assume the consequences of the order to be what the Government asserts.

[3] The regulation provides this consequence for "enforcement litigation that has been initiated by other Federal . . . regulatory agencies." 33 CFR § 326.3(e)(1)(iv) (2011). The Government acknowledges, however, that the EPA's issuance of a compliance order is considered by the Corps to fall within the provision. Brief for Respondents 31. Here again, we take the Government at its word without affirming that it represents a proper interpretation of the regulation.

The issuance of the compliance order also marks the "'consummation'" of the Agency's decisionmaking process. *Bennett*, *supra*, at 178 (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 113 (1948)). As the Sacketts learned when they unsuccessfully sought a hearing, the "Findings and Conclusions" that the compliance order contained were not subject to further Agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to "engage in informal discussion of the terms and requirements" of the order with the EPA and to inform the Agency of "any allegations [t]herein which [they] believe[d] to be inaccurate." App. 22–23, ¶2.11. But that confers no entitlement to further Agency review. The mere possibility that an agency might reconsider in light of "informal discussion" and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal.

The APA's judicial review provision also requires that the person seeking APA review of final agency action have "no other adequate remedy in a court," 5 U. S. C. §704. In Clean Water Act enforcement cases, judicial review ordinarily comes by way of a civil action brought by the EPA under 33 U. S. C. §1319. But the Sacketts cannot initiate that process, and each day they wait for the Agency to drop the hammer, they accrue, by the Government's telling, an additional $75,000 in potential liability. The other possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied—will not serve either. The remedy for denial of action that might be sought from one agency does not ordinarily provide an "adequate remedy" for action already taken by another agency. The Government, to its credit, does not seriously contend that other available remedies alone foreclose review under §704. Instead, the Government relies on §701(a)(1) of the APA, which excludes APA

review "to the extent that [other] statutes preclude judicial review." The Clean Water Act, it says, is such a statute.

III

Nothing in the Clean Water Act *expressly* precludes judicial review under the APA or otherwise. But in determining "[w]hether and to what extent a particular statute precludes judicial review," we do not look "only [to] its express language." *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 345 (1984). The APA, we have said, creates a "presumption favoring judicial review of administrative action," but as with most presumptions, this one "may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Id.*, at 349. The Government offers several reasons why the statutory scheme of the Clean Water Act precludes review.

The Government first points to 33 U. S. C. § 1319(a)(3), which provides that, when the EPA "finds that any person is in violation" of certain portions of the Act, the Agency "shall issue an order requiring such person to comply with [the Act], or . . . shall bring a civil action [to enforce the Act]." The Government argues that, because Congress gave the EPA the choice between a judicial proceeding and an administrative action, it would undermine the Act to allow judicial review of the latter. But that argument rests on the question-begging premise that the relevant difference between a compliance order and an enforcement proceeding is that only the latter is subject to judicial review. There are eminently sound reasons other than insulation from judicial review why compliance orders are useful. The Government itself suggests that they "provid[e] a means of notifying recipients of potential violations and quickly resolving the issues through voluntary compliance." Brief for Respondents 39. It is entirely consistent with this function to allow judicial review when the recipient does not choose "voluntary compliance." The Act does not guarantee the EPA that is-

suing a compliance order will always be the most effective choice.

The Government also notes that compliance orders are not self-executing, but must be enforced by the Agency in a plenary judicial action. It suggests that Congress therefore viewed a compliance order "as a step in the deliberative process[,] . . . rather than as a coercive sanction that itself must be subject to judicial review." *Id.*, at 38. But the APA provides for judicial review of all final agency actions, not just those that impose a self-executing sanction. And it is hard for the Government to defend its claim that the issuance of the compliance order was just "a step in the deliberative process" when the Agency rejected the Sacketts' attempt to obtain a hearing and when the *next* step will either be taken by the Sacketts (if they comply with the order) or will involve judicial, not administrative, deliberation (if the EPA brings an enforcement action). As the text (and indeed the very name) of the compliance order makes clear, the EPA's "deliberation" over whether the Sacketts are in violation of the Act is at an end; the Agency may still have to deliberate over whether it is confident enough about this conclusion to initiate litigation, but that is a separate subject.

The Government further urges us to consider that Congress expressly provided for prompt judicial review, on the administrative record, when the EPA assesses administrative penalties after a hearing, see § 1319(g)(8), but did not expressly provide for review of compliance orders. But if the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.

The cases on which the Government relies simply are not analogous. In *Block* v. *Community Nutrition Institute*, *supra*, we held that the Agricultural Marketing Agreement Act of 1937, which expressly allowed milk handlers to obtain judicial review of milk market orders, precluded review of

milk market orders in suits brought by milk *consumers*. 467 U. S., at 345–348. Where a statute provides that particular agency action is reviewable at the instance of one party, who must first exhaust administrative remedies, the inference that it is not reviewable at the instance of other parties, who are not *subject* to the administrative process, is strong. In *United States* v. *Erika, Inc.*, 456 U. S. 201 (1982), we held that the Medicare statute, which expressly provided for judicial review of awards under Part A, precluded review of awards under Part B. *Id.*, at 206–208. The strong parallel between the award provisions in Part A and Part B of the Medicare statute does not exist between the issuance of a compliance order and the assessment of administrative penalties under the Clean Water Act. And in *United States* v. *Fausto*, 484 U. S. 439 (1988), we held that the Civil Service Reform Act, which expressly excluded certain "nonpreference" employees from the statute's review scheme, precluded review at the instance of those employees in a separate Claims Court action. *Id.*, at 448–449. Here, there is no suggestion that Congress has sought to exclude compliance-order recipients from the Act's review scheme; quite to the contrary, the Government's case is premised on the notion that the Act's primary review mechanisms are open to the Sacketts.

Finally, the Government notes that Congress passed the Clean Water Act in large part to respond to the inefficiency of then-existing remedies for water pollution. Compliance orders, as noted above, can obtain quick remediation through voluntary compliance. The Government warns that the EPA is less likely to use the orders if they are subject to judicial review. That may be true—but it will be true for all agency actions subjected to judicial review. The APA's presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely

designed to enable the strong-arming of regulated parties into "voluntary compliance" without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA's jurisdiction. Compliance orders will remain an effective means of securing prompt voluntary compliance in those many cases where there is no substantial basis to question their validity.

* * *

We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA review, and that the Clean Water Act does not preclude that review. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GINSBURG, concurring.

Faced with an EPA administrative compliance order threatening tens of thousands of dollars in civil penalties per day, the Sacketts sued "to contest the jurisdictional bases for the order." Brief for Petitioners 9. "As a logical prerequisite to the issuance of the challenged compliance order," the Sacketts contend, "EPA had to determine that it has regulatory authority over [our] property." *Id.*, at 54–55. The Court holds that the Sacketts may immediately litigate their jurisdictional challenge in federal court. I agree, for the Agency has ruled definitively on that question. Whether the Sacketts could challenge not only the EPA's authority to regulate their land under the Clean Water Act, but also, at this preenforcement stage, the terms and conditions of the compliance order, is a question today's opinion does not reach out to resolve. Not raised by the Sacketts here, the question remains open for another day and case. On that understanding, I join the Court's opinion.

JUSTICE ALITO, concurring.

The position taken in this case by the Federal Government—a position that the Court now squarely rejects—would have put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees.

The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act, and according to the Federal Government, if property owners begin to construct a home on a lot that the Agency thinks possesses the requisite wetness, the property owners are at the Agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a Nation that values due process, not to mention private property, such treatment is unthinkable.

The Court's decision provides a modest measure of relief. At least, property owners like petitioners will have the right to challenge the EPA's jurisdictional determination under the Administrative Procedure Act. But the combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.

Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers "the waters of the United States." 33 U. S. C. § 1362(7). But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view, see *Rapanos* v. *United States*, 547 U. S. 715, 732–739 (2006) (plurality opinion); *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 167–174 (2001), but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the Agency has relied on informal guidance. But far from providing clarity and predictability, the Agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff. See Brief for Competitive Enterprise Institute as *Amicus Curiae* 7–13.

Allowing aggrieved property owners to sue under the Administrative Procedure Act is better than nothing, but only clarification of the reach of the Clean Water Act can rectify the underlying problem.

Syllabus

MISSOURI *v.* FRYE

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT

No. 10–444. Argued October 31, 2011—Decided March 21, 2012

Respondent Frye was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4-year prison term. The prosecutor sent Frye's counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 90-day sentence. Counsel did not convey the offers to Frye, and they expired. Less than a week before Frye's preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking postconviction relief in state court, he alleged his counsel's failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to the misdemeanor had he known of the offer. The court denied his motion, but the Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland* v. *Washington*, 466 U. S. 668. Specifically, the court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown that counsel's deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.

Held:

1. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to "all 'critical' stages of the criminal proceedings." *Montejo* v. *Louisiana*, 556 U. S. 778, 786. *Hill* v. *Lockhart*, 474 U. S. 52, established that *Strickland*'s two-part test governs ineffective-assistance claims in the plea bargain context. There, the defendant had alleged that his counsel had given him inadequate advice about his plea, but he failed to show that he would have proceeded to trial had he received the proper advice. 474 U. S., at 60. In *Padilla* v. *Kentucky*, 559 U. S. 356, where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that "the negotiation of a plea bargain is a critical" stage for ineffective-assistance purposes, *id.*, at 373, and rejected the argument

made by the State in this case that a knowing and voluntary plea supersedes defense counsel's errors. The State attempts to distinguish *Hill* and *Padilla* from the instant case. It notes that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present, while no formal court proceedings are involved when a plea offer has lapsed or been rejected; and it insists that there is no right to receive a plea offer in any event. Thus, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies when the opportunities for a full and fair trial, or for a later guilty plea albeit on less favorable terms, are preserved. While these contentions are neither illogical nor without some persuasive force, they do not suffice to overcome the simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Plea bargains have become so central to today's criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process. Pp. 140–144.

2. As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to this rule need not be addressed here, for the offer was a formal one with a fixed expiration date. Standards for prompt communication and consultation recommended by the American Bar Association and adopted by numerous state and federal courts, though not determinative, serve as important guides. The prosecution and trial courts may adopt measures to help ensure against late, frivolous, or fabricated claims. First, a formal offer's terms and processing can be documented. Second, States may require that all offers be in writing. Third, formal offers can be made part of the record at any subsequent plea proceeding or before trial to ensure that a defendant has been fully advised before the later proceedings commence. Here, as the result of counsel's deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty. Pp. 144–147.

3. To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it, if they had the authority to exercise that discretion under state law. This application of *Strickland* to uncommunicated, lapsed pleas does not alter

Syllabus

Hill's standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U. S., at 59. *Hill* correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel's deficient performance during plea negotiations. Because Frye argues that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial but at whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea, see *Weatherford* v. *Bursey*, 429 U. S. 545, 561, nor a federal right that the judge accept it, *Santobello* v. *New York*, 404 U. S. 257, 262. Missouri, among other States, appears to give the prosecution some discretion to cancel a plea agreement; and the Federal Rules of Criminal Procedure, some state rules, including Missouri's, and this Court's precedents give trial courts some leeway to accept or reject plea agreements. Pp. 147–149.

4. Applying these standards here, the Missouri court correctly concluded that counsel's failure to inform Frye of the written plea offer before it expired fell below an objective reasonableness standard, but it failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. These matters should be addressed by the Missouri appellate court in the first instance. Given that Frye's new offense for driving without a license occurred a week before his preliminary hearing, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it unless they were required by state law to do so. Pp. 149–151.

311 S. W. 3d 350, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 151.

Counsel

Chris Koster, Attorney General of Missouri, argued the cause for petitioner. With him on the briefs were *James R. Layton*, Solicitor General, and *Shaun J. Mackelprang*, Chief Counsel.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Emmett D. Queener argued the cause for respondent. With him on the brief was *Craig A. Johnston*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Kevin T. Kane*, Chief State's Attorney of Connecticut, *Michael E. O'Hare*, Supervisory Assistant State's Attorney, and *Michael J. Proto*, Assistant State's Attorney, by *William H. Ryan, Jr.*, former Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *John J. Burns* of Alaska, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Paula T. Dow* of New Jersey, *Gary K. King* of New Mexico, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; and for the Criminal Justice Legal Foundation et al. by *Kent S. Scheidegger*.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Stephen N. Zack*, *Margaret Colgate Love*, *Peter Goldberger*, and *Jill Wheaton;* for the Constitution Project by *John F. Cooney* and *Virginia Sloan;* and for the National Association of Criminal Defense Lawyers et al. by *Jonathan D. Hacker*, *Loren L. Alikhan*, *Norman L. Reimer*, *Malia Brink*, *Steven R. Shapiro*, and *Conrad O. Seifert*.

Daniel Meron, *Lori Alvino McGill*, and *Anthony S. Barkow* filed a brief for the Center on the Administration of Criminal Law, New York University School of Law, as *amicus curiae*.

JUSTICE KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See *Strickland* v. *Washington*, 466 U. S. 668, 686 (1984). This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today. See *Lafler* v. *Cooper*, *post*, at 162–175.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years. See Mo. Rev. Stat. §§ 302.321.2, 558.011.1(4) (2011).

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. App. 50. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a

90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. 311 S. W. 3d 350, 360 (Mo. App. 2010). The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired. *Id.*, at 356.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. App. 47–48, 311 S. W. 3d, at 352–353. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. App. 5, 13, 16. The state trial court accepted Frye's guilty plea. *Id.*, at 21. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. *Id.*, at 22. The trial judge sentenced Frye to three years in prison. *Id.*, at 21, 23.

Frye filed for postconviction relief in state court. *Id.*, at 8, 25–29. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer. *Id.*, at 34.

A state court denied the postconviction motion, *id.*, at 52–57, but the Missouri Court of Appeals reversed, 311 S. W. 3d 350. It determined that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland*. First, the court determined Frye's counsel's performance was deficient because the "record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window." 311 S. W. 3d, at 355, 356 (emphasis deleted). The court next concluded Frye had shown his counsel's deficient performance caused him prejudice be-

cause "Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year." *Id.*, at 360.

To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari. 562 U. S. 1128 (2011).

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo* v. *Louisiana*, 556 U. S. 778, 786 (2009) (quoting *United States* v. *Wade*, 388 U. S. 218, 227–228 (1967)). Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. See *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (arraignment); *Massiah* v. *United States*, 377 U. S. 201 (1964) (postindictment interrogation); *Wade*, *supra* (postindictment lineup); *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972) (guilty plea).

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill* v. *Lockhart*, 474 U. S. 52 (1985); and *Padilla* v. *Kentucky*, 559 U. S. 356 (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill*, *supra*, at 57. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill*, *supra*, at 60.

In *Padilla*, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U. S., at 373. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla* v. *Kentucky*, O. T. 2009, No. 08–651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in *Hill* and *Padilla*. In those cases the claim was that the prisoner's plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was

accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.

To give further support to its contention that the instant case is in a category different from what the Court considered in *Hill* and *Padilla*, the State urges that there is no right to a plea offer or a plea bargain in any event. See *Weatherford* v. *Bursey*, 429 U. S. 545, 561 (1977). It claims Frye therefore was not deprived of any legal benefit to which he was entitled. Under this view, any wrongful or mistaken action of counsel with respect to earlier plea offers is beside the point.

The State is correct to point out that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. See, *e. g.*, Fed. Rule Crim. Proc. 11; Mo. Sup. Ct. Rule 24.02 (2004). *Hill* and *Padilla* both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006-Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; *Padilla*, 559 U. S., at 372 (recognizing pleas account for nearly 95 percent of all criminal convictions). The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler*, *post*, at 170, it is insuffi-

cient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. "Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah*, 377 U. S., at 204 (quoting *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)).

B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. "The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents

questions further removed from immediate judicial supervision." *Premo* v. *Moore*, 562 U. S. 115, 125 (2011). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. Cf. *ibid.*

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however. Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney," ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, *e. g.*, *Davie* v. *State*, 381 S. C. 601, 608–609, 675 S. E. 2d 416, 420 (2009); *Cottle* v. *State*, 733 So. 2d 963, 965–966 (Fla. 1999) *(per curiam); Becton* v. *Hun*, 205 W. Va. 139, 144, 516 S. E. 2d 762, 767 (1999); *Harris* v. *State*, 875 S. W. 2d 662, 665 (Tenn. 1994);

Lloyd v. *State*, 258 Ga. 645, 648, 373 S. E. 2d 1, 3 (1988); *United States* v. *Rodriguez Rodriguez*, 929 F. 2d 747, 752 (CA1 1991) *(per curiam); Pham* v. *United States*, 317 F. 3d 178, 182 (CA2 2003); *United States ex rel. Caruso* v. *Zelinsky*, 689 F. 2d 435, 438 (CA3 1982); *Griffin* v. *United States*, 330 F. 3d 733, 737 (CA6 2003); *Johnson* v. *Duckworth*, 793 F. 2d 898, 902 (CA7 1986); *United States* v. *Blaylock*, 20 F. 3d 1458, 1466 (CA9 1994); cf. *Diaz* v. *United States*, 930 F. 2d 832, 834 (CA11 1991). The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. See, *e. g.*, Fla. Rule Regulating Bar 4–1.4 (2008); Ill. Rule Prof. Conduct 1.4 (2011); Kan. Rule Prof. Conduct 1.4 (2010); Ky. Sup. Ct. Rule 3.130, Rule Prof. Conduct 1.4 (2011); Mass. Rule Prof. Conduct 1.4 (2011–2012); Mich. Rule Prof. Conduct 1.4 (2011).

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N. J. Ct. Rule 3:9–1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 20 (discussing hear-

ings in Arizona conducted pursuant to *State* v. *Donald*, 198 Ariz. 406, 10 P. 3d 1193 (App. 2000)); see also N. J. Ct. Rules 3:9–1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz*, 2 Cal. 4th 924, 938, n. 7, 830 P. 2d 747, 756, n. 7 (1992) (encouraging parties to "memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant's response to the plea bargain offer"); Brief for Center on the Administration of Criminal Law, New York University School of Law, as *Amicus Curiae* 25–27.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover* v. *United States*, 531 U. S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U. S., at 59. *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill*, Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, see *Weatherford*, 429 U. S., at 561, nor a federal right that the judge accept it, *Santobello* v. *New York*, 404 U. S.

257, 262 (1971). In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed, see, *e. g.*, 311 S. W. 3d, at 359 (case below); Ariz. Rule Crim. Proc. 17.4(b) (Supp. 2011). The Federal Rules, some state rules including in Missouri, and this Court's precedents give trial courts some leeway to accept or reject plea agreements, see Fed. Rule Crim. Proc. 11(c)(3); see Mo. Sup. Ct. Rule 24.02(d)(4); *Boykin* v. *Alabama*, 395 U. S. 238, 243–244 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of *Strickland*, the Court of Appeals found the "record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so." 311 S. W. 3d, at 356. On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See *supra*, at 139. The Missouri Court of Appeals was correct that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, *supra*, at 688.

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a

defendant in Frye's position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from with-

drawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain. In Missouri, it appears "a plea offer once accepted by the defendant can be withdrawn without recourse" by the prosecution. 311 S. W. 3d, at 359. The extent of the trial court's discretion in Missouri to reject a plea agreement appears to be in some doubt. Compare *id.*, at 360, with Mo. Sup. Ct. Rule 24.02(d)(4).

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye's new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

This is a companion case to *Lafler* v. *Cooper*, *post*, p. 156. The principal difference between the cases is that the fairness of the defendant's conviction in *Lafler* was established by a full trial and jury verdict, whereas Frye's conviction

here was established by his own admission of guilt, received by the court after the usual colloquy that ensured it was voluntary and truthful. In *Lafler* all that could be said (and as I discuss there it was quite enough) is that the *fairness* of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong. Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction. Thus, as far as the reasons for my dissent are concerned, this is an *a fortiori* case. I will not repeat here the constitutional points that I discuss at length in *Lafler*, but I will briefly apply those points to the facts here and comment upon a few statements in the Court's analysis.

* * *

Galin Frye's attorney failed to inform him about a plea offer, and Frye ultimately pleaded guilty without the benefit of a deal. Counsel's mistake did not deprive Frye of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place. So little entitlement that, had he known of and accepted the bargain, the prosecution would have been able to withdraw it right up to the point that his guilty plea pursuant to the bargain was accepted. See 311 S. W. 3d 350, 359, and n. 4 (Mo. App. 2010).

The Court acknowledges, moreover, that Frye's conviction was untainted by attorney error: "[T]he guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel." *Ante*, at 141. Given the "ultimate focus" of our ineffective-assistance cases on "the fundamental fairness of the proceeding whose result is being challenged," *Strickland* v. *Washington*, 466 U. S. 668, 696 (1984), that should be the end of the matter. Instead, here, as in *Lafler*, the Court mechanically applies an outcome-based test for prejudice, and mistakes the possibility of a different result for constitu-

tional injustice. As I explain in *Lafler, post,* p. 175 (dissenting opinion), that approach is contrary to our precedents on the right to effective counsel, and for good reason.

The Court announces its holding that "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution" as though that resolves a disputed point; in reality, however, neither the State nor the Solicitor General argued that counsel's performance here was adequate. *Ante,* at 145. The only issue was whether the inadequacy deprived Frye of his constitutional right to a fair trial. In other cases, however, it will not be so clear that counsel's plea-bargaining skills, which must now meet a constitutional minimum, are adequate. "[H]ow to define the duty and responsibilities of defense counsel in the plea bargain process," the Court acknowledges, "is a difficult question," since "[b]argaining is, by its nature, defined to a substantial degree by personal style." *Ante,* at 144–145. Indeed. What if an attorney's "personal style" is to establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client's *constitutional rights* so that he can secure better deals for other clients in the future; does a hard-bargaining "personal style" now violate the Sixth Amendment? The Court ignores such difficulties, however, since "[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects." *Ante,* at 145. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.

While the inadequacy of counsel's performance in this case is clear enough, whether it was prejudicial (in the sense that the Court's new version of *Strickland* requires) is not. The Court's description of how that question is to be answered

on remand is alone enough to show how unwise it is to constitutionalize the plea-bargaining process. Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis. First of all, of course, we must estimate whether the defendant *would have accepted* the earlier plea bargain. Here that seems an easy question, but as the Court acknowledges, *ante*, at 150, it will not always be. Next, since Missouri, like other States, permits accepted plea offers to be withdrawn by the prosecution (a reality which alone should suffice, one would think, to demonstrate that Frye had no entitlement to the plea bargain), we must estimate whether the prosecution *would have withdrawn* the plea offer. And finally, we must estimate whether the trial court *would have approved* the plea agreement. These last two estimations may seem easy in the present case, since Frye committed a new infraction before the hearing at which the agreement would have been presented; but they assuredly will not be easy in the mine run of cases.

The Court says "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences." *Ante,* at 149. Assuredly it can, just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption. Virtually no cases deal with the standards for a prosecutor's withdrawal from a plea agreement beyond stating the general rule that a prosecutor may withdraw any time prior to, but not after, the entry of a guilty plea or other action constituting detrimental reliance on the defendant's part. See, *e. g.*, *United States* v. *Kuchinski*, 469 F. 3d 853, 857–858 (CA9 2006). And cases addressing trial courts' authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion in this regard. See, *e. g.*, *State* v. *Banks*, 135 S. W. 3d 497, 500 (Mo. App. 2004) (trial court abuses its discretion in rejecting a plea only if the decision "is so arbitrary and unreasonable that

it shocks the sense of justice and indicates a lack of careful consideration" (internal quotation marks omitted)). Of course after today's opinions there will be cases galore, so the Court's *assumption* would better be cast as an optimistic *prediction* of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law. Whatever the "boundaries" ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant's constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, *would have been* exercised.

The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction. "The Constitution . . . is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed." *Padilla* v. *Kentucky*, 559 U. S. 356, 388 (2010) (SCALIA, J., dissenting). In this case and its companion, the Court's sledge may require the reversal of perfectly valid, eminently just, convictions. A legislature could solve the problems presented by these cases in a much more precise and efficient manner. It might begin, for example, by penalizing the attorneys who made such grievous errors. That type of sub-constitutional remedy is not available to the Court, which is limited to penalizing (almost) everyone else by reversing valid convictions or sentences. Because that result is inconsistent with the Sixth Amendment and decades of our precedent, I respectfully dissent.

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LAFLER *v.* COOPER

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

No. 10–209. Argued October 31, 2011—Decided March 21, 2012

Respondent was charged under Michigan law with assault with intent to murder and three other offenses. The prosecution offered to dismiss two of the charges and to recommend a 51-to-85-month sentence on the other two, in exchange for a guilty plea. In a communication with the court, respondent admitted his guilt and expressed a willingness to accept the offer. But he rejected the offer, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder because the victim had been shot below the waist. At trial, respondent was convicted on all counts and received a mandatory minimum 185-to-360-month sentence. In a subsequent hearing, the state trial court rejected respondent's claim that his attorney's advice to reject the plea constituted ineffective assistance. The Michigan Court of Appeals affirmed, rejecting the ineffective-assistance claim on the ground that respondent knowingly and intelligently turned down the plea offer and chose to go to trial. Respondent renewed his claim in federal habeas. Finding that the state appellate court had unreasonably applied the constitutional effective-assistance standards laid out in *Strickland* v. *Washington*, 466 U. S. 668, and *Hill* v. *Lockhart*, 474 U. S. 52, the District Court granted a conditional writ and ordered specific performance of the original plea offer. The Sixth Circuit affirmed. Applying *Strickland*, it found that counsel had provided deficient performance by advising respondent of an incorrect legal rule, and that respondent suffered prejudice because he lost the opportunity to take the more favorable sentence offered in the plea.

Held:

1. Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed. Pp. 162–170.

(a) Because the parties agree that counsel's performance was deficient, the only question is how to apply *Strickland*'s prejudice test

where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. Pp. 162–163.

(b) In that context, the *Strickland* prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The Sixth Circuit and other federal appellate courts have agreed with the *Strickland* prejudice test for rejected pleas adopted here by this Court. Petitioner and the Solicitor General propose a narrow view—that *Strickland* prejudice cannot arise from plea bargaining if the defendant is later convicted at a fair trial—but their reasoning is unpersuasive. First, they claim that the Sixth Amendment's sole purpose is to protect the right to a fair trial, but the Amendment actually requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. This is consistent with the right to effective assistance on appeal, see, *e. g.*, *Halbert* v. *Michigan*, 545 U. S. 605, and the right to counsel during sentencing, see, *e. g.*, *Glover* v. *United States*, 531 U. S. 198, 203–204. This Court has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at trial, but has instead inquired whether the trial cured the particular error at issue. See, *e. g.*, *Vasquez* v. *Hillery*, 474 U. S. 254, 263. Second, this Court has previously rejected petitioner's argument that *Lockhart* v. *Fretwell*, 506 U. S. 364, modified *Strickland* and does so again here. *Fretwell* and *Nix* v. *Whiteside*, 475 U. S. 157, demonstrate that "it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,'" *Williams* v. *Taylor*, 529 U. S. 362, 391–392, where defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, respondent seeks relief from counsel's failure to meet a valid legal standard. Third, petitioner seeks to preserve the conviction by arguing that the Sixth Amendment's purpose is to ensure a conviction's reliability, but this argument fails to comprehend the full scope of the Sixth Amendment and is refuted by precedent. Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel's ineffective assistance. Furthermore, a reliable trial may not foreclose relief when counsel has failed to assert rights that may have altered the outcome. See *Kimmelman* v. *Morrison*, 477 U. S. 365, 379. Petitioner's position that a fair trial wipes clean ineffective assistance during plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. See *Missouri* v. *Frye*, *ante*, at 143–144. Pp. 163–170.

2. Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy

must "neutralize the taint" of a constitutional violation, *United States* v. *Morrison*, 449 U. S. 361, 365, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution, see *United States* v. *Mechanik*, 475 U. S. 66, 72. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the court should have an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, *e. g.*, where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge's sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. In either situation, a court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Petitioner argues that implementing a remedy will open the floodgates to litigation by defendants seeking to unsettle their convictions, but in the 30 years that courts have recognized such claims, there has been no indication that the system is overwhelmed or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. In addition, the prosecution and trial courts may adopt measures to help ensure against meritless claims. See *Frye*, *ante*, at 146. Pp. 170–172.

3. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but because the Michigan Court of Appeals' analysis of respondent's ineffective-assistance-of-counsel claim was contrary to clearly established federal law, AEDPA presents no bar to relief. Respondent has satisfied *Strickland*'s two-part test. The parties concede the fact of deficient performance. And respondent has shown that but for that performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, he received a minimum sentence 3½ times greater than he would have received under the plea. As a remedy, the District Court ordered specific performance of the plea agreement, but the correct remedy is to order the

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State to reoffer the plea. If respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate respondent's convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed. Pp. 172–175.

376 Fed. Appx. 563, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to all but Part IV, *post*, p. 175. ALITO, J., filed a dissenting opinion, *post*, p. 187.

John J. Bursch, Solicitor General of Michigan, argued the cause for petitioner. With him on the briefs were *Bill Schuette*, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Joel D. McGormley*.

William M. Jay argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were former *Acting Solicitor General Katyal*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz*.

Valerie R. Newman, by appointment of the Court, 562 U. S. 1285, argued the cause for respondent. With her on the brief were *Jacqueline J. McCann*, *Jeffrey T. Green*, and *Sarah O'Rourke Schrup*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *Kevin T. Kane*, Chief State's Attorney of Connecticut, *Michael E. O'Hare*, Supervisory Assistant State's Attorney, and *Michael J. Proto*, Assistant State's Attorney, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Paula T. Dow* of New Jersey, *Gary K. King* of New Mexico, *E. Scott Pruitt* of Oklahoma, *William H. Ryan, Jr.*, of Pennsylvania, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas,

JUSTICE KENNEDY delivered the opinion of the Court.

In this case, as in *Missouri* v. *Frye*, *ante*, p. 134, also decided today, a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In *Frye*, there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.

I

On the evening of March 25, 2003, respondent pointed a gun toward Kali Mundy's head and fired. From the record, it is unclear why respondent did this, and at trial it was sug-

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Mark L. Shurtleff of Utah, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman;* and for the Criminal Justice Legal Foundation et al. by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Stephen N. Zack*, *Margaret Colgate Love*, *Peter Goldberger*, and *Jill Wheaton;* for the Constitution Project by *John F. Cooney* and *Virginia Sloan;* and for the National Association of Criminal Defense Lawyers et al. by *Jonathan D. Hacker*, *Loren L. Alikhan*, *Norman L. Reimer*, *Malia Brink*, *Steven R. Shapiro*, and *Conrad O. Seifert.*

Daniel Meron, *Lori Alvino McGill*, and *Anthony S. Barkow* filed a brief for the Center on the Administration of Criminal Law, New York University School of Law, as *amicus curiae.*

gested that he might have acted either in self-defense or in defense of another person. In any event the shot missed and Mundy fled. Respondent followed in pursuit, firing repeatedly. Mundy was shot in her buttock, hip, and abdomen but survived the assault.

Respondent was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. On two occasions, the prosecution offered to dismiss some of the charges and to recommend a sentence of 51 to 85 months for the remaining charges, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months' imprisonment.

In a so-called *Ginther* hearing before the state trial court, see *People* v. *Ginther*, 390 Mich. 436, 212 N. W. 2d 922 (1973), respondent argued his attorney's advice to reject the plea constituted ineffective assistance. The trial judge rejected the claim, and the Michigan Court of Appeals affirmed. *People* v. *Cooper*, No. 250583 (Mar. 15, 2005) *(per curiam)*, App. to Pet. for Cert. 44a, 2005 WL 599740. The Michigan Court of Appeals rejected the claim of ineffective assistance of counsel on the ground that respondent knowingly and intelligently rejected two plea offers and chose to go to trial. The Michigan Supreme Court denied respondent's application for leave to file an appeal. *People* v. *Cooper*, 474 Mich. 905, 705 N. W. 2d 118 (2005) (table).

Respondent then filed a petition for federal habeas relief under 28 U. S. C. § 2254, renewing his ineffective-assistance-of-counsel claim. After finding, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland* v. *Washington*, 466 U. S. 668 (1984), and *Hill* v. *Lockhart*, 474 U. S. 52 (1985), the District Court granted a conditional writ. No. 06–11068 (ED Mich., Mar. 26, 2009), App. to Pet. for Cert. 41a–42a, 2009 WL 817712, *10. To remedy the violation, the District Court ordered "specific performance of [respondent's] original plea agreement, for a minimum sentence in the range of fifty-one to eighty-five months." *Id.*, at *9, App. to Pet. for Cert. 41a.

The United States Court of Appeals for the Sixth Circuit affirmed, 376 Fed. Appx. 563 (2010), finding "[e]ven full deference under AEDPA cannot salvage the state court's decision," *id.*, at 569. Applying *Strickland*, the Court of Appeals found that respondent's attorney had provided deficient performance by informing respondent of "an incorrect legal rule," 376 Fed. Appx., at 570–571, and that respondent suffered prejudice because he "lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him," *id.*, at 573. This Court granted certiorari. 562 U. S. 1127 (2011).

II

A

Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. *Frye*, *ante*, at 144; see also *Padilla* v. *Kentucky*, 559 U. S. 356, 364 (2010); *Hill*, *supra*, at 57. During plea negotiations defendants are "entitled to the effective assistance of competent counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771 (1970). In *Hill*, the Court held "the two-part *Strickland* v. *Washing-*

ton test applies to challenges to guilty pleas based on ineffective assistance of counsel." 474 U. S., at 58. The performance prong of *Strickland* requires a defendant to show " 'that counsel's representation fell below an objective standard of reasonableness.' " 474 U. S., at 57 (quoting *Strickland*, 466 U. S., at 688). In this case all parties agree the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

The question for this Court is how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

B

To establish *Strickland* prejudice a defendant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See *Frye*, *ante*, at 148 (noting that *Strickland*'s inquiry, as applied to advice with respect to plea bargains, turns on "whether 'the result of the proceeding would have been different' " (quoting *Strickland*, *supra*, at 694)); see also *Hill*, 474 U. S., at 59 ("The . . . 'prejudice . . . ' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). In *Hill*, when evaluating the petitioner's claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show "that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Ibid.*

In contrast to *Hill*, here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand

trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i. e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See 376 Fed. Appx., at 571–573; see also, *e. g.*, *United States* v. *Rodriguez Rodriguez*, 929 F. 2d 747, 753, n. 1 (CA1 1991) *(per curiam); United States* v. *Gordon*, 156 F. 3d 376, 380–381 (CA2 1998) *(per curiam); United States* v. *Day*, 969 F. 2d 39, 43–45 (CA3 1992); *Beckham* v. *Wainwright*, 639 F. 2d 262, 267 (CA5 1981); *Julian* v. *Bartley*, 495 F. 3d 487, 498–500 (CA7 2007); *Wanatee* v. *Ault*, 259 F. 3d 700, 703–704 (CA8 2001); *Nunes* v. *Mueller*, 350 F. 3d 1045, 1052–1053 (CA9 2003); *Williams* v. *Jones*, 571 F. 3d 1086, 1094–1095 (CA10 2009) *(per curiam); United States* v. *Gaviria*, 116 F. 3d 1498, 1512–1514 (CADC 1997) *(per curiam)*.

Petitioner and the Solicitor General propose a different, far more narrow, view of the Sixth Amendment. They contend there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The three reasons petitioner and the Solicitor General offer for their approach are unpersuasive.

First, petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fair-

ness of the trial itself. See Brief for Petitioner 12–21; Brief for United States as *Amicus Curiae* 10–12. The Sixth Amendment, however, is not so narrow in its reach. Cf. *Frye*, *ante*, at 148 (holding that a defendant can show prejudice under *Strickland* even absent a showing that the deficient performance precluded him from going to trial). The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though "counsel's absence [in these stages] may derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U. S. 218, 226 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, *e. g.*, *Halbert* v. *Michigan*, 545 U. S. 605 (2005); *Evitts* v. *Lucey*, 469 U. S. 387 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see *Glover* v. *United States*, 531 U. S. 198, 203–204 (2001); *Mempa* v. *Rhay*, 389 U. S. 128 (1967), and capital cases, see *Wiggins* v. *Smith*, 539 U. S. 510, 538 (2003). Even though sentencing does not concern the defendant's guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in *Strickland* prejudice because "any amount of [additional] jail time has Sixth Amendment significance." *Glover*, *supra*, at 203.

The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. Thus, in *Vasquez* v. *Hillery*, 474 U. S. 254 (1986), the deliberate exclusion of all African-Americans from a grand jury was prejudicial because a de-

fendant may have been tried on charges that would not have been brought at all by a properly constituted grand jury. *Id.*, at 263; see *Ballard* v. *United States*, 329 U. S. 187, 195 (1946) (dismissing an indictment returned by a grand jury from which women were excluded); see also *Stirone* v. *United States*, 361 U. S. 212, 218–219 (1960) (reversing a defendant's conviction because the jury may have based its verdict on acts not charged in the indictment). By contrast, in *United States* v. *Mechanik*, 475 U. S. 66 (1986), the complained-of error was a violation of a grand jury rule meant to ensure probable cause existed to believe a defendant was guilty. A subsequent trial, resulting in a verdict of guilt, cured this error. See *id.*, at 72–73.

In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Second, petitioner claims this Court refined *Strickland*'s prejudice analysis in *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), to add an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or procedural right. Brief for Petitioner 12–13. The Court has rejected the argument that *Fretwell* modified *Strickland* before and does so again now. See *Williams* v. *Taylor*, 529 U. S. 362, 391 (2000) ("The Virginia Supreme Court erred in holding that our decision in *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), modified or in some way supplanted the rule set down in *Strickland*"); see also *Glover*, *supra*, at 203 ("The Court explained last Term

[in *Williams*] that our holding in *Lockhart* does not supplant the *Strickland* analysis").

Fretwell could not show *Strickland* prejudice resulting from his attorney's failure to object to the use of a sentencing factor the Eighth Circuit had erroneously (and temporarily) found to be impermissible. *Fretwell*, 506 U. S., at 373. Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, Fretwell could not demonstrate an error entitling him to relief. The case presented the "unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry." *Ibid.* (O'Connor, J., concurring). See also *ibid.* (recognizing "[t]he determinative question—whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different—remains unchanged" (internal quotation marks and citation omitted)). It is for this same reason a defendant cannot show prejudice based on counsel's refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. See *Nix* v. *Whiteside*, 475 U. S. 157, 175 (1986) (holding first that counsel's refusal to present perjured testimony breached no professional duty and second that it cannot establish prejudice under *Strickland*).

Both *Fretwell* and *Nix* are instructive in that they demonstrate "there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice,'" *Williams*, *supra*, at 391–392, because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, the injured client seeks relief from counsel's failure to meet a valid legal standard, not from counsel's refusal to violate it. He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The fa-

vorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. See Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 Cal. L. Rev. 1117, 1138 (2011) ("The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain"); see also *Frye*, *ante*, at 143–144. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

It is, of course, true that defendants have "no right to be offered a plea . . . nor a federal right that the judge accept it." *Frye*, *ante*, at 148. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See *Evitts*, 469 U. S. 387; see also *Douglas* v. *California*, 372 U. S. 353 (1963). As in those cases, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution." *Evitts*, *supra*, at 401.

Third, petitioner seeks to preserve the conviction obtained by the State by arguing that the purpose of the Sixth Amendment is to ensure "the reliability of [a] conviction following trial." Brief for Petitioner 13. This argument, too, fails to comprehend the full scope of the Sixth Amendment's protections; and it is refuted by precedent. *Strickland* rec-

ognized "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U. S., at 686. The goal of a just result is not divorced from the reliability of a conviction, see *United States* v. *Cronic*, 466 U. S. 648, 658 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance.

There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), the Court held that an attorney's failure to timely move to suppress evidence during trial could be grounds for federal habeas relief. The Court rejected the suggestion that the "failure to make a timely request for the exclusion of illegally seized evidence" could not be the basis for a Sixth Amendment violation because the evidence "is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.' " *Id.*, at 379 (quoting *Stone* v. *Powell*, 428 U. S. 465, 490 (1976)). "The constitutional rights of criminal defendants," the Court observed, "are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." 477 U. S., at 380. The same logic applies here. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining.

In the end, petitioner's three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That

position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See *Frye*, *ante*, at 143–144. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Ibid.* ("[I]t is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

C

Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must now be addressed.

Sixth Amendment remedies should be "tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U. S. 361, 364 (1981). Thus, a remedy must "neutralize the taint" of a constitutional violation, *id.*, at 365, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution, see *Mechanik*, 475 U. S., at 72 ("The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences").

The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a

lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, *e. g.*, *Williams*, 571 F. 3d, at 1088; *Riggs* v. *Fairman*, 399 F. 3d 1179, 1181 (CA9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge's discretion. At this point, however, it suffices to note two considerations that are of relevance.

First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here

to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. See Brief for Petitioner 20. Petitioner's concern is misplaced. Courts have recognized claims of this sort for over 30 years, see *supra*, at 164, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed *Strickland* claims. See also *Padilla*, 559 U. S., at 371 ("We confronted a similar 'floodgates' concern in *Hill*," but a "flood did not follow in that decision's wake"). In addition, the "prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction." *Frye*, *ante,* at 146. See also *ante,* at 146–147 (listing procedures currently used by various States). This, too, will help ensure against meritless claims.

III

The standards for ineffective assistance of counsel when a defendant rejects a plea offer and goes to trial must now be applied to this case. Respondent brings a federal collateral challenge to a state-court conviction. Under AEDPA, a federal court may not grant a petition for a writ of habeas corpus unless the state court's adjudication on the merits was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Su-

preme Court of the United States." 28 U. S. C. § 2254(d)(1). A decision is contrary to clearly established law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams* v. *Taylor*, 529 U. S., at 405 (opinion for the Court by O'Connor, J.). The Court of Appeals for the Sixth Circuit could not determine whether the Michigan Court of Appeals addressed respondent's ineffective-assistance-of-counsel claim or, if it did, "what the court decided, or even whether the correct legal rule was identified." 376 Fed. Appx., at 568–569.

The state court's decision may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought, yet the federal court was correct to note that AEDPA does not present a bar to granting respondent relief. That is because the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland*, the state court simply found that respondent's rejection of the plea was knowing and voluntary. 2005 WL 599740, *1, App. to Pet. for Cert. 45a. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. See *Hill*, 474 U. S., at 57 (applying *Strickland* to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process). After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel's performance at trial and mischaracterized respondent's claim as a complaint that his attorney did not obtain a more favorable plea bargain. By failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief. See *Panetti* v. *Quarterman*, 551 U. S. 930, 948 (2007).

Respondent has satisfied *Strickland*'s two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent's counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

As to prejudice, respondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea. See 376 Fed. Appx., at 571–572. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under *Strickland* has thus been satisfied.

As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) ("If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement"). Today's decision

leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to all but Part IV, dissenting.

> "*If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.*" *Ante*, at 168.
>
> "*The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. . . . Bargaining is, by its nature, defined to a substantial degree by personal style. . . . This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects . . . .*" *Missouri* v. *Frye*, *ante*, at 144–145.

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice. See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief. Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave

other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that "constitutional" rules governing *counsel's* behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process that the Court today announces "'*is* the criminal justice system,'" *Frye*, *ante*, at 144 (quoting approvingly from Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992) (hereinafter Scott)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from "the criminal justice system"?

Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney's allegedly incompetent advice regarding a plea offer *caused* him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals' decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard of and quite absurd for violation of a constitutional right. I respectfully dissent.

I

This case and its companion, *Missouri* v. *Frye*, *ante*, p. 134, raise relatively straightforward questions about the scope of the right to effective assistance of counsel. Our case law

originally derived that right from the Due Process Clause, and its guarantee of a fair trial, see *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 147 (2006), but the seminal case of *Strickland* v. *Washington*, 466 U. S. 668 (1984), located the right within the Sixth Amendment. As the Court notes, *ante*, at 164–165, the right to counsel does not begin at trial. It extends to "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States* v. *Wade*, 388 U. S. 218, 226 (1967). Applying that principle, we held that the "entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres." *Iowa* v. *Tovar*, 541 U. S. 77, 81 (2004); see also *Hill* v. *Lockhart*, 474 U. S. 52, 58 (1985). And it follows from this that *acceptance* of a plea offer is a critical stage. That, and nothing more, is the point of the Court's observation in *Padilla* v. *Kentucky*, 559 U. S. 356, 373 (2010), that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." The defendant in *Padilla* had accepted the plea bargain and pleaded guilty, abandoning his right to a fair trial; he was entitled to advice of competent counsel before he did so. The Court has never held that the rule articulated in *Padilla*, *Tovar*, and *Hill* extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

It is also apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland* explained that "[i]n

giving meaning to the requirement [of effective assistance], . . . we must take its purpose—to ensure a fair trial—as the guide." 466 U. S., at 686. Since "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial," *United States* v. *Cronic*, 466 U. S. 648, 658 (1984), the "benchmark" inquiry in evaluating any claim of ineffective assistance is whether counsel's performance "so undermined the proper functioning of the adversarial process" that it failed to produce a reliably "just result." *Strickland*, 466 U. S., at 686. That is what *Strickland*'s requirement of "prejudice" consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence. That has been, until today, entirely clear. A defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*, at 687. See also *Gonzalez-Lopez*, *supra*, at 147. Impairment of fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance.[1]

[1] Rather than addressing the constitutional origins of the *right to effective counsel*, the Court responds to the broader claim (raised by no one) that "the sole purpose of the *Sixth Amendment* is to protect the right to a fair trial." *Ante*, at 164 (emphasis added). Cf. Brief for United States as *Amicus Curiae* 10–12 (arguing that the "purpose of the Sixth Amendment *right to counsel* is to secure a fair trial" (emphasis added)); Brief for Petitioner 12–21 (same). To destroy that straw man, the Court cites cases in which violations of rights *other* than the right to effective counsel—and, perplexingly, even rights found outside the Sixth Amendment and the Constitution entirely—were not cured by a subsequent trial. *Vasquez* v. *Hillery*, 474 U. S. 254 (1986) (violation of equal protection in grand jury selection); *Ballard* v. *United States*, 329 U. S. 187 (1946) (violation of statutory scheme providing that women serve on juries); *Stirone* v. *United States*, 361 U. S. 212 (1960) (violation of Fifth Amendment right to indictment by grand jury). Unlike the right to effective counsel, no showing of prejudice is required to make violations of the rights at issue in *Vasquez*,

To be sure, *Strickland* stated a rule of thumb for measuring prejudice which, applied blindly and out of context, could support the Court's holding today: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U. S., at 694. *Strickland* itself cautioned, however, that its test was not to be applied in a mechanical fashion, and that courts were not to divert their "ultimate focus" from "the fundamental fairness of the proceeding whose result is being challenged." *Id.*, at 696. And until today we have followed that course.

In *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993), the deficient performance at issue was the failure of counsel for a defendant who had been sentenced to death to make an objection that would have produced a sentence of life imprisonment instead. The objection was fully supported by then-extant Circuit law, so that the sentencing court would have been compelled to sustain it, producing a life sentence that principles of double jeopardy would likely make final. See *id.*, at 383–385 (Stevens, J., dissenting); *Bullington* v. *Missouri*, 451 U. S. 430 (1981). By the time Fretwell's claim came before us, however, the Circuit law had been overruled in light of one of our cases. We determined that a prejudice analysis "focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable," would be defective. *Fretwell*, 506 U. S., at 369. Because counsel's error did not

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Ballard, and *Stirone* complete. See *Vasquez*, *supra*, at 263–264 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review"); *Ballard*, *supra*, at 195 ("[R]eversible error does not depend on a showing of prejudice in an individual case"); *Stirone*, *supra*, at 217 ("Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error"). Those cases are thus irrelevant to the question presented here, which is whether a defendant can establish *prejudice* under *Strickland* v. *Washington*, 466 U. S. 668 (1984), while conceding the fairness of his conviction, sentence, and appeal.

"deprive the defendant of any substantive or procedural right to which the law entitles him," the defendant's sentencing proceeding was fair and its result was reliable, even though counsel's error may have affected its outcome. *Id.*, at 372. In *Williams* v. *Taylor*, 529 U. S. 362, 391–393 (2000), we explained that even though *Fretwell* did not mechanically apply an outcome-based test for prejudice, its reasoning was perfectly consistent with *Strickland.* "Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him." 529 U. S., at 392.[2]

Those precedents leave no doubt about the answer to the question presented here. As the Court itself observes, a criminal defendant has no right to a plea bargain. *Ante*, at 168. "[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial." *Weatherford* v. *Bursey*, 429 U. S. 545, 561 (1977). Counsel's mistakes in this case thus did not "deprive the defendant of

[2] *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986), cited by the Court, *ante*, at 169, does not contradict this principle. That case, which predated *Fretwell* and *Williams*, considered whether our holding that Fourth Amendment claims fully litigated in state court cannot be raised in federal habeas "should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment." 477 U. S., at 368. Our negative answer to that question had nothing to do with the issue here. The parties in *Kimmelman* had not raised the question "whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice' under *Strickland*"—a question similar to the one presented here—and the Court therefore did not address it. *Id.*, at 391 (Powell, J., concurring in judgment); see also *id.*, at 380. *Kimmelman* made clear, however, how the answer to that question is to be determined: "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution *that the trial was rendered unfair and the verdict rendered suspect*," *id.*, at 374 (emphasis added). "Only those habeas petitioners who can prove under *Strickland that they have been denied a fair trial* . . . will be granted the writ," *id.*, at 382 (emphasis added). In short, *Kimmelman*'s only relevance is to prove the Court's opinion wrong.

a substantive or procedural right to which the law entitles him," *Williams*, *supra*, at 393. Far from being "beside the point," *ante*, at 168, that is critical to correct application of our precedents. Like *Fretwell*, this case "concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry," 506 U. S., at 373 (O'Connor, J., concurring); he claims "that he might have been denied 'a right the law simply does not recognize,' " *id.*, at 375 (same). *Strickland*, *Fretwell*, and *Williams* all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. In ignoring *Strickland*'s "ultimate focus . . . on the fundamental fairness of the proceeding whose result is being challenged," 466 U. S., at 696, the Court has lost the forest for the trees, leading it to accept what we have previously rejected, the "novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty," *Weatherford*, *supra*, at 561.

II

Novelty alone is the second, independent reason why the Court's decision is wrong. This case arises on federal habeas, and hence is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Since, as the Court acknowledges, the Michigan Court of Appeals adjudicated Cooper's ineffective-assistance claim on the merits, AEDPA bars federal courts from granting habeas relief unless that court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). Yet the Court concludes that § 2254(d)(1) does not bar relief here, because "[b]y failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." *Ante*, at 173. That is not so.

The relevant portion of the Michigan Court of Appeals decision reads as follows:

> "To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.
>
> "Defendant challenges the trial court's finding after a *Ginther* hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these failures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant's contentions that defense counsel's representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant." *People* v. *Cooper*, No. 250583 (Mar. 15, 2005), App. to Pet. for Cert. 45a, 2005 WL 599740, *1 *(per curiam)* (footnote and citations omitted).

The first paragraph above, far from ignoring *Strickland*, recites its standard with a good deal more accuracy than the Court's opinion. The second paragraph, which is presumably an application of the standard recited in the first, says that "defendant knowingly and intelligently rejected two plea offers and chose to go to trial." This can be regarded

as a denial that there was anything "fundamentally unfair" about Cooper's conviction and sentence, so that no *Strickland* prejudice had been shown. On the other hand, the entire second paragraph can be regarded as a contention that Cooper's claims of inadequate representation were unsupported by the record. The state court's analysis was admittedly not a model of clarity, but federal habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a license to penalize a state court for its opinion-writing technique. *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011) (internal quotation marks omitted). The Court's readiness to find error in the Michigan court's opinion is "inconsistent with the presumption that state courts know and follow the law," *Woodford* v. *Visciotti*, 537 U. S. 19, 24 (2002) *(per curiam)*, a presumption borne out here by the state court's recitation of the correct legal standard.

Since it is ambiguous whether the state court's holding was based on a lack of prejudice or rather the court's factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that *both* holdings would have been unreasonable applications of clearly established law. See *Premo* v. *Moore*, 562 U. S. 115, 121 (2011). The first is impossible of doing, since this Court has never held that a defendant in Cooper's position can establish *Strickland* prejudice. The Sixth Circuit thus violated AEDPA in granting habeas relief, and the Court now does the same.

III

It is impossible to conclude discussion of today's extraordinary opinion without commenting upon the remedy it provides for the unconstitutional conviction. It is a remedy unheard of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country.

The Court requires Michigan to "reoffer the plea agreement" that was rejected because of bad advice from counsel. *Ante*, at 174. That would indeed be a powerful remedy—

but for the fact that Cooper's acceptance of that reoffered agreement is not conclusive. Astoundingly, "the state trial court can then *exercise its discretion* in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, *or to leave the convictions and sentence from trial undisturbed.*" *Ibid.* (emphasis added).

Why, one might ask, require a "reoffer" of the plea agreement, and its acceptance by the defendant? If the District Court finds (as a necessary element, supposedly, of *Strickland* prejudice) that Cooper *would have accepted* the original offer, and would thereby have avoided trial and conviction, why not skip the reoffer-and-reacceptance minuet and simply leave it to the discretion of the state trial court what the remedy shall be? The answer, of course, is camouflage. Trial courts, after all, *regularly* accept or reject plea agreements, so there seems to be nothing extraordinary about their accepting or rejecting the new one mandated by today's decision. But the acceptance or rejection of a plea agreement that has no status whatever under the United States Constitution is worlds apart from what this is: "discretionary" specification of a remedy for an unconstitutional criminal conviction.

To be sure, the Court asserts that there are "factors" which bear upon (and presumably limit) exercise of this discretion—factors that it is not prepared to specify in full, much less assign some determinative weight. "Principles elaborated over time in decisions of state and federal courts, and in statutes and rules" will (in the Court's rosy view) sort all that out. *Ante,* at 171. I find it extraordinary that "statutes and rules" can specify the remedy for a criminal defendant's unconstitutional conviction. Or that the remedy for an unconstitutional conviction should *ever* be subject *at all* to a trial judge's discretion. Or, finally, that the remedy could *ever* include no remedy at all.

I suspect that the Court's squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway. The defendant has been fairly tried, lawfully convicted, and properly sentenced, and *any* "remedy" provided for this will do nothing but undo the just results of a fair adversarial process.

IV

In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less for the purpose of sparing the expense of trial. See, *e. g.*, World Plea Bargaining 344, 363–366 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the "legality principle" by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge bargaining. See, *e. g.*, *id.*, at xxii; Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 210–211 (1979) (describing the "Legalitätsprinzip," or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided.

In the United States, we have plea bargaining aplenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, *e. g.*,

Alschuler, Plea Bargaining and Its History, 79 Colum. L. Rev. 1, 38 (1979).

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, "'it *is* the criminal justice system.'" *Frye*, *ante*, at 144 (quoting approvingly from Scott 1912). Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States[3]) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his *constitutional entitlement* to plea bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

* * *

Today's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ("plea-bargaining law") without even

[3] See *People* v. *Cooks*, 446 Mich. 503, 510, 521 N. W. 2d 275, 278 (1994); 6 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 22.1(e) (3d ed. 2007 and Supp. 2011–2012).

specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked *exactly* as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan's elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today's opinion affords constitutional status. I respectfully dissent.

JUSTICE ALITO, dissenting.

For the reasons set out in Parts I and II of JUSTICE SCALIA's dissent, the Court's holding in this case misapplies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

The weakness in the Court's analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation. If a defendant's Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be lost, the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances, as I believe the Court tacitly recognizes. The Court therefore eschews the only logical remedy and relies on the lower courts to exercise sound discretion in determining what is to be done.

Time will tell how this works out. The Court, for its part, finds it unnecessary to define "the boundaries of proper discretion" in today's opinion. *Ante*, at 171. In my view, re-

quiring the prosecution to renew an old plea offer would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant's culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.

The lower court judges who must implement today's holding may—and I hope, will—do so in a way that mitigates its potential to produce unjust results. But I would not depend on these judges to come to the rescue. The Court's interpretation of the Sixth Amendment right to counsel is unsound, and I therefore respectfully dissent.

Syllabus

ZIVOTOFSKY, BY HIS PARENTS AND GUARDIANS, ZIVOTOFSKY ET UX. *v.* CLINTON, SECRETARY OF STATE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10–699. Argued November 7, 2011—Decided March 26, 2012

Petitioner Menachem Binyamin Zivotofsky was born in Jerusalem. His mother requested that Zivotofsky's place of birth be listed as "Israel" on a consular report of birth abroad and on his passport, pursuant to § 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003. That provision states: "For purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." U. S. officials refused the request, citing a State Department policy that prohibits recording "Israel" as the place of birth for those born in Jerusalem. Zivotofsky's parents filed a suit on his behalf against the Secretary of State. The District Court dismissed the case, holding that it presented a nonjusticiable political question regarding Jerusalem's political status. The D. C. Circuit affirmed, reasoning that the Constitution gives the Executive the exclusive power to recognize foreign sovereigns, and that the exercise of that power cannot be reviewed by the courts.

Held: The political question doctrine does not bar judicial review of Zivotofsky's claim. Pp. 194–202.

(a) This Court has said that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon* v. *United States*, 506 U. S. 224, 228. The lower courts ruled that this case presents such a political question because they misunderstood the issue, assuming resolution of Zivotofsky's claim would require the Judiciary to define U. S. policy regarding the status of Jerusalem. In fact, this case asks the courts to determine only whether Zivotofsky can vindicate his statutory right under § 214(d) to choose to have Israel recorded as his place of birth on his passport. Making such determinations is a familiar judicial exercise. Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional. There is no "textually demonstrable constitutional commitment" of that question to another

Syllabus

branch: At least since *Marbury* v. *Madison*, 1 Cranch 137, this Court has recognized that it is "emphatically the province and duty" of the Judiciary to determine the constitutionality of a statute. Nor is there "a lack of judicially discoverable and manageable standards for resolving" the question: Both parties offer detailed legal arguments concerning whether the textual, structural, and historical evidence supports a determination that § 214(d) is constitutional. Pp. 194–201.

(b) Because the lower courts erroneously concluded that the case presents a political question, they did not reach the merits of Zivotofsky's claim. This Court is "a court of final review and not first view," *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 110, and ordinarily "do[es] not decide in the first instance issues not decided below," *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470. The merits of this case are therefore left to the lower courts to consider in the first instance. Pp. 201–202.

571 F. 3d 1227, vacated and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, GINSBURG, and KAGAN, JJ., joined. SOTOMAYOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined as to Part I, *post*, p. 202. ALITO, J., filed an opinion concurring in the judgment, *post*, p. 210. BREYER, J., filed a dissenting opinion, *post*, p. 212.

Nathan Lewin argued the cause for petitioner. With him on the briefs was *Alyza D. Lewin.*

Solicitor General Verrilli argued the cause for respondent. With him on the brief were *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Ginger D. Anders*, *Douglas N. Letter*, *Lewis S. Yelin*, and *Harold Hongju Koh.**

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*Briefs of *amici curiae* urging reversal were filed for the American Association of Jewish Lawyers and Jurists by *Stephen R. Greenwald*, *Robert Garson*, and *Thomas Ségal;* for the Anti-Defamation League et al. by *Michael S. Gardener*, *Jeffrey S. Robbins*, *Steven M. Freeman*, and *Steven C. Sheinberg;* for the Lawfare Project by *Michael W. Schwartz;* and for Members of the United States Senate et al. by *Randy M. Mastro* and *Paul Kujawsky.*

Margaret Krawiec and *Patrick H. Haggerty* filed a brief for Americans for Peace Now as *amicus curiae* urging affirmance.

David I. Schoen and *Susan B. Tuchman* filed a brief for the Zionist Organization of America as *amicus curiae.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Congress enacted a statute providing that Americans born in Jerusalem may elect to have "Israel" listed as the place of birth on their passports. The State Department declined to follow that law, citing its longstanding policy of not taking a position on the political status of Jerusalem. When sued by an American who invoked the statute, the Secretary of State argued that the courts lacked authority to decide the case because it presented a political question. The Court of Appeals so held.

We disagree. The courts are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution.

I

A

In 2002, Congress enacted the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1350. Section 214 of the Act is entitled "United States Policy with Respect to Jerusalem as the Capital of Israel." *Id.*, at 1365. The first two subsections express Congress's "commitment" to relocating the United States Embassy in Israel to Jerusalem. *Id.*, at 1365–1366. The third bars funding for the publication of official Government documents that do not list Jerusalem as the capital of Israel. *Id.*, at 1366. The fourth and final provision, § 214(d), is the only one at stake in this case. Entitled "Record of Place of Birth as Israel for Passport Purposes," it provides that "[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel." *Ibid.*

The State Department's Foreign Affairs Manual states that "[w]here the birthplace of the applicant is located in ter-

ritory disputed by another country, the city or area of birth may be written in the passport." 7 Foreign Affairs Manual § 1383.5–2, App. 108. The manual specifically directs that passport officials should enter "JERUSALEM" and should "not write Israel or Jordan" when recording the birthplace of a person born in Jerusalem on a passport. *Id.*, § 1383, Exh. 1383.1, App. 127; see also *id.*, §§ 1383.1, 1383.5–4, .5–5, .5–6, App. 106, 108–110.

Section 214(d) sought to override this instruction by allowing citizens born in Jerusalem to have "Israel" recorded on their passports if they wish. In signing the Foreign Relations Authorization Act into law, President George W. Bush stated his belief that § 214 "impermissibly interferes with the President's constitutional authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch." Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003, Public Papers of the Presidents, George W. Bush, Vol. 2, Sept. 30, 2002, p. 1698 (2005). He added that if the section is "construed as mandatory," then it would "interfere with the President's constitutional authority to formulate the position of the United States, speak for the Nation in international affairs, and determine the terms on which recognition is given to foreign states." *Ibid.* He concluded by emphasizing that "U. S. policy regarding Jerusalem has not changed." *Ibid.* The President made no specific reference to the passport mandate in § 214(d).

B

Petitioner Menachem Binyamin Zivotofsky was born in Jerusalem on October 17, 2002, shortly after § 214(d) was enacted. Zivotofsky's parents were American citizens and he accordingly was as well, by virtue of congressional enactment. 8 U. S. C. § 1401(c); see *Rogers* v. *Bellei*, 401 U. S. 815, 835 (1971) (foreign-born children of American citizens acquire citizenship at birth through "congressional generosity"). Zivotofsky's mother filed an application for a con-

sular report of birth abroad and a United States passport. She requested that his place of birth be listed as "Jerusalem, Israel," on both documents. U. S. officials informed Zivotofsky's mother that State Department policy prohibits recording "Israel" as Zivotofsky's place of birth. Pursuant to that policy, Zivotofsky was issued a passport and consular report of birth abroad listing only "Jerusalem." App. 19–20.

Zivotofsky's parents filed a complaint on his behalf against the Secretary of State. Zivotofsky sought a declaratory judgment and a permanent injunction ordering the Secretary to identify his place of birth as "Jerusalem, Israel," in the official documents. *Id.*, at 17–18. The District Court granted the Secretary's motion to dismiss the complaint on the grounds that Zivotofsky lacked standing and that his complaint presented a nonjusticiable political question.

The Court of Appeals for the D. C. Circuit reversed, concluding that Zivotofsky did have standing. It then observed that while Zivotofsky had originally asked that "Jerusalem, Israel," be recorded on his passport, "[b]oth sides agree that the question now is whether §214(d) entitles [him] to have just 'Israel' listed as his place of birth." 444 F. 3d 614, 619 (2006). The D. C. Circuit determined that additional factual development might be helpful in deciding whether this question was justiciable, as the parties disagreed about the foreign policy implications of listing "Israel" alone as a birthplace on the passport. *Id.*, at 619–620. It therefore remanded the case to the District Court.

The District Court again found that the case was not justiciable. It explained that "[r]esolving [Zivotofsky's] claim on the merits would necessarily require the Court to decide the political status of Jerusalem." 511 F. Supp. 2d 97, 103 (2007). Concluding that the claim therefore presented a political question, the District Court dismissed the case for lack of subject matter jurisdiction.

The D. C. Circuit affirmed. It reasoned that the Constitution gives the Executive the exclusive power to recog-

nize foreign sovereigns, and that the exercise of this power cannot be reviewed by the courts. Therefore, "deciding whether the Secretary of State must mark a passport . . . as Zivotofsky requests would necessarily draw [the court] into an area of decisionmaking the Constitution leaves to the Executive alone." 571 F. 3d 1227, 1232–1233 (2009). The D. C. Circuit held that the political question doctrine prohibits such an intrusion by the courts, and rejected any suggestion that Congress's decision to take "a position on the status of Jerusalem" could change the analysis. *Id.*, at 1233.

Judge Edwards concurred in the judgment, but wrote separately to express his view that the political question doctrine has no application to this case. He explained that the issue before the court was whether § 214(d) "impermissibly intrude[s] on the President's exclusive power to recognize foreign sovereigns." *Id.*, at 1234. That question, he observed, involves "commonplace issues of statutory and constitutional interpretation" plainly within the constitutional authority of the Judiciary to decide. *Id.*, at 1235. Reaching the merits, Judge Edwards determined that designating Israel as a place of birth on a passport is a policy "in furtherance of the recognition power." *Id.*, at 1243. Because in his view the Constitution gives that power exclusively to the President, Judge Edwards found § 214(d) unconstitutional. For this reason, he concluded that Zivotofsky had no viable cause of action, and concurred in affirming the dismissal of the complaint.

Zivotofsky petitioned for certiorari, and we granted review. 563 U. S. 973 (2011).

II

The lower courts concluded that Zivotofsky's claim presents a political question and therefore cannot be adjudicated. We disagree.

In general, the Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid."

Cohens v. *Virginia*, 6 Wheat. 264, 404 (1821). Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine. See, *e. g.*, *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 230 (1986). We have explained that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Nixon* v. *United States*, 506 U. S. 224, 228 (1993) (quoting *Baker* v. *Carr*, 369 U. S. 186, 217 (1962)). In such a case, we have held that a court lacks the authority to decide the dispute before it.

The lower courts ruled that this case involves a political question because deciding Zivotofsky's claim would force the Judicial Branch to interfere with the President's exercise of constitutional power committed to him alone. The District Court understood Zivotofsky to ask the courts to "decide the political status of Jerusalem." 511 F. Supp. 2d, at 103. This misunderstands the issue presented. Zivotofsky does not ask the courts to determine whether Jerusalem is the capital of Israel. He instead seeks to determine whether he may vindicate his statutory right, under § 214(d), to choose to have Israel recorded on his passport as his place of birth.

For its part, the D. C. Circuit treated the two questions as one and the same. That court concluded that "[o]nly the Executive—not Congress and not the courts—has the power to define U. S. policy regarding Israel's sovereignty over Jerusalem," and also to "decide how best to implement that policy." 571 F. 3d, at 1232. Because the Department's passport rule was adopted to implement the President's "exclusive and unreviewable constitutional power to keep the United States out of the debate over the status of Jerusalem," the validity of that rule was itself a "nonjusticiable political question" that "the Constitution leaves to the Executive alone." *Id.*, at 1231–1233. Indeed, the D. C. Circuit's opinion does not even mention § 214(d) until the fifth of

its six paragraphs of analysis, and then only to dismiss it as irrelevant: "That Congress took a position on the status of Jerusalem and gave Zivotofsky a statutory cause of action . . . is of no moment to whether the judiciary has [the] authority to resolve this dispute . . . ." *Id.*, at 1233.

The existence of a statutory right, however, is certainly relevant to the Judiciary's power to decide Zivotofsky's claim. The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be. Instead, Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.

Moreover, because the parties do not dispute the interpretation of § 214(d), the only real question for the courts is whether the statute is constitutional. At least since *Marbury* v. *Madison*, 1 Cranch 137 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177. That duty will sometimes involve the "[r]esolution of litigation challenging the constitutional authority of one of the three branches," but courts cannot avoid their responsibility merely "because the issues have political implications." *INS* v. *Chadha*, 462 U. S. 919, 943 (1983).

In this case, determining the constitutionality of § 214(d) involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution. If so, the law must be invalidated and Zivotofsky's case should be dismissed for failure to state a claim. If, on the other hand, the statute does not trench on the President's powers, then the Secretary must be ordered to issue Zivotofsky a passport that complies with § 214(d). Either way, the political question doctrine is not implicated. "No policy underly-

ing the political question doctrine suggests that Congress or the Executive . . . can decide the constitutionality of a statute; that is a decision for the courts." *Id.*, at 941–942.

The Secretary contends that "there is 'a textually demonstrable constitutional commitment'" to the President of the sole power to recognize foreign sovereigns and, as a corollary, to determine whether an American born in Jerusalem may choose to have Israel listed as his place of birth on his passport. *Nixon*, *supra*, at 228 (quoting *Baker*, *supra*, at 217); see Brief for Respondent 49–50. Perhaps. But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is "aggrandizing its power at the expense of another branch." *Freytag* v. *Commissioner*, 501 U. S. 868, 878 (1991); see, *e. g.*, *Myers* v. *United States*, 272 U. S. 52, 176 (1926) (finding a statute unconstitutional because it encroached upon the President's removal power); *Bowsher* v. *Synar*, 478 U. S. 714, 734 (1986) (finding a statute unconstitutional because it "intruded into the executive function"); *Morrison* v. *Olson*, 487 U. S. 654, 685 (1988) (upholding a statute's constitutionality against a charge that it "impermissibly interfere[d] with the President's exercise of his constitutionally appointed functions").

Our precedents have also found the political question doctrine implicated when there is "'a lack of judicially discoverable and manageable standards for resolving'" the question before the court. *Nixon*, 506 U. S., at 228 (quoting *Baker*, 369 U. S., at 217). Framing the issue as the lower courts did, in terms of whether the Judiciary may decide the political status of Jerusalem, certainly raises those concerns. They dissipate, however, when the issue is recognized to be the more focused one of the constitutionality of § 214(d). Indeed, both sides offer detailed legal arguments regarding whether § 214(d) is constitutional in light of powers com-

mitted to the Executive, and whether Congress's own powers with respect to passports must be weighed in analyzing this question.

For example, the Secretary reprises on the merits her argument on the political question issue, claiming that the Constitution gives the Executive the exclusive power to formulate recognition policy. She roots her claim in the Constitution's declaration that the President shall "receive Ambassadors and other public Ministers." U. S. Const., Art. II, § 3. According to the Secretary, "[c]enturies-long Executive Branch practice, congressional acquiescence, and decisions by this Court" confirm that the "receive Ambassadors" clause confers upon the Executive the exclusive power of recognition. Brief for Respondent 18.

The Secretary observes that "President Washington and his cabinet unanimously decided that the President could receive the ambassador from the new government of France without first consulting Congress." *Id.*, at 19 (citing Letter from George Washington to the Cabinet (Apr. 18, 1793), reprinted in 25 Papers of Thomas Jefferson 568–569 (J. Catanzariti ed. 1992); Thomas Jefferson, Notes on Washington's Questions on Neutrality and the Alliance with France (May 6, 1793), reprinted in *id.*, at 665–666). She notes, too, that early attempts by the Legislature to affect recognition policy were regularly "rejected in Congress as inappropriate incursions into the Executive Branch's constitutional authority." Brief for Respondent 21. And she cites precedents from this Court stating that "[p]olitical recognition is exclusively a function of the Executive." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410 (1964); see Brief for Respondent 24–27 (citing, *e. g.*, *United States* v. *Pink*, 315 U. S. 203 (1942)).

The Secretary further contends that § 214(d) constitutes an impermissible exercise of the recognition power because "the decision as to how to describe the place of birth . . .

operates as an official statement of whether the United States recognizes a state's sovereignty over a territorial area." Brief for Respondent 38. The Secretary will not "list[ ] as a place of birth a country whose sovereignty over the relevant territory the United States does not recognize." *Id.*, at 39. Therefore, she claims, "listing 'Israel' as the place of birth would constitute an official decision by the United States to begin to treat Jerusalem as a city located within Israel." *Id.*, at 38–39 (some internal quotation marks omitted).

For his part, Zivotofsky argues that, far from being an exercise of the recognition power, § 214(d) is instead a "legitimate and permissible" exercise of Congress's "authority to legislate on the form and content of a passport." Brief for Petitioner 53. He points the Court to Professor Louis Henkin's observation that "'in the competition for power in foreign relations,' Congress has an 'impressive array of powers expressly enumerated in the Constitution.'" *Id.*, at 45 (quoting L. Henkin, Foreign Affairs and the United States Constitution 63 (2d ed. 1996)). Zivotofsky suggests that Congress's authority to enact § 214(d) derives specifically from its powers over naturalization, U. S. Const., Art. I, § 8, cl. 4, and foreign commerce, *id.*, § 8, cl. 3. According to Zivotofsky, Congress has used these powers to pass laws regulating the content and issuance of passports since 1856. See Brief for Petitioner 52 (citing Act of Aug. 18, 1856, § 23, 11 Stat. 60).

Zivotofsky contends that § 214(d) fits squarely within this tradition. He notes that the State Department's designated representative stated in her deposition for this litigation that the "place of birth" entry is included *only* as "an element of identification." App. 76 (Deposition of Catherine Barry, Deputy Assistant Secretary of State for Overseas Citizens Services); see Brief for Petitioner 10. Moreover, Zivotofsky argues, the "place of birth" entry cannot be taken as a means

for recognizing foreign sovereigns, because the State Department authorizes recording unrecognized territories—such as the Gaza Strip and the West Bank—as places of birth. Brief for Petitioner 43 (citing 7 Foreign Affairs Manual § 1383.5–5, App. 109–110).

Further, Zivotofsky claims that even if § 214(d) does implicate the recognition power, that is not a power the Constitution commits exclusively to the Executive. Zivotofsky argues that the Secretary is overreading the authority granted to the President in the "receive Ambassadors" clause. He observes that in the Federalist Papers, Alexander Hamilton described the power conferred by this clause as "more a matter of dignity than of authority," and called it "a circumstance, which will be without consequence in the administration of the government." The Federalist No. 69, p. 468 (J. Cooke ed. 1961); see Brief for Petitioner 37. Zivotofsky also points to other clauses in the Constitution, such as Congress's power to declare war, that suggest some congressional role in recognition. Reply Brief for Petitioner 23 (citing U. S. Const., Art. I, § 8, cl. 11). He cites, for example, an 1836 message from President Jackson to Congress, acknowledging that it is unclear who holds the authority to recognize because it is a power "no where expressly delegated" in the Constitution, and one that is "necessarily involved in some of the great powers given to Congress." Message from the President of the United States Upon the Subject of the Political, Military, and Civil Condition of Texas, H. R. Doc. No. 35, 24th Cong., 2d Sess., 2; see Reply Brief for Petitioner 11–12.

Zivotofsky argues that language from this Court's precedents suggesting the recognition power belongs exclusively to the President is inapplicable to his claim, because that language appeared in cases where the Court was asked to alter recognition policy developed by the Executive in the absence of congressional opposition. See Brief for Petitioner 44–46; Reply Brief for Petitioner 18–19. Finally,

Zivotofsky contends that even if the "receive Ambassadors" clause confers some exclusive recognition power on the President, simply allowing a choice as to the "place of birth" entry on a passport does not significantly intrude on that power.

Recitation of these arguments—which sound in familiar principles of constitutional interpretation—is enough to establish that this case does not "turn on standards that defy judicial application." *Baker*, 369 U. S., at 211. Resolution of Zivotofsky's claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do. The political question doctrine poses no bar to judicial review of this case.

III

To say that Zivotofsky's claim presents issues the Judiciary is competent to resolve is not to say that reaching a decision in this case is simple. Because the District Court and the D. C. Circuit believed that review was barred by the political question doctrine, we are without the benefit of thorough lower court opinions to guide our analysis of the merits. Ours is "a court of final review and not first view." *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 110 (2001) (*per curiam*) (internal quotation marks omitted). Ordinarily, "we do not decide in the first instance issues not decided below." *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 470 (1999). In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing. See, *e. g.*, *Bond* v. *United States*, 564 U. S. 211, 214 (2011) (reversing the Court of Appeals' determination on standing and remanding because the "merits of petitioner's challenge to the statute's validity are to be considered, in the first instance, by the Court of Appeals"). We see no reason to depart from this approach in

this case. Having determined that this case is justiciable, we leave it to the lower courts to consider the merits in the first instance.

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins as to Part I, concurring in part and concurring in the judgment.

As this case illustrates, the proper application of *Baker*'s six factors has generated substantial confusion in the lower courts. I concur in the Court's conclusion that this case does not present a political question. I write separately, however, because I understand the inquiry required by the political question doctrine to be more demanding than that suggested by the Court.

I

The political question doctrine speaks to an amalgam of circumstances in which courts properly examine whether a particular suit is justiciable—that is, whether the dispute is appropriate for resolution by courts. The doctrine is "essentially a function of the separation of powers," *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), which recognizes the limits that Article III imposes upon courts and accords appropriate respect to the other branches' exercise of their own constitutional powers.

In *Baker*, this Court identified six circumstances in which an issue might present a political question: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent

resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Ibid.* *Baker* established that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability." *Ibid.* But *Baker* left unanswered when the presence of one or more factors warrants dismissal, as well as the interrelationship of the six factors and the relative importance of each in determining whether a case is suitable for adjudication.

In my view, the *Baker* factors reflect three distinct justifications for withholding judgment on the merits of a dispute. When a case would require a court to decide an issue whose resolution is textually committed to a coordinate political department, as envisioned by *Baker*'s first factor, abstention is warranted because the court lacks authority to resolve that issue. See, *e. g.*, *Nixon* v. *United States*, 506 U. S. 224, 229 (1993) (holding nonjusticiable the Senate's impeachment procedures in light of Article I's commitment to the Senate of the "'sole Power to try all Impeachments'"); see also *Marbury* v. *Madison*, 1 Cranch 137, 165–166 (1803) ("By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience"). In such cases, the Constitution itself requires that another branch resolve the question presented.

The second and third *Baker* factors reflect circumstances in which a dispute calls for decisionmaking beyond courts' competence. "'The judicial Power' created by Article III, § 1, of the Constitution is not *whatever* judges choose to do," but rather the power "to act in the manner traditional for English and American courts." *Vieth* v. *Jubelirer*, 541 U. S. 267, 278 (2004) (plurality opinion). That traditional role in-

volves the application of some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts of a concrete case. When a court is given no standard by which to adjudicate a dispute, or cannot resolve a dispute in the absence of a yet-unmade policy determination charged to a political branch, resolution of the suit is beyond the judicial role envisioned by Article III. See, *e. g.*, *Gilligan* v. *Morgan*, 413 U. S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence" than "[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force"); *Vieth*, 541 U. S., at 278 ("One of the most obvious limitations imposed by [Article III] is that judicial action must be governed by *standard* . . . "). This is not to say, of course, that courts are incapable of interpreting or applying somewhat ambiguous standards using familiar tools of statutory or constitutional interpretation. But where an issue leaves courts truly rudderless, there can be "no doubt of [the] validity" of a court's decision to abstain from judgment. *Ibid.*

The final three *Baker* factors address circumstances in which prudence may counsel against a court's resolution of an issue presented. Courts should be particularly cautious before forgoing adjudication of a dispute on the basis that judicial intervention risks "embarrassment from multifarious pronouncements by various departments on one question," would express a "lack of the respect due coordinate branches of government," or because there exists an "unusual need for unquestioning adherence to a political decision already made." 369 U. S., at 217. We have repeatedly rejected the view that these thresholds are met whenever a court is called upon to resolve the constitutionality or propriety of the act of another branch of Government. See, *e. g.*, *United States* v. *Munoz-Flores*, 495 U. S. 385, 390–391 (1990); *Powell* v. *McCormack*, 395 U. S. 486, 548, 549 (1969). A court may not refuse to adjudicate a dispute merely because a decision

"may have significant political overtones" or affect "the conduct of this Nation's foreign relations," *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 230 (1986). Nor may courts decline to resolve a controversy within their traditional competence and proper jurisdiction simply because the question is difficult, the consequences weighty, or the potential real for conflict with the policy preferences of the political branches. The exercise of such authority is among the "gravest and most delicate dut[ies] that this Court is called on to perform," *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring), but it is the role assigned to courts by the Constitution. "Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty." *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821).

Rare occasions implicating *Baker*'s final factors, however, may present an " 'unusual case' " unfit for judicial disposition. 369 U. S., at 218 (quoting the argument of Daniel Webster in *Luther* v. *Borden*, 7 How. 1, 29 (1849)). Because of the respect due to a coequal and independent department, for instance, courts properly resist calls to question the good faith with which another branch attests to the authenticity of its internal acts. See, *e. g.*, *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 672–673 (1892) (deeming "forbidden by the respect due to a coordinate branch of the government" "[j]udicial action" requiring a belief in a "deliberate conspiracy" by the Senate and House of Representatives "to defeat an expression of the popular will"); see also *Munoz-Flores*, 495 U. S., at 409–410 (SCALIA, J., concurring in judgment) ("Mutual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding . . . matters of internal process be accepted at face value"). Likewise, we have long acknowledged that courts are particularly ill suited to intervening in exigent disputes necessitating unusual need for "attributing finality to the ac-

tion of the political departments," *Coleman* v. *Miller*, 307 U. S. 433, 454 (1939), or creating acute "risk [of] embarrassment of our government abroad, or grave disturbance at home," *Baker*, 369 U. S., at 226. See, *e. g.*, *Luther*, 7 How., at 43 ("After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? . . . If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order").[1] Finally, it may be appropriate for courts to stay their hand in cases implicating delicate questions concerning the distribution of political authority between coordinate branches until a dispute is ripe, intractable, and incapable of resolution by the political process. See *Goldwater* v. *Carter*, 444 U. S. 996, 997 (1979) (Powell, J., concurring in judgment). Abstention merely reflects that judicial intervention in such cases is "legitimate only in the last resort," *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 345 (1892), and is disfavored relative to the prospect of accommodation between the political branches.

When such unusual cases arise, abstention accommodates considerations inherent in the separation of powers and the limitations envisioned by Article III, which conferred authority to federal courts against a common-law backdrop that recognized the propriety of abstention in exceptional cases. *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U. S. 350, 359 (1989); see generally Shapiro, Jurisdiction and Discretion, 60 N. Y. U. L. Rev. 543 (1985)

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[1] See also *Martin* v. *Mott*, 12 Wheat. 19, 29–30 (1827) (Story, J.) (declining to review the President's determination that an "exigency has arisen," necessitating the "call [of] the militia into actual service," recognizing need for "[a] prompt and unhesitating obedience to orders is indispensable"); *Ware* v. *Hylton*, 3 Dall. 199, 260 (1796) (Iredell, J., concurring) (to declare treaty with Great Britain void would turn on "considerations of policy, considerations of extreme magnitude, [which are] certainly entirely incompetent to the examination and decision of a Court of Justice").

(hereinafter Shapiro). The political questions envisioned by *Baker*'s final categories find common ground, therefore, with many longstanding doctrines under which considerations of justiciability or comity lead courts to abstain from deciding questions whose initial resolution is better suited to another time, see, *e. g.*, *National Park Hospitality Assn.* v. *Department of Interior*, 538 U. S. 803, 808 (2003) (ripeness); *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 397 (1980) (mootness); or another forum, see, *e. g.*, *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507 (1947) *(forum non conveniens); Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496, 498–500 (1941); *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 25–30 (1959); *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333–334 (1943) (abstention in favor of a state forum); *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 63–64 (1956) (primary jurisdiction doctrine). See also *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 352 (2006) ("The doctrines of mootness, ripeness, and political question all originate in Article III's 'case' or 'controversy' language"); Shapiro 550–557, 580–587 (describing practices of judicial abstention sounding in justiciability, comity, *forum non conveniens*, and separation of powers).

To be sure, it will be the rare case in which *Baker*'s final factors alone render a case nonjusticiable.[2] But our long historical tradition recognizes that such exceptional cases arise, and due regard for the separation of powers and the judicial role envisioned by Article III confirms that abstention may be an appropriate response.

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[2] Often when such factors are implicated in a case presenting a political question, other factors identified in *Baker* will likewise be apparent. See, *e. g.*, *Nixon* v. *United States*, 506 U. S. 224, 236 (1993) ("[i]n addition to the textual commitment argument," finding persuasive that "opening the door of judicial review" of impeachment procedures would " 'expose the political life of the country to months, or perhaps years, of chaos' "); *Baker* v. *Carr*, 369 U. S. 186, 222 (1962) (explaining that the Court in *Luther* v. *Borden*, 7 How. 1 (1849), found present features associated with each of the three rationales underlying *Baker*'s factors).

II

The court below held that this case presented a political question because it thought petitioner's suit asked the court to decide an issue "textually committed" to a coordinate branch—namely, "to review a policy of the State Department implementing the President's decision" to keep the United States out of the debate over the status of Jerusalem. 571 F. 3d 1227, 1231–1232 (CADC 2009). Largely for the reasons set out by the Court, I agree that the Court of Appeals misapprehended the nature of its task. In two respects, however, my understanding of the political question doctrine might require a court to engage in further analysis beyond that relied upon by the Court.

First, the Court appropriately recognizes that petitioner's claim to a statutory right is "relevant" to the justiciability inquiry required in this case. *Ante*, at 196. In order to evaluate whether a case presents a political question, a court must first identify with precision the issue it is being asked to decide. Here, petitioner's suit claims that a federal statute provides him with a right to have "Israel" listed as his place of birth on his passport and other related documents. App. 15–18. To decide that question, a court must determine whether the statute is constitutional, and therefore mandates the Secretary of State to issue petitioner's desired passport, or unconstitutional, in which case his suit is at an end. Resolution of that issue is not one "textually committed" to another branch; to the contrary, it is committed to this one. In no fashion does the question require a court to review the wisdom of the President's policy toward Jerusalem or any other decision committed to the discretion of a coordinate department. For that reason, I agree that the decision below should be reversed.

That is not to say, however, that no statute could give rise to a political question. It is not impossible to imagine a case involving the application or even the constitutionality of an enactment that would present a nonjusticiable issue. In-

deed, this Court refused to determine whether an Ohio state constitutional provision offended the Republican Guarantee Clause, Art. IV, § 4, holding that "the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy." *Ohio ex rel. Davis* v. *Hildebrant*, 241 U. S. 565, 569 (1916). A similar result would follow if Congress passed a statute, for instance, purporting to award financial relief to those improperly "tried" of impeachment offenses. To adjudicate claims under such a statute would require a court to resolve the very same issue we found nonjusticiable in *Nixon*. Such examples are atypical, but they suffice to show that the foreclosure altogether of political question analysis in statutory cases is unwarranted.

Second, the Court suggests that this case does not implicate the political question doctrine's concern with issues exhibiting "'a lack of judicially discoverable and manageable standards,'" *ante*, at 197, because the parties' arguments rely on textual, structural, and historical evidence of the kind that courts routinely consider. But that was equally true in *Nixon*, a case in which we found that "the use of the word 'try' in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions." 506 U. S., at 230. We reached that conclusion even though the parties' briefs focused upon the text of the Impeachment Trial Clause, "the Constitution's drafting history," "contemporaneous commentary," "the unbroken practice of the Senate for 150 years," contemporary dictionary meanings, "Hamilton's Federalist essays," and the practice in the House of Lords prior to ratification. Such evidence was no more or less unfamiliar to courts than that on which the parties rely here.

In my view, it is not whether the evidence upon which litigants rely is common to judicial consideration that determines whether a case lacks judicially discoverable and manageable standards. Rather, it is whether that evidence in

fact provides a court a basis to adjudicate meaningfully the issue with which it is presented. The answer will almost always be yes, but if the parties' textual, structural, and historical evidence is inapposite or wholly unilluminating, rendering judicial decision no more than guesswork, a case relying on the ordinary kinds of arguments offered to courts might well still present justiciability concerns.

In this case, however, the Court of Appeals majority found a political question solely on the basis that this case required resolution of an issue "textually committed" to the Executive Branch. Because there was no such textual commitment, I respectfully concur in the Court's decision to reverse the Court of Appeals.

JUSTICE ALITO, concurring in the judgment.

This case presents a narrow question, namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport. This case does not require the Judiciary to decide whether the power to recognize foreign governments and the extent of their territory is conferred exclusively on the President or is shared with Congress. Petitioner does not claim that the statutory provision in question represents an attempt by Congress to dictate United States policy regarding the status of Jerusalem. Instead, petitioner contends in effect that Congress has the power to mandate that an American citizen born abroad be given the option of including in his passport and Consular Report of Birth Abroad (CRBA) what amounts to a statement of personal belief on the status of Jerusalem.

Powers conferred on Congress by the Constitution certainly give Congress a measure of authority to prescribe the contents of passports and CRBAs. The Constitution gives Congress the power to regulate foreign commerce, Art. I, § 8, cl. 3, and this power includes the power to regulate the entry of persons into this country, see *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270–271 (1876). The Constitution

also gives Congress the power to make a "uniform Rule of Naturalization," Art. I, § 8, cl. 4, and pursuant to this power, Congress has enacted laws concerning the citizenship of children born abroad to parents who are citizens of this country, see *United States* v. *Wong Kim Ark*, 169 U. S. 649, 688 (1898). These powers allow Congress to mandate that identifying information be included in passports and CRBAs.

The President also has a measure of authority concerning the contents of passports and CRBAs. The President has broad authority in the field of foreign affairs, see, *e. g.*, *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414 (2003), and, historically, that authority has included the power to issue passports, even in the absence of any formal congressional conferral of authority to do so. See *Haig* v. *Agee*, 453 U. S. 280, 293 (1981) (explaining that "[p]rior to 1856, when there was no statute on the subject, the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States"). We have described a passport as "a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer." *Id.*, at 292. This is apparent from the first page of petitioner's passport, which reads as follows:

> "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." App. 19.

Similarly, a CRBA is a certification made by a consular official that the bearer acquired United States citizenship at birth. See *id.*, at 20.

Under our case law, determining the constitutionality of an Act of Congress may present a political question, but I do

not think that the narrow question presented here falls within that category. Delineating the precise dividing line between the powers of Congress and the President with respect to the contents of a passport is not an easy matter, but I agree with the Court that it does not constitute a political question that the Judiciary is unable to decide.

JUSTICE BREYER, dissenting.

I join Part I of JUSTICE SOTOMAYOR's opinion. As she points out, *Baker* v. *Carr*, 369 U. S. 186 (1962), set forth several categories of legal questions that the Court had previously held to be "political questions" inappropriate for judicial determination. Those categories include (1) instances in which the Constitution clearly commits decision-making power to another branch of Government, and (2) issues lacking judicially manageable standards for resolution. *Id.*, at 217. They also include (3) issues that courts cannot decide without making "an initial policy determination of a kind clearly for nonjudicial discretion," (4) issues that a court cannot independently decide "without expressing lack of the respect due coordinate branches of government," (5) cases in which there is "an unusual need for unquestioning adherence to a political decision already made," and (6) cases in which there is a potential for "embarrassment from multifarious pronouncements by various departments on one question." *Ibid.*

As JUSTICE SOTOMAYOR also points out, these categories (and in my view particularly the last four) embody "circumstances in which prudence may counsel against a court's resolution of an issue presented." *Ante*, at 204 (opinion concurring in part and concurring in judgment); see *Nixon* v. *United States*, 506 U. S. 224, 253 (1993) (Souter, J., concurring in judgment) (the political-question doctrine "deriv[es] in large part from prudential concerns about the respect we owe the political departments"); *Goldwater* v. *Carter*, 444 U. S. 996, 1000 (1979) (Powell, J., concurring in judgment)

("[T]he political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government"); see also Jaffe, Standing To Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265, 1304 (1961) (prudence counsels hesitation where a legal issue is "felt to be so closely related to a complex of decisions not within the court's jurisdiction that its resolution by the court would either be poor in itself or would jeopardize sound decisions in the larger complex").

JUSTICE SOTOMAYOR adds that the circumstances in which these prudential considerations lead the Court not to decide a case otherwise properly before it are rare. *Ante,* at 207. I agree. But in my view we nonetheless have before us such a case. Four sets of prudential considerations, *taken together*, lead me to that conclusion.

First, the issue before us arises in the field of foreign affairs. (Indeed, the statutory provision before us is a subsection of a section that concerns the relation between Jerusalem and the State of Israel. See § 214 of the Foreign Relations Authorization Act, Fiscal Year 2003, 116 Stat. 1365 ("United States Policy with Respect to Jerusalem as the Capital of Israel").) The Constitution primarily delegates the foreign affairs powers "to the political departments of the government, Executive and Legislative," not to the Judiciary. *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948); see also *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803) (noting discretionary foreign affairs functions of Secretary of State as beyond the power of the Judiciary to review). And that fact is not surprising. Decisionmaking in this area typically is highly political. It is "delicate" and "complex." *Chicago & Southern Air Lines*, 333 U. S., at 111. It often rests upon information readily available to the Executive Branch and to the intelligence committees of Congress, but not readily available to the courts. *Ibid.* It frequently is highly dependent upon what Justice Jackson called "prophecy." *Ibid.* And

the creation of wise foreign policy typically lies well beyond the experience or professional capacity of a judge. *Ibid.* At the same time, where foreign affairs is at issue, the practical need for the United States to speak "with one voice and ac[t] as one" is particularly important. See *United States* v. *Pink*, 315 U. S. 203, 242 (1942) (Frankfurter, J., concurring); see also R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 240 (6th ed. 2009).

The result is a judicial hesitancy to make decisions that have significant foreign policy implications, as reflected in the fact that many of the cases in which the Court has invoked the political-question doctrine have arisen in this area, *e. g.,* cases in which the validity of a treaty depended upon the partner state's constitutional authority, *Doe* v. *Braden*, 16 How. 635, 657 (1854), or upon its continuing existence, *Terlinden* v. *Ames*, 184 U. S. 270, 285 (1902); cases concerning the existence of foreign states, governments, belligerents, and insurgents, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302 (1918); *United States* v. *Klintock*, 5 Wheat. 144, 149 (1820); *United States* v. *Palmer*, 3 Wheat. 610, 634–635 (1818); and cases concerning the territorial boundaries of foreign states, *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420 (1839); *Foster* v. *Neilson*, 2 Pet. 253, 307 (1829). See *Baker*, *supra,* at 211–213 (citing these cases as the Court's principal foreign-relations political-question cases); see also Fallon, *supra,* at 243–247.

Second, if the courts must answer the constitutional question before us, they may well have to evaluate the foreign policy implications of foreign policy decisions. The constitutional question focuses upon a statutory provision, § 214(d), that says: The Secretary of State, upon the request of a U. S. citizen born in Jerusalem (or upon the request of the citizen's legal guardian), shall "record" in the citizen's passport or consular birth report "the place of birth as Israel." 116 Stat. 1366. And the question is whether this statute uncon-

stitutionally seeks to limit the President's inherent constitutional authority to make certain kinds of foreign policy decisions. See *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414–415 (2003) (citing cases); *Clinton* v. *City of New York*, 524 U. S. 417, 445 (1998) ("[T]his Court has recognized that in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved'" (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936))); cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 637–638 (1952) (Jackson, J., concurring).

The Secretary of State argues that the President's constitutional authority to determine foreign policy includes the power to recognize foreign governments, that this Court has long recognized that the latter power belongs to the President exclusively, that the power includes the power to determine claims over disputed territory as well as the policy governing recognition decisions, and that the statute unconstitutionally limits the President's exclusive authority to exercise these powers. See U. S. Const., Art. II, § 2, cl. 2; Art. II, § 3; *e. g.*, *Kennett* v. *Chambers*, 14 How. 38, 50–51 (1852) (recognition); *Williams*, *supra*, at 420 (disputed territory); *Pink*, *supra*, at 229 (recognition policy); see also *Haig* v. *Agee*, 453 U. S. 280, 293 (1981) (executive passport authority).

Zivotofsky, supported by several Members of Congress, points out that the Constitution also grants Congress powers related to foreign affairs, such as the powers to declare war, to regulate foreign commerce, and to regulate naturalization. See Art. I, § 8, cls. 3, 4, 11; see also *American Ins. Assn.*, *supra*, at 414. They add that Congress may share some of the recognition power and its attendant power of determining claims over disputed territory. *E. g.*, *Palmer*, *supra*, at 634 (recognition); *Jones* v. *United States*, 137 U. S. 202, 212 (1890) (disputed territory). And they add that Congress

may enact laws concerning travel into this country and concerning the citizenship of children born abroad to U. S. citizens. See *Henderson* v. *Mayor of New York*, 92 U. S. 259, 270–271 (1876) (travel); *Fong Yue Ting* v. *United States*, 149 U. S. 698, 714 (1893) (immigration); *United States* v. *Wong Kim Ark*, 169 U. S. 649, 688 (1898) (citizenship). They argue that these powers include the power to specify the content of a passport (or consular birth report). And when such a specification takes the form of statutory law, they say, the Constitution requires the President (through the Secretary of State) to execute that statute. See Art. II, § 3.

Were the statutory provision undisputedly concerned only with purely administrative matters (or were its enforcement undisputedly to involve only major foreign policy matters), judicial efforts to answer the constitutional question might not involve judges in trying to answer questions of foreign policy. But in the Middle East, administrative matters can have implications that extend far beyond the purely administrative. Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the President's ability to make significant recognition-related foreign policy decisions.

Certainly the parties argue as if that were so. Zivotofsky, for example, argues that replacing "Jerusalem" on his passport with "Israel" will have no serious foreign policy significance. See Brief for Petitioner 43, 46–52; Reply Brief for Petitioner 25–26. And in support he points to (1) a State Department official's statement that birthplace designation serves primarily as "an element of identification," while omitting mention of recognition; (2) the fact that the State Department has recorded births in unrecognized territories in the region, such as the Gaza Strip and the West Bank,

apparently without adverse effect; and (3) the fact that sometimes Jerusalem does (because of what the Government calls "clerical errors") carry with it the name of "Israel" on certain official documents, again apparently without seriously adverse effect. See Brief for Petitioner 7–10, 15, 43, 50; App. 50, 58–60, 75–76. Moreover, Zivotofsky says, it is unfair to allow the 100,000 or so Americans born in cities that the United States recognizes as under Israeli sovereignty, such as Tel Aviv or Haifa, the right to a record that mentions Israel, while denying that privilege to the 50,000 or so Americans born in Jerusalem. See Brief for Petitioner 18–20, 48–49; App. 48.

At the same time, the Secretary argues that listing Israel on the passports (and consular birth reports) of Americans born in Jerusalem will have significantly adverse foreign policy effects. See Brief for Respondent 8, 37–41. She says that doing so would represent "'an official decision by the United States to begin to treat Jerusalem as a city located within Israel,'" *id.*, at 38–39, that it "would be interpreted as an official act of recognizing Jerusalem as being under Israeli sovereignty," App. 56, and that our "national security interests" consequently "would be significantly harmed," *id.*, at 49. Such an action, she says, "'would signal, symbolically or concretely, that'" the United States "'recognizes that Jerusalem is a city that is located within the sovereign territory of Israel,'" and doing so "'would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process.'" Brief for Respondent 2; App. 52–53. She adds that the very enactment of this statutory provision in 2002 produced headlines in the Middle East stating that "the U. S. now recognizes Jerusalem as Israel's capital." *Id.*, at 231; Brief for Respondent 10; see also App. 53–55, 227–231.

A judge's ability to evaluate opposing claims of this kind is minimal. At the same time, a judicial effort to do so risks inadvertently jeopardizing sound foreign policy decision-

making by the other branches of Government. How, for example, is this Court to determine whether, or the extent to which, the continuation of the adjudication that it now orders will itself have a foreign policy effect?

Third, the countervailing interests in obtaining judicial resolution of the constitutional determination are not particularly strong ones. Zivotofsky does not assert the kind of interest, *e. g.*, an interest in property or bodily integrity, which courts have traditionally sought to protect. See, *e. g.*, *Ingraham* v. *Wright*, 430 U. S. 651, 673–674 (1977) (enduring commitment to legal protection of bodily integrity). Nor, importantly, does he assert an interest in vindicating a basic right of the kind that the Constitution grants to individuals and that courts traditionally have protected from invasion by the other branches of Government. And I emphasize this fact because the need for judicial action in such cases can trump the foreign policy concerns that I have mentioned. As Professor Jaffe pointed out many years ago, "Our courts would not refuse to entertain habeas corpus to test the constitutionality of the imprisonment of an alleged Chinese agent even if it were clear that his imprisonment was closely bound up with our relations to the Chinese government." 74 Harv. L. Rev., at 1304; see also T. Franck, Political Questions/Judicial Answers 63–64 (1992); cf. *Boumediene* v. *Bush*, 553 U. S. 723, 755 (2008).

The interest that Zivotofsky asserts, however, is akin to an ideological interest. See Brief for Petitioner 54 (citizen born in Jerusalem, unlike citizen born in Tel Aviv or Haifa, does not have the "option" to "specify or suppress the name of a country that accords with his or her ideology"); see also *id.*, at 19 (State Department policy bars citizens born in Jerusalem "from identifying their birthplace in a manner that conforms with their convictions"). And insofar as an individual suffers an injury that is purely ideological, courts have often refused to consider the matter, leaving the injured party to look to the political branches for protection.

E. g., *Diamond* v. *Charles*, 476 U. S. 54, 66–67 (1986); *Sierra Club* v. *Morton*, 405 U. S. 727, 739–740 (1972). This is not to say that Zivotofsky's claim is unimportant or that the injury is not serious or even that it is purely ideological. It is to point out that those suffering somewhat similar harms have sometimes had to look to the political branches for resolution of relevant legal issues. Cf. *United States* v. *Richardson*, 418 U. S. 166, 179 (1974); *Laird* v. *Tatum*, 408 U. S. 1, 15 (1972).

Fourth, insofar as the controversy reflects different foreign policy views among the political branches of Government, those branches have nonjudicial methods of working out their differences. Cf. *Goldwater*, 444 U. S., at 1002, 1004 (Rehnquist, J., joined by Burger, C. J., and Stewart and Stevens, JJ., concurring in judgment) (finding in similar fact strong reason for Judiciary not to decide treaty power question). The Executive and Legislative Branches frequently work out disagreements through ongoing contacts and relationships, involving, for example, budget authorizations, confirmation of personnel, committee hearings, and a host of more informal contacts, which, taken together, ensure that, in practice, Members of Congress as well as the President play an important role in the shaping of foreign policy. Indeed, both the Legislative Branch and the Executive Branch typically understand the need to work each with the other in order to create effective foreign policy. In that understanding, those related contacts, and the continuous foreign-policy-related relationship lie the possibility of working out the kind of disagreement we see before us. Moreover, if application of the political-question "doctrine ultimately turns, as Learned Hand put it, on 'how importunately the occasion demands an answer,'" *Nixon*, 506 U. S., at 253 (Souter, J., concurring in judgment) (quoting L. Hand, The Bill of Rights 15 (1958)), the ability of the political branches to work out their differences minimizes the need for judicial intervention here.

The upshot is that this case is unusual both in its minimal need for judicial intervention and in its more serious risk that intervention will bring about "embarrassment," show lack of "respect" for the other branches, and potentially disrupt sound foreign policy decisionmaking. For these prudential reasons, I would hold that the political-question doctrine bars further judicial consideration of this case. And I would affirm the Court of Appeals' similar conclusion.

With respect, I dissent.

Syllabus

CREDIT SUISSE SECURITIES (USA) LLC ET AL. *v.* SIMMONDS

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

No. 10–1261. Argued November 29, 2011—Decided March 26, 2012

Under § 16(b) of the Securities Exchange Act of 1934, a corporation or security holder of that corporation may sue corporate insiders who realize profits from the purchase and sale, or sale and purchase, of the corporation's securities within any 6-month period. The Act provides that such suits must be brought within "two years after the date such profit was realized." 15 U. S. C. § 78p(b).

In 2007, respondent Simmonds filed numerous § 16(b) actions, claiming that, in underwriting various initial public offerings in the late 1990's and 2000, petitioners and others inflated the stocks' aftermarket prices, allowing them to profit from the aftermarket sales. She also claimed that petitioners had failed to comply with § 16(a)'s requirement that insiders disclose any changes to their ownership interests. That failure, according to Simmonds, tolled § 16(b)'s 2-year time period. The District Court dismissed the complaints as untimely. The Ninth Circuit reversed. Citing its decision in *Whittaker* v. *Whittaker Corp.*, 639 F. 2d 516, it held that the limitations period is tolled until an insider files the § 16(a) disclosure statement "regardless of whether the plaintiff knew or should have known of the conduct at issue."

Held: Even assuming that the 2-year period can be extended (a question on which the Court is equally divided), the Ninth Circuit erred in determining that it is tolled until a § 16(a) statement is filed. The text of § 16(b)—which starts the clock from "the date such profit was realized," § 78p(b)—simply does not support the *Whittaker* rule. The rule is also not supported by the background rule of equitable tolling for fraudulent concealment. Under long-settled equitable-tolling principles, a litigant must establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418. Tolling therefore ceases when fraudulently concealed facts are, or should have been, discovered by the plaintiff. Allowing tolling to continue beyond that point would be *inequitable* and inconsistent with the general purpose of statutes of limitations: "to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133. The *Whittaker* rule's inequity is especially apparent here, where the theory

of § 16(b) liability is so novel that petitioners can plausibly claim that they were not aware they had to file a § 16(a) statement. Under the *Whittaker* rule, alleged insiders who disclaim the necessity of filing are compelled either to file or to face the prospect of § 16(b) litigation in perpetuity. Had Congress intended the possibility of such endless tolling, it would have said so. Simmonds' arguments to the contrary are unpersuasive. The lower courts should consider in the first instance how usual equitable-tolling rules apply in this case. Pp. 225–230.

638 F. 3d 1072, vacated and remanded.

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

Christopher Landau argued the cause for petitioners. With him on the briefs were *Andrew B. Clubok*, *Brant W. Bishop*, *Susan E. Engel*, *Robert B. Gilmore*, *Carter G. Phillips*, *Judith Welcom*, *Andrew N. Vollmer*, *Noah A. Levine*, *Christopher B. Wells*, *Sri Srinivasan*, *Anton Metlitsky*, *Andrew J. Frackman*, *David W. Ichel*, *Joseph M. McLaughlin*, *Gandolfo V. DiBlasi*, *Penny Shane*, and *David M. J. Rein.*

Jeffrey B. Wall argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Stewart*, *Jacob H. Stillman*, *Susan S. McDonald*, and *Benjamin L. Schiffrin.*

Jeffrey I. Tilden argued the cause for respondent. With him on the brief were *Jeffrey M. Thomas*, *Mark A. Wilner*, *David M. Simmonds*, *William C. Smart*, and *Ian S. Birk.**

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether the 2-year period to file suit against a corporate insider under § 16(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78p(b), begins to run only upon the

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**Deanne E. Maynard*, *Brian R. Matsui*, *Seth M. Galanter*, *Robin S. Conrad*, *Rachel Brand*, and *Kevin Carroll* filed a brief for the Chamber of Commerce of the United States of America et al. as *amici curiae* urging reversal.

insider's filing of the disclosure statement required by § 16(a) of the Act, § 78p(a).

I

Under § 16(b) of the Exchange Act, 48 Stat. 896, as amended, a corporation or security holder of that corporation may bring suit against the officers, directors, and certain beneficial owners[1] of the corporation who realize any profits from the purchase and sale, or sale and purchase, of the corporation's securities within any 6-month period. "The statute imposes a form of strict liability" and requires insiders to disgorge these "short-swing" profits "even if they did not trade on inside information or intend to profit on the basis of such information." *Gollust* v. *Mendell*, 501 U. S. 115, 122 (1991). Section 16(b) provides that suits must be brought within "two years after the date such profit was realized."[2] 15 U. S. C. § 78p(b).

[1] Section 16(b) regulates beneficial owners of more than 10% of any class of equity securities. 15 U. S. C. § 78p(a)(1).

[2] Section 16(b) provides in full:

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be con-

In 2007, respondent Vanessa Simmonds filed 55 nearly identical actions under § 16(b) against financial institutions that had underwritten various initial public offerings (IPOs) in the late 1990's and 2000, including these petitioners.[3] In a representative complaint, she alleged that the underwriters and the issuers' insiders employed various mechanisms to inflate the aftermarket price of the stock to a level above the IPO price, allowing them to profit from the aftermarket sale. App. 59. She further alleged that, as a group, the underwriters and the insiders owned in excess of 10% of the outstanding stock during the relevant time period, which subjected them to both disgorgement of profits under § 16(b) and the reporting requirements of § 16(a). *Id.*, at 61. See 15 U. S. C. § 78m(d)(3); 17 CFR §§ 240.13d–5(b)(1) and 240.16a–1(a)(1) (2011). The latter requires insiders to disclose any changes to their ownership interests on a document known as a Form 4, specified in the Securities and Exchange Commission regulations. 15 U. S. C. § 78p(a)(2)(C); 17 CFR § 240.16a–3(a). Simmonds alleged that the underwriters failed to comply with that requirement, thereby tolling § 16(b)'s 2-year time period.[4] App. 62.

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strued to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the [Securities and Exchange] Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U. S. C. § 78p(b).

[3] Simmonds also named the issuing companies as nominal defendants. *In re: Section 16(b) Litigation*, 602 F. Supp. 2d 1202, 1204 (WD Wash. 2009).

[4] Petitioners have consistently disputed § 16's application to them, arguing that they, as underwriters, are generally exempt from the statute's coverage. See 17 CFR §§ 240.16a–7(a) and 240.16a–10. Simmonds contends that this exemption does not apply where the underwriters do not act in good faith. Brief for Respondent 49. See § 240.16a–7(a). We express no view on this issue.

Simmonds' lawsuits were consolidated for pretrial purposes, and the United States District Court for the Western District of Washington dismissed all of her complaints.[5] *In re: Section 16(b) Litigation*, 602 F. Supp. 2d 1202 (2009). As relevant here, the court granted petitioners' motion to dismiss 24 complaints on the ground that § 16(b)'s 2-year time period had expired long before Simmonds filed the suits. The United States Court of Appeals for the Ninth Circuit reversed in relevant part. 638 F. 3d 1072 (2011). Citing its decision in *Whittaker* v. *Whittaker Corp.*, 639 F. 2d 516 (1981), the court held that § 16(b)'s limitations period is "tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." 638 F. 3d, at 1095. Judge Milan Smith, Jr., the author of the panel opinion, also specially concurred, expressing his disagreement with the *Whittaker* rule, but noting that the court was compelled to follow Circuit precedent. *Id.*, at 1099–1101. We granted certiorari, 564 U. S. 1036 (2011).

II

Petitioners maintain that these suits were properly dismissed because they were filed more than two years after the alleged profits were realized. Pointing to dictum in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U. S. 350 (1991), petitioners argue that § 16(b)'s limitations period is a period of repose, which is not to be "extended to account for a plaintiff's discovery of the facts underlying a claim." Brief for Petitioners 17. See *Lampf*, *supra*, at 360, n. 5 ("Section 16(b) . . . sets a 2-year . . . period of repose"). We do not reach that contention, because we conclude that, even assuming that the 2-year period can be extended, the Ninth Circuit erred in determining that it is tolled until the filing of a § 16(a) statement.

[5] Simmonds voluntarily dismissed one of the complaints. 602 F. Supp. 2d, at 1206, n. 4.

In adopting its rule in *Whittaker*, the Ninth Circuit expressed its concern that "[i]t would be a simple matter for the unscrupulous to avoid the salutary effect of Section 16(b) . . . simply by failing to file . . . reports in violation of subdivision (a) and thereby concealing from prospective plaintiffs the information they would need" to bring a § 16(b) action. 639 F. 2d, at 528 (internal quotation marks omitted). Assuming that is correct, it does not follow that the limitations period is tolled until the § 16(a) statement is filed. Section 16 itself quite clearly does not extend the period in that manner. The 2-year clock starts from "the date such profit was realized." § 78p(b). Congress could have very easily provided that "no such suit shall be brought more than two years after *the filing of a statement under subsection (a)(2)(C)*." But it did not. The text of § 16 simply does not support the *Whittaker* rule.

The *Whittaker* court suggested that the background rule of equitable tolling for fraudulent concealment[6] operates to toll the limitations period until the § 16(a) statement is filed. See 639 F. 2d, at 527, and n. 9. Even accepting that equitable tolling for fraudulent concealment is triggered by the

[6] Relying on our decision in *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538 (1974), Simmonds argues that the *Whittaker* rule is best understood as applying legal—rather than equitable—tolling. In *American Pipe*, we held that "commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U. S., at 554. We based our conclusion on "the efficiency and economy of litigation which is a principal purpose of [Fed. Rule Civ. Proc. 23 class actions]." *Id.*, at 553. Although we did not employ the term "legal tolling," some federal courts have used that term to describe our holding on the ground that the rule "is derived from a statutory source," whereas equitable tolling is "judicially created." *Arivella* v. *Lucent Technologies, Inc.*, 623 F. Supp. 2d 164, 176 (Mass. 2009). The label attached to the *Whittaker* rule does not matter. As we proceed to explain, neither general equitable-tolling principles nor the "statutory source" of § 16 supports the conclusion that the limitations period is tolled until the filing of a § 16(a) statement.

failure to file a § 16(a) statement, the *Whittaker* rule is completely divorced from long-settled equitable-tolling principles. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) *that he has been pursuing his rights diligently*, and (2) that some extraordinary circumstance stood in his way." *Pace* v. *DiGuglielmo*, 544 U. S. 408, 418 (2005) (emphasis added). It is well established, moreover, that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff. 2 C. Corman, Limitation of Actions § 9.7.1, pp. 55–57 (1991). Thus, we have explained that the statute does not begin to run until discovery of the fraud "'where the party injured by the fraud remains in ignorance of it *without any fault or want of diligence or care on his part.*'" *Lampf*, *supra*, at 363 (quoting *Bailey* v. *Glover*, 21 Wall. 342, 348 (1875); emphasis added). Allowing tolling to continue beyond the point at which a § 16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: "to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133 (2008).

The inequity of the *Whittaker* rule is especially apparent in a case such as this, where the theory of § 16(b) liability of underwriters is so novel that petitioners can plausibly claim that they were not aware they were required to file a § 16(a) statement. And where they disclaim the necessity of filing, the *Whittaker* rule compels them either to file or to face the prospect of § 16(b) litigation in perpetuity. Simmonds has acknowledged that "under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." 602 F. Supp. 2d, at 1218. The potential for such endless tolling in cases in which a reasonably diligent plaintiff would know of the facts underlying the

action is out of step with the purpose of limitations periods in general. And it is especially at odds with a provision that imposes strict liability on putative insiders, see *Gollust*, 501 U. S., at 122. Had Congress intended this result, it most certainly would have said so.

Simmonds maintains that failing to apply the *Whittaker* rule would obstruct Congress's objective of curbing short-swing speculation by corporate insiders. This objective, according to Simmonds, is served by § 16(a) statements, which "provide the information necessary to trigger § 16(b) enforcement." Brief for Respondent 24. Simmonds—like the Ninth Circuit in *Whittaker*—disregards the most glaring indication that Congress did not intend that the limitations period be categorically tolled until the statement is filed: The limitations provision does not say so. This fact alone is reason enough to reject a departure from settled equitable-tolling principles. Moreover, § 16's purpose is fully served by the rules outlined above, under which the limitations period would not expire until two years after a reasonably diligent plaintiff would have learned the facts underlying a § 16(b) action. The usual equitable-tolling inquiry will thus take account of the unavailability of sources of information other than the § 16(a) filing. Cf., *e. g.*, *Ruth* v. *Unifund CCR Partners*, 604 F. 3d 908, 911–913 (CA6 2010); *Santos ex rel. Beato* v. *United States*, 559 F. 3d 189, 202–203 (CA3 2009). The oddity of Simmonds' position is well demonstrated by the circumstances of this case. Under the *Whittaker* rule, because petitioners have yet to file § 16(a) statements (as noted earlier they do not think themselves subject to that requirement), Simmonds still has two years to bring suit, even though she is so well aware of her alleged cause of action that she has already sued. If § 16(a) statements were, as Simmonds suggests, indispensable to a party's ability to sue, Simmonds would not be here.

Simmonds also asserts that application of established equitable-tolling doctrine in this context would be inconsist-

ent with Congress's intention to establish in § 16 a clear rule that is capable of "mechanical application." Brief for Respondent 57 (internal quotation marks omitted). Equitable tolling, after all, involves fact-intensive disputes "about what the notice was, where it was disseminated, who received it, when it was received, and whether it provides sufficient notice of relevant Section 16(a) facts." *Id.*, at 56–57. Of course this argument counsels just as much in favor of the "statute of repose" rule that petitioners urge (that is, no tolling whatever) as it does in favor of the *Whittaker* rule. No tolling is certainly an easily administrable bright-line rule. And assuming some form of tolling does apply, it is preferable to apply that form which Congress was certainly aware of, as opposed to the rule the Ninth Circuit has fashioned.[7] See *Meyer* v. *Holley*, 537 U. S. 280, 286 (2003) ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules").

* * *

Having determined that § 16(b)'s limitations period is not tolled until the filing of a § 16(a) statement, we remand for the lower courts to consider how the usual rules of equitable tolling apply to the facts of this case.[8] We are divided 4 to

[7] It is for this reason that we also reject the Second Circuit's rule that the 2-year period is tolled until the plaintiff "gets actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing," *Litzler* v. *CC Investments, L. D. C.*, 362 F. 3d 203, 208 (2004). As that court itself recognized, this actual-notice rule departs from usual equitable-tolling principles. See *id.*, at 207.

[8] The District Court said that "there is no dispute that all of the facts giving rise to Ms. Simmonds' complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed," 602 F. Supp. 2d, at 1217. The Court of Appeals did not consider the accuracy of that statement, which Simmonds disputes, Brief for Respondent 12, since it concluded the period is tolled until a § 16(a) statement is filed.

4 concerning, and thus affirm without precedential effect, the Court of Appeals' rejection of petitioners' contention that § 16(b) establishes a period of repose that is not subject to tolling. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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

Syllabus

SETSER *v.* UNITED STATES

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

No. 10–7387. Argued November 30, 2011—Decided March 28, 2012

When petitioner Setser was indicted in a Texas court on drug charges, the State also moved to revoke the probation term that he was then serving for another drug offense. At about the same time, Setser pleaded guilty to federal drug charges. The Federal District Court imposed a 151-month sentence to run consecutively to any state sentence imposed for the probation violation, but concurrently with any state sentence imposed on the new drug charge. While Setser's federal appeal was pending, the state court sentenced him to 5 years for the probation violation and 10 years for the drug charge, but ordered the sentences to be served concurrently. The Fifth Circuit affirmed the federal sentence, holding that the District Court had authority to order a sentence consecutive to an anticipated state sentence, and that Setser's sentence was reasonable, even if the state court's decision made it unclear exactly how to administer it.

Held:

1. The District Court had discretion to order that Setser's federal sentence run consecutively to his anticipated state sentence for the probation violation. Pp. 234–243.

(a) Judges have traditionally had broad discretion in selecting whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings, see *Oregon* v. *Ice*, 555 U. S. 160, 168–169. The statutory text and structure do not foreclose a district court's exercise of this discretion with respect to anticipated state sentences. The Sentencing Reform Act of 1984 addresses the concurrent-vs.-consecutive decision, but not the situation here, since the District Court did not impose "multiple terms of imprisonment . . . at the same time," and Setser was not "already subject to" the state sentences at issue, 18 U. S. C. § 3584(a). This does not mean, as Setser and the Government claim, that the District Court lacked authority to act as it did and that the Bureau of Prisons is to make the concurrent-vs.-consecutive decision after the federal sentence has been imposed. Section 3621(b), from which the Bureau claims to derive this authority, says nothing about concurrent or consecutive sentences. And it is more natural to read § 3584(a) as leaving room for the exercise

of judicial discretion in situations not covered than it is to read § 3621(b) as giving the Bureau what amounts to sentencing authority. Setser's arguments to the contrary are unpersuasive. Pp. 234–239.

(b) None of the other objections raised by Setser and the Government require a different result. Pp. 239–243.

2. The state court's subsequent decision to make the state sentences run concurrently does not establish that the Federal District Court imposed an unreasonable sentence. The difficulty here arises not from the federal-court sentence—which is to run concurrently with one state sentence and consecutively with another—but from the state court's decision. Deciding which of the District Court's dispositions should prevail under these circumstances is a problem, but it does not show the District Court's sentence to be unlawful. The reasonableness standard for reviewing federal sentences asks whether the district court abused its discretion, see *Gall* v. *United States*, 552 U. S. 38, 46, but Setser identifies no flaw in the District Court's decisionmaking process, nor anything available at the time of sentencing that the court failed to consider. Where late-onset facts make it difficult, or even impossible, to implement the sentence, the Bureau of Prisons may determine, in the first instance, how long the District Court's sentence authorizes it to continue Setser's confinement, subject to the potential for judicial review. Pp. 243–245.

607 F. 3d 128, affirmed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed a dissenting opinion, in which KENNEDY and GINSBURG, JJ., joined, *post*, p. 247.

Jason D. Hawkins argued the cause for petitioner. With him on the briefs were *Kevin J. Page*, *J. Matthew Wright*, and *Richard A. Anderson.*

William M. Jay argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Richard A. Friedman.*

Evan A. Young, by invitation of the Court, 564 U. S. 1014, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief were *Joseph R. Knight*, *Thomas R. Phillips*, *Dustin M. Howell*, *Matt C. Wood*, *Macey Reasoner Stokes*, and *Aaron M. Streett.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a district court, in sentencing a defendant for a federal offense, has authority to order that the federal sentence be consecutive to an anticipated state sentence that has not yet been imposed.

I

When officers of the Lubbock Police Department arrested petitioner Monroe Setser for possessing methamphetamine, he was already serving a 5-year term of probation imposed by a Texas court for another drug offense. Setser was indicted in state court for possession with intent to deliver a controlled substance, and the State also moved to revoke his term of probation. As often happens in drug cases, the federal authorities also got involved. A federal grand jury indicted Setser for possessing with intent to distribute 50 grams or more of methamphetamine, 21 U. S. C. § 841(a)(1), (b)(1)(A)(viii), and he pleaded guilty.

Before the federal sentencing hearing, a probation officer calculated the applicable Sentencing Commission Guidelines range to be 121 to 151 months' imprisonment. Citing precedent from the United States Court of Appeals for the Fifth Circuit, *United States* v. *Brown*, 920 F. 2d 1212 (1991) *(per curiam)*, he indicated that the District Court had discretion to make Setser's sentence either concurrent with or consecutive to any sentence anticipated in the separate state-court proceedings. Setser objected, arguing that the District Court lacked such authority. The court nevertheless made the sentence of 151 months that it imposed consecutive to any state sentence imposed for probation violation, but concurrent with any state sentence imposed on the new drug charge. Setser appealed.

While Setser's appeal was pending, the state court sentenced him to a prison term of 5 years for probation violation and 10 years on the new drug charge. It ordered that these sentences be served concurrently. Setser then made before the Court of Appeals, in addition to the argument that the

District Court had no authority to order a consecutive sentence, the argument that his federal sentence was unreasonable because it was impossible to implement in light of the concurrent state sentences.

The Court of Appeals for the Fifth Circuit affirmed. 607 F. 3d 128 (2010). Following its earlier *Brown* decision, the court held that the District Court did have authority to order a consecutive sentence. 607 F. 3d, at 131–132. It also held that Setser's sentence was reasonable, even if it was "'partially foiled'" by the state court's decision. *Id.*, at 132–133. We granted certiorari, 564 U. S. 1004 (2011), and appointed an *amicus curiae* to brief and argue this case in support of the judgment below, 564 U. S. 1014 (2011).

II

Before proceeding further, it is important to be clear about what is at issue. Setser does not contend that his federal sentence must run concurrently with both state sentences imposed after his federal sentencing hearing. He acknowledges that *someone* must answer "the consecutive versus concurrent question," Brief for Petitioner 27, and decide how the state and federal sentences will fit together. The issue here is *who* will make that decision, which in turn determines *when* that decision is made. One possible answer, and the one the Fifth Circuit gave, is that the decision belongs to the Federal District Court at the federal sentencing hearing.

The concurrent-vs.-consecutive decision has been addressed by §212(a) of the Sentencing Reform Act of 1984, 18 U. S. C. §3584, reproduced in full as Appendix A, *infra*. The first subsection of that provision, which says when concurrent and consecutive sentences may be imposed, and specifies which of those dispositions will be assumed in absence of indication by the sentencing judge, does not cover the situation here. It addresses only "multiple terms of imprisonment . . . imposed . . . at the same time" and "a term of imprisonment . . . imposed on a defendant who is

already subject to an undischarged term of imprisonment." § 3584(a). Here the state sentence is not imposed at the same time as the federal sentence, and the defendant was not already subject to that state sentence.

Setser, supported by the Government, argues that, because § 3584(a) does not cover this situation, the District Court lacked authority to act as it did; and that the concurrent-vs.-consecutive decision is therefore to be made by the Bureau of Prisons at any time after the federal sentence has been imposed. The Bureau of Prisons is said to derive this authority from 18 U. S. C. § 3621(b) (2006 ed. and Supp. IV), reproduced in full as Appendix B, *infra.*

On its face, this provision says nothing about concurrent or consecutive sentences, but the Government explains its position as follows: Section 3621(b) gives the Bureau the authority to order that a prisoner serve his federal sentence in any suitable prison facility "whether maintained by the Federal Government or otherwise." The Bureau may therefore order that a prisoner serve his federal sentence in a *state* prison. Thus, when a person subject to a federal sentence is serving a state sentence, the Bureau may designate the state prison as the place of imprisonment for the federal sentence—effectively making the two sentences concurrent—or decline to do so—effectively making them consecutive.[1] Based on §§ 3584(a) and 3621(b), Setser and the Government argue that the concurrent-vs.-consecutive decision, under the circumstances presented here, is committed exclusively to the Bureau of Prisons.

It is fundamental that we construe statutes governing the jurisdiction of the federal courts in light of "the common-law background against which the statutes . . . were enacted," *New Orleans Public Service, Inc.* v. *Council of City of New Orleans*, 491 U. S. 350, 359 (1989), and the same approach

[1] The Bureau of Prisons sometimes makes this designation while the prisoner is in state custody and sometimes makes a *nunc pro tunc* designation once the prisoner enters federal custody.

is appropriate here, where the issue concerns a matter of discretion traditionally committed to the Judiciary. Judges have long been understood to have discretion to select whether the sentences they impose will run concurrently or consecutively with respect to other sentences that they impose, or that have been imposed in other proceedings, including state proceedings. See *Oregon* v. *Ice*, 555 U. S. 160, 168–169 (2009). And a large majority of the federal appellate courts addressing the question have recognized a similar authority in the context here, where a federal judge anticipates a state sentence that has not yet been imposed. See *Salley* v. *United States*, 786 F. 2d 546, 547 (CA2 1986); *Anderson* v. *United States*, 405 F. 2d 492, 493 (CA10 1969) *(per curiam); United States ex rel. Lester* v. *Parker*, 404 F. 2d 40, 41–42 (CA3 1968) *(per curiam); United States* v. *Kanton*, 362 F. 2d 178, 179–180 (CA7 1966) *(per curiam);* but see *United States* v. *Eastman*, 758 F. 2d 1315, 1317 (CA9 1985).[2] We find noth-

[2] The dissent is incorrect to say, *post*, at 253–254 (opinion of BREYER, J.), that only the Second Circuit, in *Salley*, held to that effect. So did the Seventh Circuit in *Kanton* and the Tenth Circuit in *Anderson*. The dissent says that *Anderson* addressed only the question "whether a federal sentence runs from the date of its imposition or from the date of entry into federal custody," *post*, at 253. That is true enough (and it is true of *Kanton* as well); but answering that question in a manner that upheld the consecutive federal sentence (*i. e.*, it runs from the date of entry into federal custody) necessarily upheld the sentencing court's authority to impose the consecutive federal sentence. In fact, *Anderson* confronted and specifically rejected the defendant's argument that "'no court has the authority to impose a sentence consecutive to something that does not exist,'" 405 F. 2d, at 493. And, finally, so did the Third Circuit in *Lester*. The dissent says that *Lester* addressed only the question "whether a sentence was insufficiently certain for purposes of due process," *post*, at 253. But that was the defendant's principal reason (as it appears also to be the dissent's principal reason) for asserting that the sentencing court *had no authority* to impose a consecutive sentence. And the Third Circuit rejected not only that reason but "[o]ther arguments advanced by [the defendant]" attacking the consecutive sentence, 404 F. 2d, at 42.

The only contrary federal appellate decision rendered before the Sentencing Reform Act took effect relied upon 18 U. S. C. § 4082 (1982 ed.)

ing in the Sentencing Reform Act, or in any other provision of law, to show that Congress foreclosed the exercise of district courts' sentencing discretion in these circumstances.

Setser's main contention is that § 3584(a) has this effect. But that provision cannot sustain the weight that Setser asks it to bear. In essence, he reads the first sentence in § 3584(a) to say that "terms [of imprisonment] may run concurrently or consecutively" *only* "[i]f multiple terms of imprisonment are imposed . . . at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment." Since the District Court was not imposing the state sentence and since it was not already imposed, the sentence could not be ordered to run consecutively. But if the text is exclusive—if the addition of *only* is correct—the provision forbids not only the imposition of consecutive sentences, but the imposition of concurrent ones as well. And yet, as Setser acknowledges, it must be one or the other; *someone* must decide the issue.

Setser's response is that, read in context, the sentence speaks only to district courts. Under the circumstances at issue here, he says, the federal and state sentences still might run either concurrently or consecutively, but just not at the discretion of the District Court. That is an odd parsing of the text, which makes no distinction between the district court and the Bureau of Prisons. The placement of § 3584 does indeed suggest that it is directed at district courts—but that is likely because Congress contemplated that only district courts would have the authority to make the concurrent-vs.-consecutive decision, not because Congress meant to leave the Bureau unfettered. Indeed, the Bureau already follows the other directives in § 3584(a). See Brief for United States 35. For example, if the district

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(the predecessor of § 3621) and § 3568 (1982 ed.) (repealed by 98 Stat. 1987), which provided that a federal sentence "shall commence to run from the date on which such person is received" into federal custody. See *United States* v. *Eastman*, 758 F. 2d 1315, 1317 (CA9 1985).

court imposes multiple terms of imprisonment at the same time, but fails to address the concurrent-vs.-consecutive issue, the terms "run concurrently," § 3584(a), and the Bureau is not free to use its "place of imprisonment" authority to achieve a different result.[3]

The Latin maxim on which Setser relies—*expressio unius est exclusio alterius*—might have application here if the provision in question were a conferral of authority on district courts. Giving sentencing authority in only specified circumstances could be said to imply that it is withheld in other circumstances. Section 3584, however, is framed not as a conferral of authority but as a limitation of authority that already exists (and a specification of what will be assumed when the exercise of that authority is ambiguous). It reads *not* "District courts shall have authority to impose multiple terms of imprisonment on a defendant at the same time, etc." but rather "*If* multiple terms of imprisonment are imposed on a defendant at the same time, [etc.]"—quite clearly assuming that such authority already exists. (Emphasis added.) The mere acknowledgment of the existence of certain pre-existing authority (and regulation of that authority) in no way implies a repeal of other pre-existing authority. And that is especially true when there is an obvious reason for selecting the instances of pre-existing authority that are addressed—to wit, that they are the examples of sentencing discretion most frequently encountered.

Moreover, *expressio unius est exclusio alterius* is a double-edged sword. Setser thinks it suggests that, because § 3584(a) recognizes judicial discretion in scenario *A*

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[3] The Government contends that the Bureau applies the default rules in § 3584(a) "[a]s a matter of discretion" but is not "'bound'" by that subsection. Reply Brief for United States 15, n. 5. We think it implausible that the effectiveness of those rules—of § 3584(a)'s prescription, for example, that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently"—depends upon the "discretion" of the Bureau.

and scenario *B*, there is no such discretion in scenario *C*. But the same maxim shows much more convincingly why § 3621(b) cannot be read to give the Bureau of Prisons exclusive authority to make the sort of decision committed to the district court in § 3584(a). When § 3584(a) specifically addresses decisions about concurrent and consecutive sentences, and makes no mention of the Bureau's role in the process, the implication is that no such role exists. And that conclusion is reinforced by application of the same maxim (properly, in this instance) to § 3621(b)—which *is* a conferral of authority on the Bureau of Prisons, but does not confer authority to choose between concurrent and consecutive sentences. Put to the choice, we believe it is much more natural to read § 3584(a) as not containing an implied "only," leaving room for the exercise of judicial discretion in the situations not covered, than it is to read § 3621(b) as giving the Bureau of Prisons what amounts to sentencing authority.

III

None of the other objections to this approach raised by Setser and the Government require a different result.

Our decision today follows the interpretive rule they invoke, that we must "give effect . . . to every clause and word" of the Act. *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955) (internal quotation marks omitted). The first sentence in § 3584(a) addresses the most common situations in which the decision between concurrent and consecutive sentences must be made: where two sentences are imposed at the same time, and where a sentence is imposed subsequent to a prior sentence that has not yet been fully served. It says that the district court has discretion whether to make the sentences concurrent or consecutive, *except that* it may not make consecutive a sentence for "an attempt" and a sentence for an "offense that was the sole objective of the attempt." And the last two sentences of § 3584(a) say what will be assumed in those two common situations if the court

does not specify that the sentence is concurrent or consecutive. Giving those dispositions full effect does not demand that we regard them as eliminating sentencing discretion in other situations.

Setser and the Government both suggest that, because § 3584(b) directs courts to consider the sentencing factors in § 3553(a) in making these decisions, and because some of those factors will be difficult to apply with respect to anticipated sentences, the Act cannot be read to allow judicial discretion in these circumstances. One cannot be sure that the sentence imposed is "sufficient, but not greater than necessary," § 3553(a), the argument goes, if one does not know how long it will actually be. But the district judge faces the same uncertainty if the concurrent-vs.-consecutive decision is left for later resolution by the Bureau of Prisons; he does not know, for example, whether the 5-year sentence he imposes will be an actual five years or will be simply swallowed within another sentence. To be sure, the Bureau of Prisons, if it waits to decide the matter until after the state court has imposed its sentence, will know for sure what sentences it is dealing with. But the Bureau is not charged with applying § 3553(a). The factors that guide the agency's "place of imprisonment" decision do include "the nature and circumstances of the offense" and "the history and characteristics of the prisoner," § 3621(b)(2), (b)(3) (2006 ed.)—factors that are, to be sure, relevant to sentencing but also relevant to selection of the place of confinement; but they also include factors that make little, if any, sense in the sentencing context, such as "the resources of the facility contemplated" and whether the state facility "meets minimum standards of health and habitability," § 3621(b), (b)(1). (These factors confirm our view that § 3621 is not a sentencing provision but a place-of-confinement provision.) It is much more natural for a judge to apply the § 3553(a) factors in making all concurrent-vs.-consecutive decisions, than it is for some such decisions to be made by a judge applying § 3553(a) factors

and others by the Bureau of Prisons applying § 3621(b) factors.

The final objection is that principles of federalism and good policy do not allow a district court to make the concurrent-vs.-consecutive decision when it does not have before it all of the information about the anticipated state sentence. As for principles of federalism, it seems to us they cut in precisely the opposite direction. In our American system of dual sovereignty, each sovereign—whether the Federal Government or a State—is responsible for "the administration of [its own] criminal justice syste[m]." *Ice*, 555 U. S., at 170. If a prisoner like Setser starts in state custody, serves his state sentence, and then moves to federal custody, it will always be the Federal Government—whether the district court or the Bureau of Prisons—that decides whether he will receive credit for the time served in state custody. And if he serves his federal sentence first, the State will decide whether to give him credit against his state sentences without being bound by what the district court or the Bureau said on the matter. Given this framework, it is always more respectful of the State's sovereignty for the district court to make its decision up front rather than for the Bureau of Prisons to make the decision *after* the state court has acted. That way, the state court has all of the information before it when it acts.[4] The Government's position does not promote the States' interest—just the interests of the Bureau of Prisons.

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[4] Setser notes that the text of § 3584(a) does not distinguish between state and federal sentences. If a district court can enter a consecutive sentencing order in advance of an anticipated state sentence, he asks, what is to stop it from issuing such an order in advance of an anticipated federal sentence? It could be argued that § 3584(a) impliedly prohibits such an order because it gives that decision to the federal court that sentences the defendant when the other sentence is "already" imposed—and does not speak (of course) to what a *state* court must do when a sentence has already been imposed. It suffices to say, however, that this question is not before us.

As for good policy: The basic claim of Setser, the Government, and the dissent is that when it comes to sentencing, later is always better because the decisionmaker has more information. See, *e. g.*, *post*, at 252 ("[A] sentencing judge typically needs detailed information when constructing a multiple-count or multiple-conviction Guideline sentence"). That is undoubtedly true, but when that desideratum is applied to the statutory structure before us here it is overwhelmed by text, by our tradition of judicial sentencing,[5] and by the accompanying desideratum that sentencing not be left to employees of the same Department of Justice that conducts the prosecution.[6] Moreover, when the district court's

[5] To support its view that Congress authorized the Bureau to make concurrent-vs.-consecutive decisions, the dissent relies on the fact that the Executive long had what is effectively sentencing authority in its ability to grant or deny parole. That is a particularly curious power for the dissent to rely upon, inasmuch as most of the dissent discusses (in great detail) the Sentencing Reform Act, *whose principal objective was to eliminate the Executive's parole power.* Curiouser still is the dissent's invocation of the Guidelines system, which "tell[s] the sentencing judge how, through the use of partially concurrent and partially consecutive sentences, to build a total sentence that meets the Guidelines' requirements." *Post*, at 249–250. These "instructions," *post*, at 249 do not cover yet-to-be-imposed sentences, the dissent says, because "the sentencing judge normally does not yet know enough about the behavior that underlies (or will underlie)" such a sentence. *Post*, at 250. That explains, perhaps, why the Guidelines' "instructions" to judges do not cover them. But why do not the Guidelines "instruct" the Bureau of Prisons how to conduct its concurrent/consecutive sentencing? If the reason is (as we suspect) that the Sentencing Commission does not have, or does not believe it has, authority to "instruct" the Bureau of Prisons, the dissent's entire argument based upon what it calls "the purposes and the mechanics of the SRA's sentencing system," *post*, at 252, falls apart. Yet-to-be-imposed sentences are not within the system at all, and we are simply left with the question whether judges or the Bureau of Prisons is responsible for them. For the reasons we have given, we think it is judges.

[6] Of course, a district court should exercise the power to impose anticipatory consecutive (or concurrent) sentences intelligently. In some situations, a district court may have inadequate information and may forbear, but in other situations, that will not be the case.

failure to "anticipat[e] developments that take place after the first sentencing," Brief for United States 29, produces unfairness to the defendant, the Act provides a mechanism for relief. Section 3582(c)(1)(A) provides that a district court,

> "upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction [or that the defendant meets other criteria for relief]."

IV

Setser argues that, even if the District Court's consecutive order was consistent with § 3584(a), it made his sentence impossible to implement and therefore unreasonable under the Act, see *United States* v. *Booker*, 543 U. S. 220, 261–262 (2005),[7] in light of the State's decision to make his sentences concurrent. We think not. There is nothing unreasonable—let alone inherently impossible—about the sentence itself. Setser is ordered to serve a 151-month term in federal custody, and that sentence should run concurrently with one state sentence and consecutively with another.

The difficulty arises not from the sentence, but from the state court's decision to make both state sentences concurrent. Which of the District Court's dispositions should prevail: that his federal sentence run consecutively to the state sentence on the parole revocation charge, or that his federal sentence run concurrently with the state sentence on the

[7] We have never had occasion to decide whether reasonableness review under *Booker* applies to a court's decision that a federal sentence should run concurrently with or consecutively to another sentence. The Courts of Appeals, however, generally seem to agree that such review applies. See, *e. g., United States* v. *Padilla*, 618 F. 3d 643, 647 (CA7 2010) *(per curiam); United States* v. *Matera*, 489 F. 3d 115, 123–124 (CA2 2007). For purpose of the present case we assume, without deciding, that it does.

new drug charge? If the federal sentence is added to the state sentence it will not be concurrent with the new drug charge, and if it is merged in the state sentence it will not be consecutive to the parole revocation charge. This is indeed a problem, but not, we think, one that shows the District Court's sentence to be unlawful. The reasonableness standard we apply in reviewing federal sentences asks whether the district court abused its discretion. See *Gall* v. *United States*, 552 U. S. 38, 46 (2007). Setser identifies no flaw in the District Court's decisionmaking process, nor anything available at the time of sentencing that the District Court failed to consider. That a sentence is thwarted does not mean that it was unreasonable. If a district court ordered, as a term of supervised release, that a defendant maintain a steady job, but a subsequent disability rendered gainful employment infeasible, we doubt that one would call the original sentence an abuse of discretion. There will often be late-onset facts that materially alter a prisoner's position and that make it difficult, or even impossible, to implement his sentence.

This is where the Bureau of Prisons comes in—which ultimately has to determine how long the District Court's sentence authorizes it to continue Setser's confinement. Setser is free to urge the Bureau to credit his time served in state court based on the District Court's judgment that the federal sentence run concurrently with the state sentence for the new drug charges. If the Bureau initially declines to do so, he may raise his claim through the Bureau's Administrative Remedy Program. See 28 CFR § 542.10 *et seq.* (2011). And if that does not work, he may seek a writ of habeas corpus. See 28 U. S. C. § 2241. We express no view on whether those proceedings would be successful.

* * *

Because it was within the District Court's discretion to order that Setser's sentence run consecutively to his antici-

pated state sentence in the probation revocation proceeding; and because the state court's subsequent decision to make that sentence concurrent with its other sentence does not establish that the District Court abused its discretion by imposing an unreasonable sentence; we affirm the judgment of the Court of Appeals.

It is so ordered.

APPENDIXES

A

18 U. S. C. § 3584

"Multiple sentences of imprisonment

"(a) IMPOSITION OF CONCURRENT OR CONSECUTIVE TERMS.—If multiple terms of imprisonment are imposed on a defendant at the same time, or if a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively, except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt. Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively. Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.

"(b) FACTORS TO BE CONSIDERED IN IMPOSING CONCURRENT OR CONSECUTIVE TERMS.—The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively, shall consider, as to each offense for which a term of imprisonment is being imposed, the factors set forth in section 3553(a).

"(c) TREATMENT OF MULTIPLE SENTENCE AS AN AGGREGATE.—Multiple terms of imprisonment ordered to run con-

secutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment."

B

18 U. S. C. § 3621(b) (2006 ed. and Supp. IV)

"PLACE OF IMPRISONMENT.—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

"(1) the resources of the facility contemplated;

"(2) the nature and circumstances of the offense;

"(3) the history and characteristics of the prisoner;

"(4) any statement by the court that imposed the sentence—

"(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

"(B) recommending a type of penal or correctional facility as appropriate; and

"(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

"In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or

abuse. Any order, recommendation, or request by a sentencing court that a convicted person serve a term of imprisonment in a community corrections facility shall have no binding effect on the authority of the Bureau under this section to determine or change the place of imprisonment of that person."

JUSTICE BREYER, with whom JUSTICE KENNEDY and JUSTICE GINSBURG join, dissenting.

The Sentencing Reform Act of 1984 seeks to reform federal sentencing practices by creating a Federal Sentencing Commission instructed to develop and to promulgate Federal Sentencing Guidelines. The provision of the Act here at issue concerns "[m]ultiple sentences." See 18 U. S. C. § 3584. It brings into focus a difficult Guidelines-related problem: How should a federal judge sentence an offender where the offender has been convicted of having violated several different statutes? The convictions may have taken place all at the same time. Or, some convictions might have taken place at an earlier time, the offender may already have been sentenced to prison, and indeed the offender may still be serving that sentence. The federal judge must decide the extent to which a sentence attached to one conviction should be served concurrently or consecutively with sentences attached to other convictions.

An understanding of the nature of this general problem and the Sentencing Commission's statutorily foreseen solutions will help the reader understand why, in my view, the better legal answer to the question before us is that a federal sentencing judge does *not* have the power to order that a "federal sentence be consecutive to an anticipated state sentence that has not yet been imposed." *Ante,* at 233.

I

The Sentencing Reform Act (SRA or Act) has two overall objectives. See *Barber* v. *Thomas*, 560 U. S. 474, 481–482 (2010); see also United States Sentencing Commission,

Guidelines Manual § 1A3, p. 1.2 (Oct. 1987) (USSG) (addressing statutory objectives). First, it seeks greater honesty in sentencing. Instead of a parole commission and a judge trying to second-guess each other about the time an offender will actually serve in prison, the SRA tries to create a sentencing system that will require the offender actually to serve most of the sentence the judge imposes. See *Mistretta* v. *United States*, 488 U. S. 361, 367 (1989) ("[The SRA] makes all sentences basically determinate"). Second, the Act seeks greater fairness in sentencing through the creation of Guidelines that will increase the likelihood that two offenders who engage in roughly similar criminal behavior will receive roughly similar sentences. See *Barber*, *supra*, at 482 (noting that Congress sought to achieve, in part, "increased sentencing uniformity").

To implement these reforms, the SRA instructs the Commission to write Guidelines that inevitably move in the direction of increased "real offense" sentencing. See USSG § 1A2, at 1.1 (describing how statute, *e. g.*, by insisting upon categories of offense behavior and offender characteristics, leads to this result). In principle, real offense sentencing would impose the same sentence upon different offenders who engage in the same real conduct *irrespective of the statutes under which they are charged.* Real offense sentencing, for example, would mean that two individuals, both of whom rob a bank and injure a teller, would receive the same sentence even if the Government charges one of them under a bank robbery statute and the other under an assault statute. See, *e. g.*, USSG App. A (listing federal statutory offenses, while keying them to specific individual Guidelines that determine sentence based upon likely actual *behavior*). In the event, the Guidelines move the sentencing system in this direction while simultaneously recognizing that other factors require considerable modification of the real offense principle. See § 1A4(a) ("Real Offense vs. Charge Offense Sentencing").

Nonetheless the "real offense" goal influenced the Act's, and the Commission's, objectives in respect to the sentencing of an offender with multiple convictions. Insofar as several convictions arise out of the same course of behavior, the sentencing judge should treat the crimes underlying the convictions as if they were all part of a single crime and sentence accordingly. But, insofar as the crimes underlying the convictions arise out of different courses of behavior, the sentencing judge should treat the crimes underlying the convictions as if they were not part of a single crime and should see that the ultimate sentence reflects that fact.

To achieve these objectives is easier said than done. For one thing, it requires a definition of what counts as the same course of behavior. The Guidelines set forth that definition in § 1B1.3, at 1.17 ("Relevant Conduct"). For another thing, statutes and Guidelines that set forth related instructions must take into account the fact that sentencing-related circumstances can prove highly complex. To take a fairly simple example, suppose that a defendant is convicted of both robbery and impersonating a federal official, that he has engaged in a single course of behavior, but that neither the robbery nor the impersonation Guidelines take account of the other. Instructions about concurrent/consecutive sentences must give the judge an idea about what to do in such a case. They must also take account of the fact that a maximum penalty contained in a statute will trump a greater penalty contained in a Guideline. And they must tell the judge (faced with multiple convictions) what to do where that is so.

Reflecting these, and other, complexities, the Guidelines contain complex instructions about how to sentence where the offender is convicted of "Multiple Counts," see USSG § 3D, or has previously been convicted of a crime for which he is "subject to an undischarged term of imprisonment," see § 5G1.3. The Guidelines also tell the sentencing judge how, through the use of partially concurrent and partially consec-

utive sentences, to build a total sentence that meets the Guidelines' requirements. See §§ 5G1.2(d), 5G1.3.

With this background it becomes easier to understand the statutory provisions before us. They reflect the fact that Congress expected sentencing judges, when faced with a defendant convicted of multiple crimes, to construct a sentence that would, at least to a degree, reflect the defendant's real underlying behavior. Where two convictions reflect in whole or in part the same behavior, the overall sentences should reflect that fact, say, by running concurrently.

Accordingly, the statute says that "[m]ultiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." 18 U. S. C. § 3584(a). And that statement reflects the fact that often (but not always) multiple convictions after a single trial will reflect a single course of behavior (different aspects of which violate different criminal statutes). The statute also says that "[m]ultiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently." *Ibid.* This statement reflects the fact that several convictions imposed after different trials are more likely to reflect unrelated behaviors. In the first instance that the statute addresses, concurrent sentences are more likely to be appropriate; in the second, consecutive sentences are more likely to be appropriate. But that is not always so. Thus the statutory provisions assure sentencing judges that they retain the power to reach a different conclusion.

At this point, I would ask the question that this case poses. Why does the statute say nothing about a sentencing judge imposing a sentence that might run consecutively with a sentence that a (typically different) judge *has not yet imposed?* The answer is this: Because the sentencing judge normally does not yet know enough about the behavior that underlies (or will underlie) a sentence that has not yet been imposed. Normally the sentencing judge does not know, for example,

(1) what that sentence will be, (2) whether the behavior underlying that later sentence constitutes part of the same course of behavior that underlies the present sentence or, instead, is totally separate from the behavior underlying the present sentence, or (3) is partly the same and partly different. Even if the judge has an idea about what will happen, he does not know *precisely* what will happen; and precision in this matter is important.

In a word, the sentencing judge normally does not yet know enough about what will happen in the sentencing-proceeding-yet-to-come to be able to construct a sentence that meets the Guidelines' instructions and which, in doing so, helps to ensure that different individuals who engage in the same criminal behavior will typically receive roughly comparable sentences.

Of course, the Court is correct when it says that eventually the sentences will run (either wholly or in part) concurrently or consecutively. And *someone* must decide how they will run. *Ante*, at 234. But the Court is not correct when it says that this someone should be the first federal sentencing judge. Rather, the Executive and Judicial Branches have devised a system that can draw upon the intentions of that first federal judge, while applying them in light of actual knowledge about what later happened. The Bureau of Prisons (BOP or Bureau) in effect makes the consecutive/concurrent decision after considering, among other things, "any statement by the court that imposed the sentence," including statements "concerning the purposes for which the sentence to imprisonment was determined to be warranted." 18 U. S. C. §3621(b)(4)(A). And its program statement provides that it will review the "intent of the federal sentencing court" when deciding whether in effect to make an earlier federal, and later state, sentence concurrent or consecutive. Dept. of Justice, BOP, Program Statement No. 5160.05: Designation of State Institution for Service of Federal Sentence 4 (Jan. 16, 2003). The Bureau exercises this authority by

designating (or refusing to designate) the state prison where an offender is or will be incarcerated pursuant to his state sentence as the place where he will serve his federal sentence. 18 U. S. C. § 3621(b) (2006 ed. and Supp. IV).

This exercise of authority by the Executive Branch is not constitutionally surprising. After all, "federal sentencing" has "never . . . been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government." *Mistretta*, 488 U. S., at 364. And, until fairly recently the federal BOP decided (via parole) the far more global question of just how long (within broad limits) each imprisoned offender would serve. See *id.*, at 367. Thus, the present Bureau involvement represents a further practical accommodation to a fact about the world, namely, that the initial sentencing judge typically lacks important sentencing-related information about a second sentence that has not yet been imposed.

II

Given the purposes and the mechanics of the SRA's sentencing system, just described, the better reading of the "multiple sentences" provision is a reading that denies a sentencing judge the authority to "order that the federal sentence be consecutive to an anticipated state sentence that has not yet been imposed." *Ante*, at 233. For one thing, nothing in the statute explicitly grants the judge that authority. The text refers to *other* circumstances, those that involve earlier or contemporaneous (multiple-count) convictions, while it does not refer to later imposed sentences.

For another, exercise of any such authority would more likely hinder than advance the basic objectives of the SRA. As I have explained, *supra*, at 247–250, a sentencing judge typically needs detailed information when constructing a multiple-count or multiple-conviction Guideline sentence. The fact that the future sentence has not yet been imposed

means that information will often be lacking, and that in turn means that the exercise of such authority would risk confusion and error. A sentencing judge who believes, for example, that the future conviction will be based upon different relevant conduct (and consequently orders a consecutive sentence) could discover that the second conviction rests upon the same relevant conduct (warranting a concurrent sentence). Mistakes of this kind increase the risk of sentencing disparity and, insofar as the first judge guesses wrong, they can mean a less honest sentencing process as well.

Further, I can find no significant tradition (pre-Guideline or post-Guideline) of federal judges imposing a sentence that runs consecutively with a sentence not yet imposed. The Court refers to four Courts of Appeals cases for the proposition that "traditionally" a judge possessed this authority. *Ante,* at 236. The opinions in three of the cases are each about a page long and do not discuss the matter here at issue. (They assume, without significant discussion, the existence of the relevant sentencing authority.) See *Anderson* v. *United States*, 405 F. 2d 492, 493 (CA10 1969) *(per curiam)* (addressing the question whether a federal sentence runs from the date of its imposition or from the date of entry into federal custody); *United States* v. *Kanton*, 362 F. 2d 178, 179–180 (CA7 1966) *(per curiam)* (same); *United States ex rel. Lester* v. *Parker*, 404 F. 2d 40, 41 (CA3 1968) *(per curiam)* (addressing the question whether a sentence was insufficiently certain for purposes of due process). The fourth case, *Salley* v. *United States*, 786 F. 2d 546, 548 (CA2 1986), discusses the issue directly and takes the Court's position. But, like the other three cases, it was decided before the Guidelines took effect (*i. e.*, when the reasons for denying the authority were less strong). And, one judge on the panel disagreed in a separate opinion, and in my view has the better of the argument. See *id.*, at 548–550 (Newman, J., concurring in result); see also *United States* v. *Eastman*, 758 F. 2d 1315, 1317

(CA9 1985) (holding that a judge lacks the here-relevant sentencing power). In any event, these instances are too few to constitute a "tradition."

In fact the Senate Committee Report accompanying the SRA provides strong evidence that there was no such tradition. S. Rep. No. 98–225 (1983). That Report thoroughly surveyed prior law. It says that the SRA is a "comprehensive statement of the Federal law of sentencing," that it "describes in detail the kinds of sentences that may be imposed," and that § 3584 "provides the rules for determining the length of a term of imprisonment for a person convicted of more than one offense." *Id.*, at 50, 125–126. It further states that "[e]xisting law permits the imposition of either concurrent or consecutive sentences," *which practice it then describes as limited to two scenarios:* "[t]erms of imprisonment imposed at the same time," and those "imposed on a person already serving a prison term." *Id.*, at 126. It says the same when describing how § 3584 is supposed to work. In neither place does it refer to a practice of, or any authority for, imposing a prison term that runs consecutively with a future term *not yet imposed.*

In addition, a grant of such authority risks at least occasional incoherence. For example, the statute, after setting forth the court's authority to impose a sentence of imprisonment that runs either concurrently or consecutively with other terms *imposed in the same or in earlier proceedings*, creates an exception that says: "except that the terms may not run consecutively for an attempt and for another offense that was the sole objective of the attempt." 18 U. S. C. § 3584(a) (2006 ed.). Now suppose the Court were right, and a sentencing judge had the authority to run a present term consecutively with a not-yet-imposed future term. Would it not be important to apply this same "attempt" exception in such instances as well? Indeed, the exception is phrased in categorical terms, and the legislative history in no way indicates that the exception applies only occasionally. See S. Rep. No. 98–225, at 126 ("[C]onsecutive terms of imprison-

ment *may not*, contrary to current law, be imposed for [attempt] and for an offense that was the sole objective of the attempt" (emphasis added)). Yet it is difficult, if not impossible, to read the statute's language as broadening the exception beyond the statutorily listed scenarios.

Or, consider, for example, an offender tried for arguably related crimes in two different federal courts at two different times. The Court's reading would not only allow the second judge to order concurrent service with the first sentence if warranted, as the statute explicitly permits, but it would also allow the first judge to make an analogous but anticipatory order based upon the sentence he expected the second judge would impose. But where complex forms of criminal behavior are at issue, these different judges may reach different conclusions. The result may well be conflict and confusion.

Finally, as I said above, *supra*, at 250–252, a more practical solution to potential problems presented by a future sentencing proceeding lies closer at hand. The BOP has the statutory authority to effect concurrent service of federal and state sentences and is well situated to take into account both the intent of the first sentencing judge and the specific facts developed in the second sentencing. The relevant statute provides that "[t]he Bureau may designate any available penal or correctional facility . . . , whether maintained by the Federal Government or otherwise . . . ." 18 U. S. C. § 3621(b). And in reliance on this authority, the Bureau has concluded that it has the power to "designat[e] . . . a state institution for concurrent service of a federal sentence." Program Statement No. 5160.05, at 1. The Program Statement further provides that exercise of this power will be guided by, in part, "the intent of the federal sentencing court" in addition to "any other pertinent information regarding the inmate." *Id.*, at 4.

The Court's only criticism of this system is that it is less "natural" to read the statute "as giving the Bureau of Prisons what amounts to sentencing authority." *Ante*, at 239.

But what is unnatural about giving the Bureau that authority? The sentencing process has long involved cooperation among the three branches of Government. *Mistretta*, 488 U. S., at 364. And until the Guidelines the BOP itself decided, within broad limits, precisely how much prison time every typical offender would serve. Even today, it still decides that question within certain limits. 18 U. S. C. § 3624 (2006 ed. and Supp. IV) (delegating to the BOP authority to calculate "good time credit," which in effect reduces a prisoner's term of incarceration); see also *Barber*, 560 U. S., at 476. Although Congress limited the Bureau's authority in this respect, there is nothing unnatural about leaving the Bureau with a small portion of that authority—particularly where doing so helps significantly to alleviate a small, but important, technical problem in the application of the SRA's sentencing system.

* * *

Because the Court does not ask *why* the "multiple sentencing" provision leaves out the authority at issue—concerning the not-yet-imposed sentence—it reaches what I believe is the wrong result. Consequently, with respect, I dissent.

Syllabus

VARTELAS *v.* HOLDER, ATTORNEY GENERAL

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

No. 10–1211. Argued January 18, 2012—Decided March 28, 2012

Before passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), United States immigration law provided deportation hearings for excludable aliens who had already entered the United States and exclusion hearings for excludable aliens seeking entry into the United States. Lawful permanent residents were not regarded as making an "entry," upon their return from "innocent, casual, and brief excursion[s] . . . outside this country's borders." *Rosenberg* v. *Fleuti*, 374 U. S. 449, 462. In IIRIRA, Congress abolished the distinction between exclusion and deportation procedures, creating a uniform "removal" proceeding. See 8 U. S. C. §§ 1229, 1229a. Congress made "admission" the key word, and defined "admission" to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." § 1101(a)(13)(A). This alteration, the Board of Immigration Appeals (BIA) determined, superseded *Fleuti.* Thus, lawful permanent residents returning from a trip abroad are now regarded as seeking admission if they have "committed an offense identified in section 1182(a)(2)," § 1101(a)(13)(C)(v), including, as relevant here, "a crime involving moral turpitude . . . or conspiracy to commit such a crime," § 1182(a)(2)(A)(i).

Petitioner Vartelas, a lawful permanent resident of the United States since 1989, pleaded guilty to a felony (conspiring to make a counterfeit security) in 1994, and served a 4-month prison sentence. In the years after his conviction, and even after IIRIRA's passage, Vartelas regularly traveled to Greece to visit his aging parents. In 2003, when Vartelas returned from a week-long trip to Greece, an immigration officer classified him as an alien seeking "admission" based on his 1994 conviction. At Vartelas' removal proceedings, his attorneys conceded removability and requested discretionary relief under former § 212(c) of the Immigration and Nationality Act. The Immigration Judge denied the request for relief, and ordered Vartelas removed to Greece. The BIA affirmed. In 2008, Vartelas filed with the BIA a timely motion to reopen the removal proceedings, alleging that his previous attorneys were ineffective for, among other lapses, conceding his removability. He sought to withdraw the concession of removability on the ground that IIRIRA's new "admission" provision did not reach back to deprive him

of lawful resident status based on his pre-IIRIRA conviction. The BIA denied the motion. The Second Circuit affirmed. Rejecting Vartelas' argument that IIRIRA operated prospectively and therefore did not govern his case, the Second Circuit reasoned that he had not relied on the prior legal regime at the time he committed the disqualifying crime.

Held: The impact of Vartelas' brief travel abroad on his permanent resident status is determined not by IIRIRA, but by the legal regime in force at the time of his conviction. Pp. 265–276.

(a) Under the principle against retroactive legislation invoked by Vartelas, courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 263. The presumption against retroactive legislation "embodies a legal doctrine centuries older than our Republic." *Id.*, at 265. Numerous decisions of this Court have invoked Justice Story's formulation for determining when a law's retrospective application would collide with the doctrine, namely, as relevant here, when such application would "attac[h] a new disability, in respect to transactions or considerations already past," *Society for Propagation of Gospel* v. *Wheeler*, 22 F. Cas. 756, 767. See, *e. g.*, *INS* v. *St. Cyr*, 533 U. S. 289, 321; *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 947; *Landgraf*, 511 U. S., at 283. Vartelas urges that applying IIRIRA to him would attach a "new disability," effectively a ban on travel outside the United States, "in respect to" past events, specifically, his offense, guilty plea, conviction, and punishment, all occurring prior to IIRIRA's passage.

Congress did not expressly prescribe § 1101(a)(13)'s temporal reach. The Court, therefore, proceeds to the dispositive question whether application of IIRIRA's travel restraint to Vartelas "would have retroactive effect" Congress did not authorize. See *id.*, at 280. Vartelas presents a firm case for application of the antiretroactivity principle. Beyond genuine doubt § 1101(a)(13)(C)(v)'s restraint on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to, *e. g.*, fulfill religious obligations or respond to family emergencies, they now face potential banishment, a severe sanction. See, *e. g.*, *Padilla* v. *Kentucky*, 559 U. S. 356, 365–366, 373–374. The Government suggests that Vartelas could have avoided any adverse consequences if he simply stayed at home in the United States. But losing the ability to travel abroad is itself a harsh penalty, made all the more devastating if it means enduring separation from close family members.

This Court has rejected arguments for retroactivity in similar cases, see *Chew Heong* v. *United States*, 112 U. S. 536, 559; *St. Cyr*, 533 U. S., at 321–323, and in cases in which the loss at stake was less momentous,

see *Landgraf*, 511 U. S., at 280–286; *Hughes Aircraft*, 520 U. S., at 946–950. Pp. 265–269.

(b) The Court finds disingenuous the Government's argument that no retroactive effect is involved in this case because the relevant event is the alien's post-IIRIRA return to the United States. Vartelas' return occasioned his treatment as a new entrant, but the reason for his "new disability" was his pre-IIRIRA conviction. That past misconduct is the wrongful activity targeted by § 1101(a)(13)(C)(v). Pp. 269–272.

(c) In determining that the change IIRIRA wrought had no retroactive effect, the Second Circuit homed in on the words "committed an offense" in § 1101(a)(13)(C)(v). It reasoned that reliance on the prior law is essential to application of the antiretroactivity principle, and that Vartelas did not commit his crime in reliance on immigration laws. This reasoning is doubly flawed. A party is not required to show reliance on the prior law in structuring his conduct. See, *e. g.*, *Landgraf*, 511 U. S., at 282, n. 35. In any event, Vartelas likely relied on then-existing immigration law, and this likelihood strengthens the case for reading a newly enacted law prospectively. *St. Cyr* is illustrative. There, a lawful permanent resident pleaded guilty to a criminal charge that made him deportable. Under the immigration law in effect when he was convicted, he would have been eligible to apply for a waiver of deportation. But his removal proceeding was commenced after IIRIRA withdrew that dispensation. Disallowance of discretionary waivers attached a new disability to past conduct, 533 U. S., at 321. Aliens like St. Cyr "almost certainly relied upon th[e] likelihood [of receiving discretionary relief] in deciding [to plead guilty, thereby] forgo-[ing] their right to a trial," *id.*, at 325. Because applying the IIRIRA withdrawal to St. Cyr would have an "obvious and severe retroactive effect," *ibid.*, and Congress made no such intention plain, *ibid.*, n. 55, the prior law governed St. Cyr's case. Vartelas' case is at least as clear as St. Cyr's for declining to apply a new law retroactively. St. Cyr could seek only the Attorney General's *discretionary* dispensation, while Vartelas, under *Fleuti*, was free, without seeking an official's permission, to make short trips to see and assist his parents in Greece. The Second Circuit compounded its initial misperception of the antiretroactivity principle by holding otherwise. *Fleuti* continues to govern Vartelas' short-term travel. Pp. 272–275.

620 F. 3d 108, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined, *post*, p. 276.

Stephanos Bibas argued the cause for petitioner. With him on the briefs were *James A. Feldman*, *Nancy Bregstein Gordon*, *Amy Wax*, *Andrew K. Chow*, and *Stephen B. Kinnaird.*

Eric D. Miller argued the cause for respondent. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, and *John W. Blakeley.**

JUSTICE GINSBURG delivered the opinion of the Court.

Panagis Vartelas, a native of Greece, became a lawful permanent resident of the United States in 1989. He pleaded guilty to a felony (conspiring to make a counterfeit security) in 1994, and served a prison sentence of four months for that offense. Vartelas traveled to Greece in 2003 to visit his parents. On his return to the United States a week later, he was treated as an inadmissible alien and placed in removal proceedings. Under the law governing at the time of Vartelas' plea, an alien in his situation could travel abroad for brief periods without jeopardizing his resident alien status. See 8 U. S. C. § 1101(a)(13) (1988 ed.), as construed in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963).

In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), 110 Stat. 3009–546. That Act effectively precluded foreign travel by lawful permanent residents who had a conviction like Vartelas'. Under IIRIRA, such aliens, on return from a sojourn abroad, however brief, may be permanently removed from the United States. See 8 U. S. C. § 1101(a)(13)(C)(v); § 1182(a)(2).

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*Briefs of *amici curiae* urging reversal were filed for the Asian American Justice Center et al. by *Nancy Morawetz;* for the National Association of Criminal Defense Lawyers et al. by *David Debold* and *Jim Walden;* and for the National Immigrant Justice Center by *Brian J. Murray* and *Charles Roth.*

Ira J. Kurzban filed a brief for the American Immigration Lawyers Association as *amicus curiae.*

This case presents a question of retroactivity not addressed by Congress: As to a lawful permanent resident convicted of a crime before the effective date of IIRIRA, which regime governs, the one in force at the time of the conviction, or IIRIRA? If the former, Vartelas' brief trip abroad would not disturb his lawful permanent resident status. If the latter, he may be denied reentry. We conclude that the relevant provision of IIRIRA, § 1101(a)(13)(C)(v), attached a new disability (denial of reentry) in respect to past events (Vartelas' pre-IIRIRA offense, plea, and conviction). Guided by the deeply rooted presumption against retroactive legislation, we hold that § 1101(a)(13)(C)(v) does not apply to Vartelas' conviction. The impact of Vartelas' brief travel abroad on his permanent resident status is therefore determined not by IIRIRA, but by the legal regime in force at the time of his conviction.

I

A

Before IIRIRA's passage, United States immigration law established "two types of proceedings in which aliens can be denied the hospitality of the United States: deportation hearings and exclusion hearings." *Landon* v. *Plasencia*, 459 U. S. 21, 25 (1982). Exclusion hearings were held for certain aliens seeking entry to the United States, and deportation hearings were held for certain aliens who had already entered this country. See *ibid.*

Under this regime, "entry" into the United States was defined as "any coming of an alien into the United States, from a foreign port or place." 8 U. S. C. § 1101(a)(13) (1988 ed.). The statute, however, provided an exception for lawful permanent residents; aliens lawfully residing here were not regarded as making an "entry" if their "departure to a foreign port or place . . . was not intended or reasonably to be expected by [them] or [their] presence in a foreign port or place . . . was not voluntary." *Ibid.* Interpreting this cryptic

provision, we held in *Fleuti*, 374 U. S., at 461–462, that Congress did not intend to exclude aliens long resident in the United States upon their return from "innocent, casual, and brief excursion[s] . . . outside this country's borders." Instead, the Court determined, Congress meant to rank a once-permanent resident as a new entrant only when the foreign excursion "meaningfully interrupt[ed] . . . the alien's [U. S.] residence." *Id.*, at 462. Absent such "disrupti[on]" of the alien's residency, the alien would not be "subject . . . to the consequences of an 'entry' into the country on his return." *Ibid.*[1]

In IIRIRA, Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as "removal." See 8 U. S. C. §§ 1229, 1229a; *Judulang* v. *Holder*, 565 U. S. 42, 46 (2011). Congress made "admission" the key word, and defined admission to mean "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." § 1101(a)(13)(A). This alteration, the Board of Immigration Appeals (BIA) determined, superseded *Fleuti*. See *In re Collado-Munoz*, 21 I. & N. Dec. 1061, 1065–1066 (1998) (en banc).[2] Thus, lawful permanent residents returning post-IIRIRA, like Vartelas, may be required to " 'see[k] an admis-

[1] The dissent appears driven, in no small measure, by its dim view of the Court's opinion in *Fleuti*. See *post*, at 280 ("same instinct" operative in *Fleuti* and this case).

[2] The BIA determined that the *Fleuti* doctrine no longer held sway because it was rooted in the "no longer existent definition of 'entry' in the [Immigration and Nationality] Act." 21 I. & N. Dec., at 1065. The Board also noted that "Congress . . . amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine" when it provided that a lawful permanent resident absent from the United States for less than 180 days would not be regarded as seeking an admission except in certain enumerated circumstances, among them, prior commission of a crime of moral turpitude. See *ibid.* (citing 8 U. S. C. § 1101(a)(13)(C)(ii)).

Vartelas does not challenge the ruling in *Collado-Munoz*. We therefore assume, but do not decide, that IIRIRA's amendments to § 1101(a)(13)(A) abrogated *Fleuti*.

sion' into the United States, without regard to whether the alien's departure from the United States might previously have been regarded as 'brief, casual, and innocent' under the Fleuti doctrine." *Id.*, at 1066.

An alien seeking "admission" to the United States is subject to various requirements, see, *e. g.*, § 1181(a), and cannot gain entry if she is deemed "inadmissible" on any of the numerous grounds set out in the immigration statutes, see § 1182. Under IIRIRA, lawful permanent residents are regarded as seeking admission into the United States if they fall into any of six enumerated categories. § 1101(a)(13)(C). Relevant here, the fifth of these categories covers aliens who "ha[ve] committed an offense identified in section 1182(a)(2) of this title." § 1101(a)(13)(C)(v). Offenses in this category include "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime." § 1182(a)(2)(A)(i).

In sum, before IIRIRA, lawful permanent residents who had committed a crime of moral turpitude could, under the *Fleuti* doctrine, return from brief trips abroad without applying for admission to the United States. Under IIRIRA, such residents are subject to admission procedures, and, potentially, to removal from the United States on grounds of inadmissibility.[3]

B

Panagis Vartelas, born and raised in Greece, has resided in the United States for over 30 years. Originally admitted

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[3] Although IIRIRA created a uniform removal procedure for both excludable and deportable aliens, the list of criminal offenses that subject aliens to exclusion remains separate from the list of offenses that render an alien deportable. These lists are "sometimes overlapping and sometimes divergent." *Judulang* v. *Holder*, 565 U. S. 42, 46 (2011). Pertinent here, although a single crime involving moral turpitude may render an alien inadmissible, it would not render her deportable. See 8 U. S. C. § 1182(a)(2) (listing excludable crimes); § 1227(a)(2) (listing deportable crimes).

on a student visa issued in 1979, Vartelas became a lawful permanent resident in 1989. He currently lives in the New York area and works as a sales manager for a roofing company.

In 1992, Vartelas opened an auto body shop in Queens, New York. One of his business partners used the shop's photocopier to make counterfeit travelers' checks. Vartelas helped his partner perforate the sheets into individual checks, but Vartelas did not sell the checks or receive any money from the venture. In 1994, he pleaded guilty to conspiracy to make or possess counterfeit securities, in violation of 18 U. S. C. § 371. He was sentenced to four months' incarceration, followed by two years' supervised release.

Vartelas regularly traveled to Greece to visit his aging parents in the years after his 1994 conviction; even after the passage of IIRIRA in 1996, his return to the United States from these visits remained uneventful. In January 2003, however, when Vartelas returned from a week-long trip to Greece, an immigration officer classified him as an alien seeking "admission." The officer based this classification on Vartelas' 1994 conviction. See *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 423 (1933) (counterfeiting ranks as a crime of moral turpitude).

At Vartelas' removal proceedings, his initial attorney conceded removability, and requested discretionary relief from removal under the former § 212(c) of the Immigration and Nationality Act. See 8 U. S. C. § 1182(c) (1994 ed.) (repealed 1996). This attorney twice failed to appear for hearings and once failed to submit a requested brief. Vartelas engaged a new attorney, who continued to concede removability and to request discretionary relief. The Immigration Judge denied the request for relief, and ordered Vartelas removed to Greece. The BIA affirmed the Immigration Judge's decision.

In July 2008, Vartelas filed with the BIA a timely motion to reopen the removal proceedings, alleging that his previous

attorneys were ineffective for, among other lapses, conceding his removability. He sought to withdraw the concession of removability on the ground that IIRIRA's new "admission" provision, codified at § 1101(a)(13), did not reach back to deprive him of lawful resident status based on his pre-IIRIRA conviction. The BIA denied the motion, declaring that Vartelas had not been prejudiced by his lawyers' performance, for no legal authority prevented the application of IIRIRA to Vartelas' pre-IIRIRA conduct.

The U. S. Court of Appeals for the Second Circuit affirmed the BIA's decision, agreeing that Vartelas had failed to show he was prejudiced by his attorneys' allegedly ineffective performance. Rejecting Vartelas' argument that IIRIRA operated prospectively and therefore did not govern his case, the Second Circuit reasoned that he had not relied on the prior legal regime at the time he committed the disqualifying crime. See 620 F. 3d 108, 118–120 (2010).

In so ruling, the Second Circuit created a split with two other Circuits. The Fourth and Ninth Circuits have held that the new § 1101(a)(13) may not be applied to lawful permanent residents who committed crimes listed in § 1182 (among them, crimes of moral turpitude) prior to IIRIRA's enactment. See *Olatunji* v. *Ashcroft*, 387 F. 3d 383 (CA4 2004); *Camins* v. *Gonzales*, 500 F. 3d 872 (CA9 2007). We granted certiorari, 564 U. S. 1066 (2011), to resolve the conflict among the Circuits.

II

As earlier explained, see *supra*, at 261–263, pre-IIRIRA, a resident alien who once committed a crime of moral turpitude could travel abroad for short durations without jeopardizing his status as a lawful permanent resident. Under IIRIRA, on return from foreign travel, such an alien is treated as a new arrival to our shores, and may be removed from the United States. Vartelas does not question Congress' authority to restrict reentry in this manner. Nor does he contend that Congress could not do so retroactively. Instead,

he invokes the principle against retroactive legislation, under which courts read laws as prospective in application unless Congress has unambiguously instructed retroactivity. See *Landgraf* v. *USI Film Products*, 511 U. S. 244, 263 (1994).

The presumption against retroactive legislation, the Court recalled in *Landgraf*, "embodies a legal doctrine centuries older than our Republic." *Id.*, at 265. Several provisions of the Constitution, the Court noted, embrace the doctrine, among them, the *Ex Post Facto* Clause, the Contract Clause, and the Fifth Amendment's Due Process Clause. *Id.*, at 266. Numerous decisions of this Court repeat the classic formulation Justice Story penned for determining when retrospective application of a law would collide with the doctrine. It would do so, Story stated, when such application would "tak[e] away or impai[r] vested rights acquired under existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past." *Society for Propagation of Gospel* v. *Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CC NH 1814). See, *e. g.*, *INS* v. *St. Cyr*, 533 U. S. 289, 321 (2001) (invoking Story's formulation); *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U. S. 939, 947 (1997); *Landgraf*, 511 U. S., at 283.[4]

Vartelas urges that applying IIRIRA to him, rather than the law that existed at the time of his conviction, would attach a "new disability," effectively a ban on travel outside the United States, "in respect to [events] . . . already past," *i. e.*, his offense, guilty plea, conviction, and punishment, all occurring prior to the passage of IIRIRA. In evaluating Vartelas' argument, we note first a matter not disputed by

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[4] The dissent asserts that Justice Story's opinion "bear[s] no relation to the presumption against retroactivity." *Post*, at 281. That is a bold statement in view of this Court's many references to Justice Story's formulation in cases involving the presumption that statutes operate only prospectively in the absence of a clear congressional statement to the contrary.

the Government: Congress did not expressly prescribe the temporal reach of the IIRIRA provision in question, 8 U. S. C. § 1101(a)(13). See *Landgraf*, 511 U. S., at 280 (Court asks first "whether Congress has expressly prescribed [new § 1101(a)(13)'s] proper reach"); Brief for Respondent 11 (Court's holding in *INS* v. *St. Cyr*, 533 U. S., at 317–320, "compels the conclusion that Congress has not 'expressly prescribed the statute's proper reach'" (quoting *Landgraf*, 511 U. S., at 280)).[5] Several other provisions of IIRIRA, in contrast to § 1101(a)(13), expressly direct retroactive application, *e. g.*, § 1101(a)(43) (IIRIRA's amendment of the "aggravated felony" definition applies expressly to "conviction[s] . . . entered before, on, or after" the statute's enactment date (internal quotation marks omitted)). See *St. Cyr*, 533 U. S., at 319–320, and n. 43 (setting out further examples). Accordingly, we proceed to the dispositive question whether, as Vartelas maintains, application of IIRIRA's travel restraint to him "would have retroactive effect" Congress did not authorize. See *Landgraf*, 511 U. S., at 280.

Vartelas presents a firm case for application of the antiretroactivity principle. Neither his sentence, nor the immigration law in effect when he was convicted and sentenced, blocked him from occasional visits to his parents in Greece. Current § 1101(a)(13)(C)(v), if applied to him, would thus attach "a new disability" to conduct over and done well before the provision's enactment.

Beyond genuine doubt, we note, the restraint § 1101(a)(13)(C)(v) places on lawful permanent residents like Vartelas ranks as a "new disability." Once able to journey abroad to fulfill religious obligations, attend funerals and weddings of family members, tend to vital financial interests, or respond to family emergencies, permanent residents situated as Vartelas is now face potential banishment. We have several

[5] In *St. Cyr*, 533 U. S., at 317–320, we rejected the Government's contention that Congress directed retroactive application of IIRIRA in its entirety.

times recognized the severity of that sanction. See, *e. g.*, *Padilla* v. *Kentucky*, 559 U. S. 356, 365–366, 373–374 (2010).

It is no answer to say, as the Government suggests, that Vartelas could have avoided any adverse consequences if he simply stayed at home in the United States, his residence for 24 years prior to his 2003 visit to his parents in Greece. See Brief in Opposition 13 (Vartelas "could have avoided the application of the statute . . . [by] refrain[ing] from departing from the United States (or from returning to the United States)."); *post*, at 278. Loss of the ability to travel abroad is itself a harsh penalty,[6] made all the more devastating if it means enduring separation from close family members living abroad. See Brief for Asian American Justice Center et al. as *Amici Curiae* 16–23 (describing illustrative cases). We have rejected arguments for retroactivity in similar cases, and in cases in which the loss at stake was less momentous.

In *Chew Heong* v. *United States*, 112 U. S. 536 (1884), a pathmarking decision, the Court confronted the "Chinese Restriction Act," which barred Chinese laborers from reentering the United States without a certificate issued on their departure. The Court held the reentry bar inapplicable to aliens who had left the country prior to the Act's passage and tried to return afterward without a certificate. The Act's text, the Court observed, was not "so clear and positive as to leave no room to doubt [retroactive application] was the intention of the legislature." *Id.*, at 559.

In *Landgraf*, the question was whether an amendment to Title VII's ban on employment discrimination authorizing

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[6] See *Kent* v. *Dulles*, 357 U. S. 116, 126 (1958) ("Freedom of movement across frontiers . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads."); *Aptheker* v. *Secretary of State*, 378 U. S. 500, 519–520 (1964) (Douglas, J., concurring) (right to travel, "at home and abroad, is important for . . . business[,] . . . cultural, political, and social activities—for all the commingling which gregarious man enjoys").

compensatory and punitive damages applied to preenactment conduct. The Court held it did not. No doubt the complaint against the employer charged discrimination that violated the Act at the time it occurred. But compensatory and punitive damages were not then available remedies. The later provision for such damages, the Court determined, operated prospectively only, and did not apply to employers whose discriminatory conduct occurred prior to the amendment. See 511 U. S., at 280–286. And in *Hughes Aircraft*, the Court held that a provision removing an affirmative defense to *qui tam* suits did not apply to preenactment fraud. As in *Landgraf*, the provision attached "a new disability" to past wrongful conduct and therefore could not apply retrospectively unless Congress clearly manifested such an intention. *Hughes Aircraft*, 520 U. S., at 946–950.

Most recently, in *St. Cyr*, the Court took up the case of an alien who had entered a plea to a deportable offense. At the time of the plea, the alien was eligible for discretionary relief from deportation. IIRIRA, enacted after entry of the plea, removed that eligibility. The Court held that the IIRIRA provision in point could not be applied to the alien, for it attached a "new disability" to the guilty plea and Congress had not instructed such a result. 533 U. S., at 321–323.

III

The Government, echoed in part by the dissent, argues that no retroactive effect is involved in this case, for the Legislature has not attached any disability to past conduct. Rather, it has made the relevant event the alien's post-IIRIRA act of returning to the United States. See Brief for Respondent 19–20; *post*, at 278. We find this argument disingenuous. Vartelas' return to the United States occasioned his treatment as a new entrant, but the reason for the "new disability" imposed on him was not his lawful foreign travel. It was, indeed, his conviction, pre-IIRIRA, of an offense qualifying as one of moral turpitude. That past mis-

conduct, in other words, not present travel, is the wrongful activity Congress targeted in § 1101(a)(13)(C)(v).

The Government observes that lower courts have upheld Racketeer Influenced and Corrupt Organizations Act prosecutions that encompassed preenactment conduct. See Brief for Respondent 18 (citing *United States* v. *Brown*, 555 F. 2d 407, 416–417 (CA5 1977), and *United States* v. *Campanale*, 518 F. 2d 352, 364–365 (CA9 1975) *(per curiam)*). But those prosecutions depended on criminal activity, *i. e.*, an act of racketeering occurring *after* the provision's effective date. Section 1101(a)(13)(C)(v), in contrast, does not require any showing of criminal conduct postdating IIRIRA's enactment.

Fernandez-Vargas v. *Gonzales*, 548 U. S. 30 (2006), featured by the Government and the dissent, Brief for Respondent 17, 36–37; *post*, at 278, is similarly inapposite. That case involved 8 U. S. C. § 1231(a)(5), an IIRIRA addition, which provides that an alien who reenters the United States after having been removed can be removed again under the same removal order. We held that the provision could be applied to an alien who reentered illegally before IIRIRA's enactment. Explaining the Court's decision, we said: "[T]he conduct of remaining in the country . . . is the predicate action; the statute applies to stop *an indefinitely continuing violation* . . . . It is therefore the alien's choice *to continue his illegal presence* . . . *after* the effective date of the new la[w] that subjects him to the new . . . legal regime, not a past act that he is helpless to undo." 548 U. S., at 44 (emphasis added). Vartelas, we have several times stressed, engaged in no criminal activity after IIRIRA's passage. He simply took a brief trip to Greece, anticipating a return without incident as in past visits to his parents. No "indefinitely continuing" crime occurred; instead, Vartelas was apprehended because of a pre-IIRIRA crime he was "helpless to undo." *Ibid.*

The Government further refers to lower court decisions in cases involving 18 U. S. C. § 922(g), which prohibits the

possession of firearms by convicted felons. Brief for Respondent 18–19 (citing *United States* v. *Pfeifer*, 371 F. 3d 430, 436 (CA8 2004), and *United States* v. *Hemmings*, 258 F. 3d 587, 594 (CA7 2001)). "[L]ongstanding prohibitions on the possession of firearms by felons," *District of Columbia* v. *Heller*, 554 U. S. 570, 626 (2008), however, target a present danger, *i. e.*, the danger posed by felons who bear arms. See, *e. g.*, *Pfeifer*, 371 F. 3d, at 436 (hazardous conduct that statute targets "occurred after enactment of the statute"); Omnibus Crime Control and Safe Streets Act of 1968, § 1201, 82 Stat. 236 (noting hazards involved when felons possess firearms).[7]

Nor do recidivism sentencing enhancements support the Government's position. Enhanced punishment imposed for the later offense "'is not to be viewed as . . . [an] additional penalty for the earlier crimes,' but instead, as a 'stiffened penalty for the latest crime, which is considered to be an

[7] The dissent, see *post*, at 281, notes two statutes of the same genre: laws prohibiting persons convicted of a sex crime against a victim under 16 years of age from working in jobs involving frequent contact with minors, and laws prohibiting a person "who has been adjudicated as a mental defective or who has been committed to a mental institution" from possessing guns, 18 U. S. C. § 922(g)(4). The dissent is correct that these statutes do not operate retroactively. Rather, they address dangers that arise postenactment: sex offenders with a history of child molestation working in close proximity to children, and mentally unstable persons purchasing guns. The act of flying to Greece, in contrast, does not render a lawful permanent resident like Vartelas hazardous. Nor is it plausible that Congress' solution to the problem of dangerous lawful permanent residents would be to pass a law that would deter such persons from ever leaving the United States.

As for student loans, it is unlikely that the provision noted by the dissent, 20 U. S. C. § 1091(r), would raise retroactivity questions in the first place. The statute has a prospective thrust. It concerns "[s]uspension of eligibility" when a student receiving a college loan commits a drug crime. The suspension runs "from the date of th[e] conviction" for specified periods, *e. g.*, two years for a second offense of possession. Moreover, eligibility may be restored before the period of ineligibility ends if the student establishes, under prescribed criteria, his rehabilitation.

aggravated offense because [it is] a repetitive one.'" *Witte* v. *United States*, 515 U. S. 389, 400 (1995) (quoting *Gryger* v. *Burke*, 334 U. S. 728, 732 (1948)). In Vartelas' case, however, there is no "aggravated . . . repetitive" offense. There is, in contrast, no post-IIRIRA criminal offense at all. Vartelas' travel abroad and return are "innocent" acts, see *Fleuti*, 374 U. S., at 462, burdened only because of his pre-IIRIRA offense.

In sum, Vartelas' brief trip abroad post-IIRIRA involved no criminal infraction. IIRIRA disabled him from leaving the United States and returning as a lawful permanent resident. That new disability rested not on any continuing criminal activity, but on a single crime committed years before IIRIRA's enactment. The antiretroactivity principle instructs against application of the new proscription to render Vartelas a first-time arrival at the country's gateway.

IV

The Second Circuit homed in on the words "committed an offense" in § 1101(a)(13)(C)(v) in determining that the change IIRIRA wrought had no retroactive effect. 620 F. 3d, at 119–121. It matters not that Vartelas may have relied on the prospect of continuing visits to Greece in deciding to plead guilty, the court reasoned. "[I]t would border on the absurd," the court observed, "to suggest that Vartelas committed his counterfeiting crime in reliance on the immigration laws." *Id.*, at 120. This reasoning is doubly flawed.

As the Government acknowledges, "th[is] Court has not required a party challenging the application of a statute to show [he relied on prior law] in structuring his conduct." Brief for Respondent 25–26. In *Landgraf*, for example, the issue was the retroactivity of compensatory and punitive damages as remedies for employment discrimination. "[C]oncerns of . . . upsetting expectations are attenuated in the case of intentional employment discrimination," the Court noted, for such discrimination "has been unlawful for

more than a generation." 511 U. S., at 282, n. 35. But "[e]ven when the conduct in question is morally reprehensible or illegal," the Court added, "a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.*, at 283, n. 35. And in *Hughes Aircraft*, the Court found that Congress' 1986 removal of a defense to a *qui tam* action did not apply to pre-1986 conduct in light of the presumption against retroactivity. 520 U. S., at 941–942.[8] As in *Landgraf*, the relevant conduct (submitting a false claim) had been unlawful for decades. See 520 U. S., at 947.

The operative presumption, after all, is that Congress intends its laws to govern prospectively only. See *supra*, at 265–266. "It is a strange 'presumption,'" the Third Circuit commented, "that arises only on . . . a showing [of] actual reliance." *Ponnapula* v. *Ashcroft*, 373 F. 3d 480, 491 (2004). The essential inquiry, as stated in *Landgraf*, 511 U. S., at 269–270, is "whether the new provision attaches new legal consequences to events completed before its enactment." That is just what occurred here.

In any event, Vartelas likely relied on then-existing immigration law. While the presumption against retroactive application of statutes does not require a showing of detrimental reliance, see *Olatunji*, 387 F. 3d, at 389–395, reasonable reliance has been noted among the "familiar considerations" animating the presumption, see *Landgraf*, 511 U. S., at 270 (presumption reflects "familiar considerations of fair notice, reasonable reliance, and settled expectations"). Although not a necessary predicate for invoking the antiretroactivity

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[8] The deleted defense permitted *qui tam* defendants to escape liability if the information on which a private plaintiff (relator) relied was already in the Government's possession. Detrimental reliance was hardly apparent, for the Government, both before and after the statutory change, could bring suit with that information, and "the monetary liability faced by [a False Claims Act] defendant is the same whether the action is brought by the Government or by a *qui tam* relator." 520 U. S., at 948.

principle, the likelihood of reliance on prior law strengthens the case for reading a newly enacted law prospectively. See *Olatunji*, 387 F. 3d, at 393 (discussing *St. Cyr*).

St. Cyr is illustrative. That case involved a lawful permanent resident who pleaded guilty to a criminal charge that made him deportable. Under the immigration law in effect when he was convicted, he would have been eligible to apply for a waiver of deportation. But his removal proceeding was commenced after Congress, in IIRIRA, withdrew that dispensation. Disallowance of discretionary waivers, the Court recognized, "attache[d] a new disability, in respect to transactions or considerations already past." 533 U. S., at 321 (internal quotation marks omitted). Aliens like St. Cyr, the Court observed, "almost certainly relied upon th[e] likelihood [of receiving discretionary relief] in deciding [to plead guilty, thereby] forgo[ing] their right to a trial." *Id.*, at 325.[9] Hence, applying the IIRIRA withdrawal to St. Cyr would have an "obvious and severe retroactive effect." *Ibid.* Because Congress made no such intention plain, *ibid.*, n. 55, we held that the prior law, permitting relief from deportation, governed St. Cyr's case.

As to retroactivity, one might think Vartelas' case even easier than St. Cyr's. St. Cyr could seek the Attorney General's *discretionary* dispensation. Vartelas, under *Fleuti*, was free, without seeking an official's permission, to make trips of short duration to see and assist his parents in

[9] "There can be little doubt," the Court noted in *St. Cyr*, "that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." 533 U. S., at 322. Indeed, "[p]reserving [their] right to remain in the United States may be more important to [them] than any potential jail sentence." *Ibid.* (internal quotation marks omitted). See *Padilla* v. *Kentucky*, 559 U. S. 356, 366–369 (2010) (holding that counsel has a duty under the Sixth Amendment to inform a noncitizen defendant that his plea would make him eligible for deportation).

Greece.[10] The Second Circuit thought otherwise, compounding its initial misperception (treating reliance as essential to application of the antiretroactivity principle). The deportation provision involved in *St. Cyr*, 8 U. S. C. § 1229b(a)(3), referred to the alien's "convict[ion]" of a crime, while the statutory words *sub judice* in Vartelas' case were "committed an offense," § 1101(a)(13)(C)(v); see *supra*, at 272.[11] The practical difference, so far as retroactivity is concerned, escapes from our grasp. Ordinarily, to determine whether there is clear and convincing evidence that an alien has committed a qualifying crime, the immigration officer at the border would check the alien's records for a conviction. He would not call into session a piepowder court[12] to entertain a plea or conduct a trial.

Satisfied that Vartelas' case is at least as clear as St. Cyr's for declining to apply a new law retroactively, we hold that *Fleuti* continues to govern Vartelas' short-term travel.

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[10] Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e. g.*, possession of counterfeit securities—or exercise a right to trial.

[11] After the words "committed an offense," § 1101(a)(13)(C)(v)'s next words are "identified in section 1182(a)(2)." That section refers to "any alien *convicted of*, or who admits having committed," *inter alia*, "a crime involving moral turpitude." § 1182(a)(2)(A)(i)(I) (emphasis added). The entire § 1101(a)(13)(C)(v) phrase "committed an offense identified in section 1182(a)(2)," on straightforward reading, appears to advert to a lawful permanent resident who has been convicted of an offense under § 1182(a)(2) (or admits to one).

[12] Piepowder ("dusty feet") courts were temporary mercantile courts held at trade fairs in Medieval Europe; local merchants and guild members would assemble to hear commercial disputes. These courts provided fast and informal resolution of trade conflicts, settling cases "while the merchants' feet were still dusty." Callahan, Medieval Church Norms and Fiduciary Duties in Partnership, 26 Cardozo L. Rev. 215, 235, and n. 99 (2004) (quoting H. Berman, Law and Revolution: The Formation of the Western Legal Tradition 347 (1983); internal quotation marks omitted).

* * *

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

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS and JUSTICE ALITO join, dissenting.

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress required that lawful permanent residents who have committed certain crimes seek formal "admission" when they return to the United States from abroad. 8 U. S. C. § 1101(a)(13)(C)(v). This case presents a straightforward question of statutory interpretation: Does that statute apply to lawful permanent residents who, like Vartelas, committed one of the specified offenses before 1996, but traveled abroad after 1996? Under the proper approach to determining a statute's temporal application, the answer is yes.

I

The text of § 1101(a)(13)(C)(v) does not contain a clear statement answering the question presented here. So the Court is correct that this case is governed by our longstanding interpretive principle that, in the absence of a contrary indication, a statute will not be construed to have retroactive application. See, *e. g.*, *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280 (1994). The operative provision of this text—the provision that specifies the act that it prohibits or prescribes—says that lawful permanent residents convicted of offenses similar to Vartelas's must seek formal "admission" before they return to the United States from abroad. Since Vartelas returned to the United States after the statute's effective date, the application of that text to his reentry does not give the statute a retroactive effect.

In determining whether a statute applies retroactively, we should concern ourselves with the statute's actual operation on regulated parties, not with retroactivity as an abstract concept or as a substitute for fairness concerns. It is impossible to decide whether a statute's application is retrospective or prospective without first identifying a reference point—a moment in time to which the statute's effective date is either subsequent or antecedent. (Otherwise, the obvious question—retroactive in reference to what?—remains unanswered.) In my view, the identity of that reference point turns on the activity a statute is intended to regulate. For any given regulated party, the reference point (or "retroactivity event") is the moment at which the party does what the statute forbids or fails to do what it requires. See *Martin* v. *Hadix*, 527 U. S. 343, 362–363 (1999) (SCALIA, J., concurring in part and concurring in judgment); *Landgraf*, *supra*, at 291 (SCALIA, J., concurring in judgments). With an identified reference point, the retroactivity analysis is simple. If a person has engaged in the primary regulated activity *before* the statute's effective date, then the statute's application *would* be retroactive. But if a person engages in the primary regulated activity *after* the statute's effective date, then the statute's application is prospective only. In the latter case, the interpretive presumption against retroactivity does not bar the statute's application.

Under that commonsense approach, this is a relatively easy case. Although the *class* of aliens affected by § 1101(a)(13)(C)(v) is defined with respect to past crimes, the *regulated activity* is reentry into the United States. By its terms, the statute is all about controlling admission at the border. It specifies six criteria to identify lawful permanent residents who are subject to formal "admission" procedures, most of which relate to the circumstances of departure, the trip itself, or reentry. The titles of the statutory sections containing § 1101(a)(13)(C)(v) confirm its focus on admission, rather than crime: The provision is located within Title III

of IIRIRA ("Inspection, Apprehension, Detention, Adjudication, and Removal of Inadmissible and Deportable Aliens"), under Subtitle A ("Revision of Procedures for Removal of Aliens"), and § 301 ("Treating Persons Present in the United States Without Authorization as Not Admitted"). 110 Stat. 3009–575. And the specific subsection of IIRIRA at issue (§ 301(a), entitled "'Admission' Defined") is an amendment to the definition of "entry" in the general "Definitions" section of the Immigration and Nationality Act (INA). See *ante*, at 261–262. The original provision told border officials how to regulate admission—not how to punish crime—and the amendment does as well.

Section 1101(a)(13)(C)(v) thus has no retroactive effect on Vartelas because the reference point here—Vartelas's readmission to the United States after a trip abroad—occurred years after the statute's effective date. Although Vartelas cannot change the fact of his prior conviction, he could have avoided *entirely* the consequences of § 1101(a)(13)(C)(v) by simply remaining in the United States or, having left, remaining in Greece. That § 1101(a)(13)(C)(v) had no effect on Vartelas until he performed a postenactment activity is a clear indication that the statute's application is purely prospective. See *Fernandez-Vargas* v. *Gonzales*, 548 U. S. 30, 45, n. 11, 46 (2006) (no retroactive effect where the statute in question did "not operate on a completed preenactment act" and instead turned on "a failure to take timely action that would have avoided application of the new law altogether").

II

The Court avoids this conclusion by insisting that "past misconduct, . . . not present travel, is the wrongful activity Congress targeted" in § 1101(a)(13)(C)(v). *Ante*, at 269–270. That assertion does not, however, have any basis in the statute's text or structure, and the Court does not pretend otherwise. Instead, the Court simply asserts that Vartelas's "lawful foreign travel" surely could not be the "reason for

the 'new disability' imposed on him." *Ante*, at 269. But the *reason* for a prohibition has nothing to do with whether the prohibition is being applied to a past rather than a future act. It may be relevant to other legal inquiries—for example, to whether a legislative act violates one of the *Ex Post Facto* Clauses in Article I, see, *e. g.*, *Smith* v. *Doe*, 538 U. S. 84, 92 (2003), or one of the Due Process Clauses in the Fifth and Fourteenth Amendments, see, *e. g.*, *Williamson* v. *Lee Optical of Okla., Inc.*, 348 U. S. 483, 487 (1955), or the Takings Clause in the Fifth Amendment, see, *e. g.*, *Kelo* v. *New London*, 545 U. S. 469, 477–483 (2005), or the Obligation of Contracts Clause in Article I, see, *e. g.*, *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1, 29 (1977). But it has no direct bearing upon whether the statute is retroactive.*

The Court's failure to differentiate between the statutory-interpretation question (whether giving certain effect to a provision would make it retroactive and hence presumptively unintended) and the validity question (whether giving certain effect to a provision is unlawful) is on full display in its attempts to distinguish § 1101(a)(13)(C)(v) from similar statutes. Take, for example, the Court's discussion of the Racketeer Influenced and Corrupt Organizations Act (RICO). That Act, which targets "patterns of racketeering," *expressly* defines those "patterns" to include some preenactment conduct. See 18 U. S. C. § 1961(5). Courts interpreting RICO therefore need not consider the presumption against retroactivity; instead, the cases cited by the majority

*I say no *direct* bearing because if the prospective application of a statute would raise constitutional doubts because of its effect on preenactment conduct, *that* would be a reason to presume a legislative intent not to apply it unless the conduct in question is postenactment—that is, to consider it retroactive when the conduct in question is preenactment. See *Clark* v. *Martinez*, 543 U. S. 371, 380–381 (2005). That is not an issue here. If the statute had expressly made the new "admission" rule applicable to those aliens with prior convictions, its constitutionality would not be in doubt.

consider whether RICO violates the *Ex Post Facto* Clause. See *United States* v. *Brown*, 555 F. 2d 407, 416–417 (CA5 1977); *United States* v. *Campanale*, 518 F. 2d 352, 364–365 (CA9 1975) *(per curiam)*. The Government recognized this distinction and cited RICO to make a point about the *Ex Post Facto* Clause rather than the presumption against retroactivity, Brief for Respondent 17–18; the Court evidently does not.

The Court's confident assertion that Congress surely would not have meant this statute to apply to Vartelas, whose foreign travel and subsequent return to the United States were innocent events, *ante*, at 269–270, 272, simply begs the question presented in this case. Ignorance, of course, is no excuse *(ignorantia legis neminem excusat);* and his return was entirely lawful only if the statute before us did not render it unlawful. Since IIRIRA's effective date in 1996, lawful permanent residents who have committed crimes of moral turpitude are forbidden to leave the United States and return without formally seeking "admission." See § 1101(a)(13)(C)(v). As a result, Vartelas's numerous trips abroad and "uneventful" reentries into the United States after the passage of IIRIRA, see *ante*, at 264, were lawful only *if* § 1101(a)(13)(C)(v) does not apply to him—which is, of course, precisely the matter in dispute here.

The Court's circular reasoning betrays its underlying concern: Because the Court believes that reentry after a brief trip abroad *should* be lawful, it will decline to apply a statute that clearly provides otherwise for certain criminal aliens. (The same instinct likely produced the Court's questionable statutory interpretation in *Rosenberg* v. *Fleuti*, 374 U. S. 449 (1963).) The Court's test for retroactivity—asking whether the statute creates a "new disability" in "respect to past events"—invites this focus on fairness. Understandably so, since it is derived from a Justice Story opinion interpreting a provision of the New Hampshire Constitution that *forbade* retroactive laws—a provision comparable to the Federal

Constitution's *ex post facto* prohibition and bearing no relation to the presumption against retroactivity. What is unfair or irrational (and hence should be forbidden) has nothing to do with whether applying a statute to a particular act is prospective (and thus presumptively intended) or retroactive (and thus presumptively unintended). On the latter question, the "new disability in respect to past events" test provides no meaningful guidance.

I can imagine countless laws that, like § 1101(a)(13)(C)(v), impose "new disabilities" related to "past events" and yet do not operate retroactively. For example, a statute making persons convicted of drug crimes ineligible for student loans. See, *e. g.*, 20 U. S. C. § 1091(r)(1). Or laws prohibiting those convicted of sex crimes from working in certain jobs that involve repeated contact with minors. See, *e. g.*, Cal. Penal Code Ann. § 290.95(c) (West Supp. 2012). Or laws prohibiting those previously committed for mental instability from purchasing guns. See, *e. g.*, 18 U. S. C. § 922(g)(4). The Court concedes that it would not consider the last two laws inapplicable to preenactment convictions or commitments. *Ante*, at 271, n. 7. The Court does not deny that these statutes impose a "new disability in respect to past events," but it distinguishes them based on the *reason* for their enactment: These statutes "address dangers that arise postenactment." *Ibid.* So much for the new-disability-in-respect-to-past-events test; it has now become a new-disability-not-designed-to-guard-against-future-danger test. But why is guarding against future danger the *only* reason Congress may wish to regulate future action in light of past events? It obviously is not. So the Court must invent yet another doctrine to address my first example, the law making persons convicted of drug crimes ineligible for student loans. According to the Court, that statute differs from § 1101(a)(13)(C)(v) because it "has a prospective thrust." *Ante*, at 271, n. 7. I cannot imagine what that means, other than that the statute regulates postenactment conduct.

But, of course, so does § 1101(a)(13)(C)(v). Rather than reconciling any of these distinctions with Justice Story's formulation of retroactivity, the Court leaves to lower courts the unenviable task of identifying new-disabilities-not-designed-to-guard-against-future-danger-and-also-lacking-a-prospective-thrust.

And anyway, is there any doubt that § 1101(a)(13)(C)(v) is intended to guard against the "dangers that arise postenactment" from having aliens in our midst who have shown themselves to have proclivity for crime? Must that be rejected as its purpose simply because Congress has not sought to achieve it by all possible means—by ferreting out such dangerous aliens and going through the expensive and lengthy process of deporting them? At least some of the postenactment danger can readily be eliminated by forcing lawful permanent residents who have committed certain crimes to undergo formal "admission" procedures at our borders. Indeed, by limiting criminal aliens' opportunities to travel and then return to the United States, § 1101(a)(13)(C)(v) may encourage self-deportation. But all this is irrelevant. The positing of legislative "purpose" is always a slippery enterprise compared to the simple determination whether a statute regulates a future event—and it is that, rather than the Court's pronouncement of some forward-looking *reason*, which governs whether a statute has retroactive effect.

Finally, I cannot avoid observing that even if the Court's concern about the fairness or rationality of applying § 1101(a)(13)(C)(v) to Vartelas were relevant to the statutory-interpretation question, that concern is greatly exaggerated. In disregard of a federal statute, convicted criminal Vartelas repeatedly traveled to and from Greece without ever seeking formal admission at this country's borders. When he was finally unlucky enough to be apprehended, and sought discretionary relief from removal under former § 212(c) of the INA, 8 U. S. C. § 1182(c) (1994 ed.), the Immigration Judge denying his application found that Vartelas had made frequent trips

to Greece and had remained there for long periods of time, that he was "a serious tax evader," that he had offered testimony that was "close to incredible," and that he had not shown hardship to himself or his estranged wife and children should he be removed. See 620 F. 3d 108, 111 (CA2 2010); Brief for Respondent 5 (internal quotation marks omitted). In decrying the "harsh penalty" imposed by this statute on Vartelas, the Court ignores those inconvenient facts. *Ante*, at 268. But never mind. Under any sensible approach to the presumption against retroactivity, these factual subtleties should be irrelevant to the temporal application of § 1101(a)(13)(C)(v).

* * *

This case raises a plain-vanilla question of statutory interpretation, not broader questions about frustrated expectations or fairness. Our approach to answering that question should be similarly straightforward: We should determine what relevant activity the statute regulates (here, reentry); absent a clear statement otherwise, only such relevant activity which occurs after the statute's effective date should be covered (here, post-1996 reentries). If, as so construed, the statute is unfair or irrational enough to violate the Constitution, that is another matter entirely, and one not presented here. Our interpretive presumption against retroactivity, however, is just that—a tool to ascertain what the statute means, not a license to rewrite the statute in a way the Court considers more desirable.

I respectfully dissent.

Syllabus

FEDERAL AVIATION ADMINISTRATION ET AL. *v.* COOPER

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

No. 10–1024. Argued November 30, 2011—Decided March 28, 2012

Respondent Cooper, a licensed pilot, failed to disclose his human immunodeficiency virus (HIV) diagnosis to the Federal Aviation Administration (FAA) at a time when the agency did not issue medical certificates, which are required to operate an aircraft, to persons with HIV. Subsequently, respondent applied to the Social Security Administration (SSA) and received long-term disability benefits on the basis of his HIV status. Thereafter, he renewed his certificate with the FAA on several occasions, each time intentionally withholding information about his condition. The Department of Transportation (DOT), the FAA's parent agency, launched a joint criminal investigation with the SSA to identify medically unfit individuals who had obtained FAA certifications. The DOT provided the SSA with the names of licensed pilots, and the SSA, in turn, provided the DOT with a spreadsheet containing information on those pilots who had also received disability benefits. Respondent's name appeared on the spreadsheet, and an investigation led to his admission that he had intentionally withheld information about his HIV status from the FAA. His pilot certificate was revoked, and he was indicted for making false statements to a Government agency. He pleaded guilty and was fined and sentenced to probation. He then filed suit, alleging that the FAA, DOT, and SSA violated the Privacy Act of 1974, which contains a detailed set of requirements for the management of records held by Executive Branch agencies. The Act allows an aggrieved individual to sue for "actual damages," 5 U. S. C. § 552a(g)(4)(A), if the Government intentionally or willfully violates the Act's requirements in such a way as to adversely affect the individual. Specifically, respondent claimed that the unlawful disclosure to the DOT of his confidential medical information had caused him mental and emotional distress. The District Court concluded that the Government had violated the Act. But, finding the term "actual damages" ambiguous, the court relied on the sovereign immunity canon, which provides that sovereign immunity waivers must be strictly construed in the Government's favor, to hold that the Act does not authorize the recovery of nonpecuniary damages. Reversing the District Court, the Ninth Circuit concluded

that "actual damages" in the Act is not ambiguous and includes damages for mental and emotional distress.

Held: The Privacy Act does not unequivocally authorize damages for mental or emotional distress and therefore does not waive the Government's sovereign immunity from liability for such harms. Pp. 290–304.

(a) A waiver of sovereign immunity must be unequivocally expressed in statutory text, see, *e. g.*, *Lane* v. *Peña*, 518 U. S. 187, 192, and any ambiguities are to be construed in favor of immunity, *United States* v. *Williams*, 514 U. S. 527, 531. Ambiguity exists if there is a plausible interpretation of the statute that would not allow money damages against the Government. *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 37. Pp. 290–291.

(b) The term "actual damages" in the Privacy Act is a legal term of art, and Congress, when it employs a term of art, "'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken,'" *Molzof* v. *United States*, 502 U. S. 301, 307. Even as a legal term, the precise meaning of "actual damages" is far from clear. Although the term is sometimes understood to include nonpecuniary harm, it has also been used or construed more narrowly to cover damages for only pecuniary harm. Because of the term's chameleon-like quality, it must be considered in the particular context in which it appears. Pp. 291–294.

(c) The Privacy Act serves interests similar to those protected by defamation and privacy torts. Its remedial provision, under which plaintiffs can recover a minimum award of $1,000 if they first prove at least some "actual damages," "parallels" the common-law torts of libel *per quod* and slander, under which plaintiffs can recover "general damages" if they first prove "special damages." *Doe* v. *Chao*, 540 U. S. 614, 625. "Special damages" are limited to actual pecuniary loss, which must be specially pleaded and proved. "General damages" cover nonpecuniary loss and need not be pleaded or proved. This parallel suggests the possibility that Congress intended the term "actual damages" to mean "special damages," thus barring Privacy Act victims from any recovery unless they can first show some actual pecuniary harm. That Congress would choose "actual damages" instead of "special damages" is not without precedent, as the terms have occasionally been used interchangeably. Furthermore, any doubt about the plausibility of construing "actual damages" as special damages in the Privacy Act is put to rest by Congress' deliberate refusal to allow recovery for "general damages." In common-law defamation and privacy cases, special damages is the only category of compensatory damages other than general damages. Because Congress declined to authorize general damages, it

is reasonable to infer that Congress intended the term "actual damages" in the Act to mean special damages for proven pecuniary loss. Pp. 294–299.

(d) Although the contrary reading of the Privacy Act accepted by the Ninth Circuit and advanced by respondent is not inconceivable, it is plausible to read the Act as authorizing only damages for economic loss. Because Congress did not speak unequivocally, the Court adopts an interpretation of "actual damages" limited to proven pecuniary harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires. P. 299.

(e) Respondent raises several counterarguments: (1) Common-law cases often define "actual damages" to mean all compensatory damages; (2) the elimination of "general damages" from the Privacy Act means that there can be no recovery for *presumed* damages, but plaintiffs can still recover for *proven* mental and emotional distress; (3) because some courts have construed "actual damages" in similar statutes to include mental and emotional distress, Congress must have intended "actual damages" in the Act to include mental and emotional distress as well; and (4) precluding nonpecuniary damages would lead to absurd results, thereby frustrating the Act's remedial purpose. None of these arguments overcomes the sovereign immunity canon. Pp. 299–303.

622 F. 3d 1016, reversed and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 304. KAGAN, J., took no part in the consideration or decision of the case.

Eric J. Feigin argued the cause for petitioners. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, and *Mark B. Stern*.

Raymond A. Cardozo argued the cause for respondent. With him on the brief were *James M. Wood*, *James C. Martin*, *David J. Bird*, and *Thomas M. Pohl*.*

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*Briefs of *amici curiae* urging affirmance were filed for the AIDS Foundation of Chicago et al. by *Hayley J. Gorenberg* and *Jon W. Davidson;* for the Electronic Privacy Information Center by *Marc Rotenberg;* and for the National Whistleblower Center by *David K. Colapinto* and *Stephen M. Kohn*.

JUSTICE ALITO delivered the opinion of the Court.

The Privacy Act of 1974, codified in part at 5 U. S. C. § 552a, contains a comprehensive and detailed set of requirements for the management of confidential records held by Executive Branch agencies. If an agency fails to comply with those requirements "in such a way as to have an adverse effect on an individual," the Act authorizes the individual to bring a civil action against the agency. § 552a(g)(1)(D). For violations found to be "intentional or willful," the United States is liable for "actual damages." § 552a(g)(4)(A). In this case, we must decide whether the term "actual damages," as used in the Privacy Act, includes damages for mental or emotional distress. We hold that it does not.

I

The Federal Aviation Administration (FAA) requires pilots to obtain a pilot certificate and medical certificate as a precondition for operating an aircraft. 14 CFR §§ 61.3(a), (c) (2011). Pilots must periodically renew their medical certificates to ensure compliance with FAA medical standards. See § 61.23(d). When applying for renewal, pilots must disclose any illnesses, disabilities, or surgeries they have had, and they must identify any medications they are taking. See 14 CFR pt. 67.

Respondent Stanmore Cooper has been a private pilot since 1964. In 1985, he was diagnosed with a human immunodeficiency virus (HIV) infection and began taking antiretroviral medication. At that time, the FAA did not issue medical certificates to persons with respondent's condition. Knowing that he would not qualify for renewal of his medical certificate, respondent initially grounded himself and chose not to apply. In 1994, however, he applied for and received a medical certificate, but he did so without disclosing his HIV status or his medication. He renewed his certificate in 1998, 2000, 2002, and 2004, each time intentionally withholding information about his condition.

When respondent's health deteriorated in 1995, he applied for long-term disability benefits under Title II of the Social Security Act, 42 U. S. C. § 401 *et seq.* To substantiate his claim, he disclosed his HIV status to the Social Security Administration (SSA), which awarded him benefits for the year from August 1995 to August 1996.

In 2002, the Department of Transportation (DOT), the FAA's parent agency, launched a joint criminal investigation with the SSA, known as "Operation Safe Pilot," to identify medically unfit individuals who had obtained FAA certifications to fly. The DOT gave the SSA a list of names and other identifying information of 45,000 licensed pilots in northern California. The SSA then compared the list with its own records of benefit recipients and compiled a spreadsheet, which it gave to the DOT.

The spreadsheet revealed that respondent had a current medical certificate but had also received disability benefits. After reviewing respondent's FAA medical file and his SSA disability file, FAA flight surgeons determined in 2005 that the FAA would not have issued a medical certificate to respondent had it known his true medical condition.

When investigators confronted respondent with what had been discovered, he admitted that he had intentionally withheld from the FAA information about his HIV status and other relevant medical information. Because of these fraudulent omissions, the FAA revoked respondent's pilot certificate, and he was indicted on three counts of making false statements to a Government agency, in violation of 18 U. S. C. § 1001. Respondent ultimately pleaded guilty to one count of making and delivering a false official writing, in violation of § 1018. He was sentenced to two years of probation and fined $1,000.[1]

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[1] Respondent eventually applied for recertification as a pilot. After reviewing respondent's medical records, including information about his HIV diagnosis and treatment, the FAA reissued his pilot certificate and medical certificate. Brief for Respondent 5, n. 1.

Claiming that the FAA, DOT, and SSA (hereinafter Government) violated the Privacy Act by sharing his records with one another, respondent filed suit in the United States District Court for the Northern District of California. He alleged that the unlawful disclosure to the DOT of his confidential medical information, including his HIV status, had caused him "humiliation, embarrassment, mental anguish, fear of social ostracism, and other severe emotional distress." App. to Pet. for Cert. 120a. Notably, he did not allege any pecuniary or economic loss.

The District Court granted summary judgment against respondent. 816 F. Supp. 2d 778, 781 (2008). The court concluded that the Government had violated the Privacy Act and that there was a triable issue of fact as to whether the violation was intentional or willful.[2] But the court held that respondent could not recover damages because he alleged only mental and emotional harm, not economic loss. Finding that the term "actual damages" is "facially ambiguous," *id.*, at 791, and relying on the sovereign immunity canon, which provides that waivers of sovereign immunity must be strictly construed in favor of the Government, the court concluded that the Act does not authorize the recovery of damages from the Government for nonpecuniary mental or emotional harm.

The United States Court of Appeals for the Ninth Circuit reversed and remanded. 622 F. 3d 1016, 1024 (2010). The court acknowledged that the term "actual damages" is a "'chameleon'" in that "its meaning changes with the specific

[2] With certain exceptions, it is unlawful for an agency to disclose a record to another agency without the written consent of the person to whom the record pertains. 5 U. S. C. § 552a(b). One exception to this nondisclosure requirement applies when the head of an agency makes a written request for law enforcement purposes to the agency that maintains the record. See § 552a(b)(7). The agencies in this case could easily have shared respondent's medical records pursuant to the procedures prescribed by the Privacy Act, but the District Court concluded that they failed to do so.

statute in which it is found." *Id.*, at 1029. But the court nevertheless held that, as used in the Privacy Act, the term includes damages for mental and emotional distress. Looking to what it described as "[i]ntrinsic" and "[e]xtrinsic" sources, *id.*, at 1028, 1031, the court concluded that the meaning of "actual damages" in the Privacy Act is not ambiguous and that "a construction that limits recovery to pecuniary loss" is not "plausible," *id.*, at 1034.

The Government petitioned for rehearing or rehearing en banc, but a divided court denied the petition. *Id.*, at 1019. The Government then petitioned for certiorari, and we granted review. 564 U. S. 1018 (2011).

II

Because respondent seeks to recover monetary compensation from the Government for mental and emotional harm, we must decide whether the civil remedies provision of the Privacy Act waives the Government's sovereign immunity with respect to such a recovery.

A

We have said on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. See, *e. g.*, *Lane* v. *Peña*, 518 U. S. 187, 192 (1996); *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 33 (1992); *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95 (1990). Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. *Lane*, *supra*, at 192. Any ambiguities in the statutory language are to be construed in favor of immunity, *United States* v. *Williams*, 514 U. S. 527, 531 (1995), so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires, *Ruckelshaus* v. *Sierra Club*, 463 U. S. 680, 685–686 (1983) (citing *Eastern Transp. Co.* v. *United States*, 272 U. S. 675, 686 (1927)). Ambiguity exists if there is a plausible interpretation of the statute that would

not authorize money damages against the Government. *Nordic Village*, *supra*, at 34, 37.

The question that confronts us here is not whether Congress has consented to be sued for damages under the Privacy Act. That much is clear from the statute, which expressly authorizes recovery from the Government for "actual damages." Rather, the question at issue concerns the *scope* of that waiver. For the same reason that we refuse to enforce a waiver that is not unambiguously expressed in the statute, we also construe any ambiguities in the scope of a waiver in favor of the sovereign. *Lane*, *supra*, at 192.

Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon "is a tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction." *Richlin Security Service Co.* v. *Chertoff*, 553 U. S. 571, 589 (2008). What we thus require is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.

B

The civil remedies provision of the Privacy Act provides that, for any "intentional or willful" refusal or failure to comply with the Act, the United States shall be liable for "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000." 5 U. S. C. § 552a(g)(4)(A). Because Congress did not define "actual damages," respondent urges us to rely on the ordinary meaning of the word "actual" as it is defined in standard general-purpose dictionaries. But as the Court of Appeals

explained, "actual damages" is a legal term of art, 622 F. 3d, at 1028, and it is a "cardinal rule of statutory construction" that, when Congress employs a term of art, "'it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken,'" *Molzof* v. *United States*, 502 U. S. 301, 307 (1992) (quoting *Morissette* v. *United States*, 342 U. S. 246, 263 (1952)).

Even as a legal term, however, the meaning of "actual damages" is far from clear. The latest edition of Black's Law Dictionary available when Congress enacted the Privacy Act defined "actual damages" as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages." Black's Law Dictionary 467 (rev. 4th ed. 1968). But this general (and notably circular) definition is of little value here because, as the Court of Appeals accurately observed, the precise meaning of the term "changes with the specific statute in which it is found." 622 F. 3d, at 1029.

The term is sometimes understood to include nonpecuniary harm. Take, for instance, some courts' interpretations of the Fair Housing Act (FHA), 42 U. S. C. § 3613(c), and the Fair Credit Reporting Act (FCRA), 15 U. S. C. §§ 1681n, 1681*o*. A number of courts have construed "actual" damages in the remedial provisions of both statutes to include compensation for mental and emotional distress. See, *e. g.*, *Seaton* v. *Sky Realty Co.*, 491 F. 2d 634, 636–638 (CA7 1974) (authorizing compensatory damages under the FHA, 42 U. S. C. § 3612, the predecessor to § 3613, for humiliation); *Steele* v. *Title Realty Co.*, 478 F. 2d 380, 384 (CA10 1973) (stating that damages under the FHA "are not limited to out-of-pocket losses but may include an award for emotional distress and humiliation"); *Thompson* v. *San Antonio Retail Merchants Assn.*, 682 F. 2d 509, 513–514 (CA5 1982) *(per*

curiam) (explaining that, "[e]ven when there are no out-of-pocket expenses, humiliation and mental distress do constitute recoverable elements of damage" under the FCRA); *Millstone* v. *O'Hanlon Reports, Inc.*, 528 F. 2d 829, 834–835 (CA8 1976) (approving an award of damages under the FCRA for "loss of sleep, nervousness, frustration and mental anguish").

In other contexts, however, the term has been used or construed more narrowly to authorize damages for only pecuniary harm. In the wrongful-death provision of the Federal Tort Claims Act (FTCA), for example, Congress authorized "actual or compensatory damages, measured by the pecuniary injuries resulting from such death." 28 U. S. C. § 2674, ¶2. At least one court has defined "actual damages" in the Copyright Act of 1909, 17 U. S. C. § 101(b) (1970 ed.), as "the extent to which the market value of a copyrighted work has been injured or destroyed by an infringement." *Frank Music Corp.* v. *Metro-Goldwyn-Mayer, Inc.*, 772 F. 2d 505, 512 (CA9 1985); see also *Mackie* v. *Rieser*, 296 F. 3d 909, 917 (CA9 2002) (holding that "'hurt feelings' over the nature of the infringement" have no place in the actual damages calculus). And some courts have construed "actual damages" in the Securities Exchange Act of 1934, 15 U. S. C. § 78bb(a), to mean "some form of economic loss." *Ryan* v. *Foster & Marshall, Inc.*, 556 F. 2d 460, 464 (CA9 1977); see also *Osofsky* v. *Zipf*, 645 F. 2d 107, 111 (CA2 1981) (stating that the purpose of § 78bb(a) "is to compensate civil plaintiffs for economic loss suffered as a result of wrongs committed in violation of the 1934 Act"); *Herpich* v. *Wallace*, 430 F. 2d 792, 810 (CA5 1970) (noting that the "gist" of an action for damages under the Act is "economic injury").[3]

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[3] This narrow usage is reflected in contemporaneous state-court decisions as well. See, *e. g.*, *Reist* v. *Manwiller*, 231 Pa. Super. 444, 449, n. 4, 332 A. 2d 518, 520, n. 4 (1974) (explaining that recovery for intentional infliction of emotional distress is allowed "despite the total absence of physical injury and actual damages"); *Nalder* v. *Crest Corp.*, 93 Idaho 744,

Because the term "actual damages" has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.[4]

C

The Privacy Act directs agencies to establish safeguards to protect individuals against the disclosure of confidential records "which could result in substantial harm, embarrass-

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749, 472 P. 2d 310, 315 (1970) (noting that damages for "mental anguish" due to the wrongful execution of a judgment "are allowable only as an element of punitive but not of actual damages"). It is also reflected in post-Privacy Act statutes and judicial decisions. See, *e. g.*, 17 U. S. C. § 1009(d)(1)(A)(ii) (defining "actual damages" in the Audio Home Recording Act of 1992 as "the royalty payments that should have been paid"); 18 U. S. C. § 2318(e)(3) (2006 ed., Supp. IV) (calculating "actual damages" for purposes of a counterfeit labeling statute in terms of financial loss); *Guzman* v. *Western State Bank of Devils Lake*, 540 F. 2d 948, 953 (CA8 1976) (stating that compensatory damages in a civil rights suit "can be awarded for emotional and mental distress even though no actual damages are proven").

[4] The dissent criticizes us for noting that the dictionary definition contains an element of circularity. The dissent says that the definition—"'[a]ctual damages' compensate for actual injury"—is "plain enough." *Post*, at 306 (opinion of SOTOMAYOR, J.). But defining "actual" damages by reference to "actual" injury is hardly helpful when our task is to determine what Congress meant by "actual." The dissent's reference to the current version of Black's Law Dictionary, which provides that "actual damages" can mean "tangible damages," only highlights the term's ambiguity. See Black's Law Dictionary 445 (9th ed. 2009). If "actual damages" can mean "tangible damages," then it can be construed not to include intangible harm, like mental and emotional distress. Similarly unhelpful is the dissent's citation to a general-purpose dictionary that defines "actual" as "existing *in fact* or reality" and "damages" as "compensation or satisfaction *imposed by law* for a wrong or injury." Webster's Third New International Dictionary 22, 571 (2002) (emphasis added). Combining these two lay definitions says nothing about whether compensation for mental and emotional distress is *in fact imposed by law.* The definitions merely beg the question we are trying to answer. It comes as little surprise, therefore, that "actual damages" has taken on different meanings in different statutes, as our examples amply illustrate.

ment, inconvenience, or unfairness to any individual on whom information is maintained." 5 U. S. C. § 552a(e)(10); see also § 2(b), 88 Stat. 1896 (stating that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy"). Because the Act serves interests similar to those protected by defamation and privacy torts, there is good reason to infer that Congress relied upon those torts in drafting the Act.

In *Doe* v. *Chao*, 540 U. S. 614 (2004), we held that the Privacy Act's remedial provision authorizes plaintiffs to recover a guaranteed minimum award of $1,000 for violations of the Act, but only if they prove at least some "actual damages." *Id.*, at 620, 627; see § 552a(g)(4)(A). Although we did not address the meaning of "actual damages," *id.*, at 622, n. 5, 627, n. 12, we observed that the provision "parallels" the remedial scheme for the common-law torts of libel *per quod* and slander, under which plaintiffs can recover "general damages," but only if they prove "special harm" (also known as "special damages"), *id.*, at 625; see also 3 Restatement of Torts § 575, Comments *a* and *b* (1938) (hereinafter Restatement); D. Dobbs, Law of Remedies § 7.2, pp. 511–513 (1973) (hereinafter Dobbs).[5] "Special damages" are limited to actual pecuniary loss, which must be specially pleaded and proved. 1 D. Haggard, Cooley on Torts § 164, p. 580 (4th ed. 1932) (hereinafter Cooley).[6] "General damages," on the

[5] Libel *per quod* and slander (as opposed to libel and slander *per se*) apply to a communication that is not defamatory on its face but that is defamatory when coupled with some other extrinsic fact. Dobbs § 7.2, at 512–513.

[6] See also 3 Restatement § 575, Comment *b* ("Special harm . . . is harm of a material and generally of a pecuniary nature"); Dobbs § 7.2, at 520 ("Special damages in defamation cases mean pecuniary damages, or at least 'material loss' " (footnote omitted)). Special damages do not include mental or emotional distress. See 3 Restatement § 575, Comment *c* ("The emotional distress caused to the person slandered by his knowledge that he has been defamed is not special harm and this is so although the distress results in a serious illness"); Dobbs § 7.2, at 520 ("Even under the

other hand, cover "loss of reputation, shame, mortification, injury to the feelings and the like and need not be alleged in detail and require no proof." *Id.*, § 164, at 579.[7]

This parallel between the Privacy Act and the common-law torts of libel *per quod* and slander suggests the possibility that Congress intended the term "actual damages" in the Act to mean special damages. The basic idea is that Privacy Act victims, like victims of libel *per quod* or slander, are barred from any recovery unless they can first show actual—that is, pecuniary or material—harm. Upon showing some pecuniary harm, no matter how slight, they can recover the statutory minimum of $1,000, presumably for any unproven harm. That Congress would choose to use the term "actual damages" instead of "special damages" was not without precedent. The terms had occasionally been used interchangeably. See, *e. g.*, *Wetzel* v. *Gulf Oil Corp.*, 455 F. 2d 857, 862 (CA9 1972) (holding that plaintiff could not establish libel *per quod* because he "did not introduce any valid and sufficient evidence of actual damage"); *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 325 F. 2d 761, 765 (CA6 1963) (stating that "libel per quod standing alone without proof of actual damages . . . will not support a verdict for the plaintiff"); *M & S Furniture Sales Co.* v. *Edward J. De Bartolo Corp.*, 249 Md. 540, 544, 241 A. 2d 126, 128 (1968) ("In the

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more modern approach, special damages in defamation cases must be economic in nature, and it is not enough that the plaintiff has suffered harm to reputation, mental anguish or other dignitary harm, unless he has also suffered the loss of something having economic value").

[7] See also *id.*, § 3.2, at 139 (explaining that noneconomic harms "are called general damages"); W. Prosser, Law of Torts § 112, p. 761 (4th ed. 1971) (noting that "'general' damages may be recovered for the injury to the plaintiff's reputation, his wounded feelings and humiliation, and resulting physical illness and pain, as well as estimated future damages of the same kind" (footnotes omitted)); 3 Restatement § 621, Comment *a* (stating that, in actions for defamation, a plaintiff may recover general damages for "impairment of his reputation or, through loss of reputation, to his other interests").

case of words or conduct actionable only *per quod*, the injurious effect must be established by allegations and proof of special damage and in such cases it is not only necessary to plead and show that the words or actions were defamatory, but it must also appear that such words or conduct caused actual damage"); *Clementson* v. *Minnesota Tribune Co.*, 45 Minn. 303, 47 N. W. 781 (1891) (distinguishing "actual, or, as they are sometimes termed, 'special,' damages" from "general damages—that is, damages not pecuniary in their nature").[8]

Any doubt about the plausibility of construing "actual damages" in the Privacy Act synonymously with "special damages" is put to rest by Congress' refusal to authorize "general damages." In an uncodified section of the Act, Congress established the Privacy Protection Study Commission to consider, among other things, "whether the Federal Government should be liable for general damages." § 5(c)(2)(B)(iii), 88 Stat. 1907, note following 5 U. S. C. § 552a, p. 84 (1970 ed., Supp. IV). As we explained in *Doe*, "Congress left the question of general damages . . . for another day." 540 U. S., at 622. Although the Commission later recommended that general damages be allowed, *ibid.*, n. 4, Congress never amended the Act to include them. For that reason, we held that it was "beyond serious doubt" that general damages are not available for violations of the Privacy Act. *Id.*, at 622.

By authorizing recovery for "actual" but not for "general" damages, Congress made clear that it viewed those terms as mutually exclusive. In actions for defamation and related

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[8] The dissent disregards these precedents as the product of careless imprecision. *Post*, at 311, n. 6. But just as we assume that Congress did not act carelessly, we should not be so quick to assume that the courts did. The better explanation for these precedents is not that the courts were careless, but that the term "actual damages" has a varied meaning that, depending on the context, can be limited to compensation for only pecuniary harm.

dignitary torts, two categories of compensatory damages are recoverable: general damages and special damages. Cooley § 164, at 579; see also 4 Restatement § 867, Comment *d* (1939) (noting that damages for interference with privacy "can be awarded in the same way in which general damages are given for defamation").[9] Because Congress declined to authorize "general damages," we think it likely that Congress intended "actual damages" in the Privacy Act to mean special damages for proven pecuniary loss.

Not surprisingly, this interpretation was accepted by the Privacy Protection Study Commission, an expert body authorized by Congress and highly sensitive to the Act's goals. The Commission understood "actual damages" in the Act to be "a synonym for special damages as that term is used in defamation cases." Personal Privacy in an Information Society: The Report of the Privacy Protection Study Commission 530 (July 1977); see also *ibid.* ("The legislative history and language of the Act suggest that Congress meant to re-

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[9] See also *Moriarty* v. *Lippe*, 162 Conn. 371, 382–383, 294 A. 2d 326, 332–333 (1972) ("Having admittedly alleged or proven no special damages, the plaintiff here is limited to a recovery of general damages . . . "); *Meyerle* v. *Pioneer Publishing Co.*, 45 N. D. 568, 574, 178 N. W. 792, 794 (1920) *(per curiam)* ("Generally speaking, there are recognized two classes of damages in libel cases, general damages and special damages"); *Winans* v. *Chapman*, 104 Kan. 664, 666, 180 P. 266, 267 (1919) ("Actual damages include both general and special damages"); *Childers* v. *San Jose Mercury Printing & Publishing Co.*, 105 Cal. 284, 288–289, 38 P. 903, 904 (1894) (explaining that special damages, "as a branch of actual damages[,] may be recovered when actual pecuniary loss has been sustained" and that the "remaining branch of actual damages embraces recovery for loss of reputation, shame, mortification, injury to feelings, etc."); see generally Dobbs § 7.3, at 531 ("Though the dignitary torts often involve only general damages . . . , they sometimes produce actual pecuniary loss. When this happens, the plaintiff is usually entitled to recover any special damage he can prove . . . "); 1 F. Harper & F. James, Law of Torts § 5.30, p. 470 (1956) ("When liability for defamation is established, the defendant, in addition to such 'general' damages as may be assessed by the jury, is also liable for any special damage which he has sustained").

strict recovery to specific pecuniary losses until the Commission could weigh the propriety of extending the standard of recovery"). Although we are not bound in any way by the Commission's report, we think it confirms the reasonableness of interpreting "actual damages" in the unique context of the Privacy Act as the equivalent of special damages.

D

We do not claim that the contrary reading of the statute accepted by the Court of Appeals and advanced now by respondent is inconceivable. But because the Privacy Act waives the Federal Government's sovereign immunity, the question we must answer is whether it is plausible to read the statute, as the Government does, to authorize only damages for economic loss. *Nordic Village*, 503 U. S., at 34, 37. When waiving the Government's sovereign immunity, Congress must speak unequivocally. *Lane*, 518 U. S., at 192. Here, we conclude that it did not. As a consequence, we adopt an interpretation of "actual damages" limited to proven pecuniary or economic harm. To do otherwise would expand the scope of Congress' sovereign immunity waiver beyond what the statutory text clearly requires.

III

None of respondent's contrary arguments suffices to overcome the sovereign immunity canon.

A

Respondent notes that the term "actual damages" has often been defined broadly in common-law cases, and in our own, to include all compensatory damages. See Brief for Respondent 18–25. For example, in *Birdsall* v. *Coolidge*, 93 U. S. 64 (1876), a patent infringement case, we observed that "[c]ompensatory damages and actual damages mean the same thing." *Ibid.* And in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we wrote that actual injury in the defama-

tion context "is not limited to out-of-pocket loss" and that it customarily includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.*, at 350.

These cases and others cited by respondent stand for the unremarkable point that the term "actual damages" *can* include nonpecuniary loss. But this generic meaning does not establish with the requisite clarity that the Privacy Act, with its distinctive features, authorizes damages for mental and emotional distress. As we already explained, the term "actual damages" takes on different meanings in different contexts.

B

Respondent's stronger argument is that the exclusion of "general damages" from the statute simply means that there can be no recovery for presumed damages. Privacy Act victims can still recover for mental and emotional distress, says respondent, so long as it is proved. See Brief for Respondent 54–56.[10]

This argument is flawed because it suggests that *proven* mental and emotional distress does not count as general damages. The term "general damages" is not limited to compensation for unproven injuries; it includes compensation for proven injuries as well. See 3 Restatement § 621, Comment *a* (noting that general damages compensate for "harm which . . . is proved, or, in the absence of proof, is assumed to have caused to [the plaintiff's] reputation"). To be sure, specific proof of emotional harm is not required to recover general damages for dignitary torts. Dobbs § 7.3, at 529. But it does not follow that general damages cannot be recovered for emotional harm that is actually proved.

Aside from the fact that general damages need not be proved, what distinguishes those damages, whether proved

[10] The dissent advances the same argument. See *post*, at 312–314.

or not, from the only other category of compensatory damages available in the relevant common-law suits is the *type* of harm. In defamation and privacy cases, "the affront to the plaintiff's dignity and the emotional harm done" are "called general damages, to distinguish them from proof of actual economic harm," which is called "special damages." *Id.*, § 3.2, at 139; see also *supra*, at 295–296, 298, and nn. 6, 7, 9. Therefore, the converse of general damages is special damages, not all proven damages, as respondent would have it. Because Congress removed "general damages" from the Act's remedial provision, it is reasonable to infer that Congress foreclosed recovery for nonpecuniary harm, even if such harm can be proved, and instead waived the Government's sovereign immunity only with respect to harm compensable as special damages.

C

Looking beyond the Privacy Act's text, respondent points to the use of the term "actual" damages in the remedial provisions of the FHA, 42 U. S. C. § 3613(c), and the FCRA, 15 U. S. C. §§ 1681n, 1681*o*. As previously mentioned, courts have held that "actual" damages within the meaning of these statutes include compensation for mental and emotional distress. *Supra*, at 292–293. Citing the rule of construction that Congress intends the same language in similar statutes to have the same meaning, see *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) *(per curiam)*, respondent argues that the Privacy Act should also be interpreted as authorizing damages for mental and emotional distress. See Brief for Respondent 25–32.

Assuming for the sake of argument that these lower court decisions are correct, they provide only weak support for respondent's argument here. Since the term "actual damages" can mean different things in different contexts, statutes other than the Privacy Act provide only limited in-

terpretive aid, and that is especially true here. Neither the FHA nor the FCRA contains text that precisely mirrors the Privacy Act.[11] In neither of those statutes did Congress specifically decline to authorize recovery for general damages as it did in the Privacy Act. *Supra*, at 297–298. And most importantly, none of the lower court cases interpreting the statutes, which respondent has cited, see Brief for Respondent 29–31, involves the sovereign immunity canon.

Respondent also points to the FTCA, but the FTCA's general liability provision does not even use the term "actual damages." It instead provides that the "United States shall be liable" for certain tort claims "in the same manner and to the same extent as a private individual" under relevant state law. 28 U. S. C. § 2674, ¶1. For that reason alone, the FTCA's general liability provision is not a reliable source for interpreting the term "actual damages" in the Privacy Act. Nor does the FTCA's wrongful-death provision—which authorizes "actual or compensatory damages, measured by the pecuniary injuries resulting from such death," § 2674, ¶2—prove that Congress understood the term "actual damages" in the Privacy Act to include nonpecuniary mental and emotional harm. To the contrary, it proves that actual damages can be understood to entail only pecuniary harm depending on the context. Because the FTCA, like the FHA and FCRA, does not share the same text or design as the Privacy Act, it is not a fitting analog for construing the Act.

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[11] Compare 42 U. S. C. § 3613(c)(1) (stating that "the court may award to the plaintiff actual and punitive damages"); 15 U. S. C. § 1681n(a)(1) (authorizing "(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or (B) . . . actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater"); § 1681*o*(a)(1) (authorizing "any actual damages sustained by the consumer as a result of the failure") with 5 U. S. C. § 552a(g)(4)(A) (authorizing "actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000").

D

Finally, respondent argues that excluding damages for mental and emotional harm would lead to absurd results. Persons suffering relatively minor pecuniary loss would be entitled to recover $1,000, while others suffering only severe and debilitating mental or emotional distress would get nothing. See Brief for Respondent 33–35.

Contrary to respondent's suggestion, however, there is nothing absurd about a scheme that limits the Government's Privacy Act liability to harm that can be substantiated by proof of tangible economic loss. Respondent insists that such a scheme would frustrate the Privacy Act's remedial purpose, but that ignores the fact that, by deliberately refusing to authorize general damages, Congress intended to cabin relief, not to maximize it.[12]

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[12] Despite its rhetoric, the dissent does not dispute most of the steps in our analysis. For example, although the dissent belittles the sovereign immunity canon, the dissent does not call for its abandonment. See *post*, at 305–306. Nor does the dissent point out any error in our understanding of the canon's meaning. See *ibid.* The dissent acknowledges that statutes and judicial opinions sometimes use the term "actual damages" to mean pecuniary harm, see *post*, at 308, and that determining its meaning in a particular statute requires consideration of context, see *ibid.* In addition, the dissent concedes—as it must in light of our reasoning in *Doe* v. *Chao*, 540 U. S. 614 (2004)—that the common law of defamation has relevance in construing the term "actual damages" in the Privacy Act. See *post*, at 310–312.

The dissent's argument thus boils down to this: The text and purpose of the Privacy Act make it clear beyond any reasonable dispute that the term "actual damages," as used in the Act, means compensatory damages for all proven harm and not just damages for pecuniary harm. The dissent reasons that, because the Act seeks to prevent pecuniary and nonpecuniary harm, Congress must have intended to authorize the recovery of money damages from the Federal Government for both types of harm. This inference is plausible, but it surely is not unavoidable. The Act deters violations of its substantive provisions in other ways—for instance, by permitting recovery for economic injury; by imposing criminal sanctions for some violations, see 5 U. S. C. § 552a(i); and possibly by allowing for injunctive relief under the Administrative Procedure Act (APA), 5

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In sum, applying traditional rules of construction, we hold that the Privacy Act does not unequivocally authorize an award of damages for mental or emotional distress. Accordingly, the Act does not waive the Federal Government's sovereign immunity from liability for such harms. We therefore reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

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

Congress enacted the Privacy Act of 1974 for the stated purpose of safeguarding individual privacy against Government invasion. To that end, the Act provides a civil remedy entitling individuals adversely affected by certain agency misconduct to recover "actual damages" sustained as a result of the unlawful action.

Today the Court holds that "actual damages" is limited to pecuniary loss. Consequently, individuals can no longer recover what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely, mental or emotional distress. That result is at odds with the text, structure, and drafting history of the Act. And it cripples the Act's core purpose of redressing and deterring violations of privacy interests. I respectfully dissent.

U. S. C. §§ 702, 706; see *Doe*, *supra*, at 619, n. 1 (noting that the absence of equitable relief in suits under § 552a(g)(1)(C) or § 552a(g)(1)(D) may be explained by the availability of such relief under the APA).

I

The majority concludes that "actual damages" in the civil-remedies provision of the Privacy Act allows recovery for pecuniary loss alone. But it concedes that its interpretation is not compelled by the plain text of the statute or otherwise required by any other traditional tool of statutory interpretation. And it candidly acknowledges that a contrary reading is not "inconceivable." *Ante*, at 299. Yet because it considers its reading of "actual damages" to be "plausible," the majority contends that the canon of sovereign immunity requires adoption of an interpretation most favorable to the Government. *Ibid.*

The canon simply cannot bear the weight the majority ascribes it. "The sovereign immunity canon is just that—a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction." *Richlin Security Service Co.* v. *Chertoff*, 553 U. S. 571, 589 (2008) (majority opinion of ALITO, J.). Here, traditional tools of statutory construction—the statute's text, structure, drafting history, and purpose—provide a clear answer: The term "actual damages" permits recovery for all injuries established by competent evidence in the record, whether pecuniary or nonpecuniary, and so encompasses damages for mental and emotional distress. There is no need to seek refuge in a canon of construction, see *id.*, at 589–590 (declining to rely on canon as there is "no ambiguity left for us to construe" after application of "traditional tools of statutory construction and considerations of *stare decisis*"), much less one that has been used so haphazardly in the Court's history, see *United States* v. *Nordic Village, Inc.*, 503 U. S. 30, 42 (1992) (Stevens, J., dissenting) (canon is "nothing but a judge-made rule that is sometimes favored and sometimes disfavored" (footnote omitted)) (collecting cases).

It bears emphasis that we have said repeatedly that, while "we should not take it upon ourselves to *extend* the waiver

[of sovereign immunity] beyond that which Congress intended," "[n]either . . . should we assume the authority to *narrow* the waiver that Congress intended." *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979) (emphasis added). See also, *e. g.*, *Block* v. *Neal*, 460 U. S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced" (internal quotation marks omitted)). In the Privacy Act, Congress expressly authorized recovery of "actual damages" for certain intentional or willful agency misconduct. The Court should not "as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 69 (1955).

II

A

"In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U. S. 469, 475 (1992). The language of the civil-remedies provision of the Privacy Act is clear.

At the time Congress drafted the Act, Black's Law Dictionary defined "actual damages" as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury" and as "[s]ynonymous with 'compensatory damages.'" Black's Law Dictionary 467 (rev. 4th ed. 1968) (hereinafter Black's). The majority claims this is a "general" and "notably circular" definition, *ante*, at 292, but it is unclear why. The definition is plain enough: "Actual damages" compensate for actual injury, and thus the term is synonymous with compensatory dam-

ages. See Black's 467 (defining "compensatory damages" as damages that "will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury").[1] There is nothing circular about that definition.[2] It is the definition this Court adopted more than a century ago when we recognized that "[c]ompensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered." *Birdsall* v. *Coolidge*, 93 U. S. 64 (1876). It is the definition embraced in current legal dictionaries. See Black's 445 (9th ed. 2009) (defining "actual damages" as "[a]n amount awarded to a complainant to compensate for a proven injury or loss; damages that repay actual losses.—Also termed compensatory damages; tangible damages; real damages" (italics omitted)). And it is the definition that accords with the plain and ordinary meaning of the term. See Webster's Third New International Dictionary 22, 571 (2002) (defining "actual" as "existing in fact or reality" and "damages" as "compensation or satisfaction imposed by law for a

[1] Black's Law Dictionary also defined "actual damages" as synonymous with "general damages." Black's 467. While "general damages" has a specialized meaning of presumed damages in libel and slander cases, see n. 4, *infra*, it more generally can mean damages that "did in fact result from the wrong, directly and proximately," Black's 468.

[2] The majority declares the definition circular because "defining 'actual' damages by reference to 'actual' injury is hardly helpful when our task is to determine what Congress meant by 'actual.'" *Ante*, at 294, n. 4. "Actual injury," however, is far from an unhelpful reference. This Court already has recognized in the defamation context that "actual injury is not limited to out-of-pocket loss." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 350 (1974). That accords with the definitions of the terms. See Black's 53, 924 (defining "actual" as "[r]eal; substantial; existing presently in act, having a valid objective existence as opposed to that which is merely theoretical or possible," and "injury" as "[a]ny wrong or damage done to another").

wrong or injury caused by a violation of a legal right"). Thus, both as a term of art and in its plain meaning, "actual damages" connotes compensation for proven injuries or losses. Nothing in the use of that phrase indicates proven injuries need be pecuniary in nature.

The majority discards all this on the asserted ground that "the precise meaning of the term 'changes with the specific statute in which it is found.'" *Ante*, at 292 (quoting 622 F. 3d 1016, 1029 (CA9 2010)). Context, of course, is relevant to statutory interpretation; it may provide clues that Congress did not employ a word or phrase in its ordinary meaning. That well-established interpretive rule cannot, however, render irrelevant—as the majority would have it—the ordinary meaning of "actual damages."

Moreover, the authority the majority cites for its claim that "actual damages" has no fixed meaning undermines—rather than supports—its holding. Each cited authority involves either a statute in which Congress expressly directed that compensation be measured in strictly economic terms, or else a statute (*e. g.*, the Copyright Act of 1909) in which economic loss is the natural and probable consequence of a violation of the defined legal interest.[3] Neither factor is present here. Notably absent from the Privacy Act is any provision so much as hinting that "actual damages" should be limited to economic loss. And while "'"hurt feelings" over the nature of the [copyright] infringement'" may "have no place in the actual damages calculus" under the Copyright Act of 1909, *ante*, at 293 (quoting in parenthetical *Mackie* v. *Rieser*, 296 F. 3d 909, 917 (CA9 2002)), the majority provides no basis for concluding that "hurt feelings" are equally invalid in an Act concerned with safeguarding individual privacy. Thus, while context is no doubt relevant, the majori-

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[3] See 28 U. S. C. §2674; 17 U. S. C. §1009(d)(1); 18 U. S. C. §2318(e)(3) (2006 ed., Supp. IV); 17 U. S. C. §101(b) (1970 ed.); 15 U. S. C. §78bb(a) (2006 ed., Supp. IV).

ty's cited authority does little to help its cause in the stated context of this statute.

B

Indeed, the relevant statutory context—the substantive provisions whose breach may trigger suit under the civil-remedies provision—only reinforces the ordinary meaning of "actual damages."

Congress established substantive duties in the Act that are expressly designed to prevent agency conduct resulting in intangible harms to the individual. The Act requires agencies to "establish appropriate administrative, technical, and physical safeguards" to ensure against security breaches that could result in "substantial harm, embarrassment, inconvenience, or unfairness to any individual." 5 U. S. C. § 552a(e)(10). It also requires agencies to "maintain all records" used in making a determination about an individual in a manner that is "reasonably necessary to assure fairness to the individual in the determination." § 552a(e)(5). Thus an agency violates the terms of the Act if it fails, *e. g.*, to maintain safeguards protecting against "embarrassment"; there is no additional requirement that the pocketbook be implicated. An agency's intentional or willful violation of those duties triggers liability for "actual damages" under § 552a(g)(4) in the event of an adverse impact. §§ 552a(g)(1)(C)–(D), (g)(4).

Adopting a reading of "actual damages" that permits recovery for pecuniary loss alone creates a disconnect between the Act's substantive and remedial provisions. It allows a swath of Government violations to go unremedied: A federal agency could intentionally or willfully forgo establishing safeguards to protect against embarrassment and no successful private action could be taken against it for the harm Congress identified. Only an interpretation of "actual damages" that permits recovery for nonpecuniary harms harmonizes the Act's substantive and remedial provisions. *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997) (statutory interpreta-

tion must consider "the broader context of the statute as a whole").[4]

The majority draws a different conclusion from the substantive provisions of the Privacy Act. It (correctly) infers from them that the Act "serves interests similar to those protected by defamation and privacy torts." *Ante*, at 295. It then points to our observation in *Doe* v. *Chao*, 540 U. S. 614, 625 (2004), that the Act's civil-remedies provision "parallels" the remedial scheme for the common-law torts of defamation *per quod*, which permitted recovery of "general damages" (*i. e.*, presumed damages) only if a plaintiff first establishes "special damages" (*i. e.*, monetary loss).[5] *Ante*, at 295. That "parallel," the majority concludes, "suggests the possibility that Congress intended the term 'actual damages' in the Act to mean special damages." *Ante*, at 296.

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[4] It bears noting that the Privacy Act does not authorize injunctive relief when a suit is maintained under 5 U. S. C. §§ 552a(g)(1)(C) and (D). Rather, injunctive relief is available under the Act only for a limited category of suits: suits to amend a record and suits for access to a record. See §§ 552a(g)(2), (g)(3). Thus an individual who, like respondent, brings suit under subparagraph (g)(1)(C) or (D) for an intentional or willful violation of the Act will be without a remedy under the majority's reading of "actual damages."

[5] As the majority notes, "general damages" at common law refers to damages "presumed" to accrue from the violation of the legally protected right. No proof of actual injury was required. See D. Dobbs, Law of Remedies § 7.2, p. 513 (1973) (hereinafter Dobbs); *Doe*, 540 U. S., at 621. "Special damages," in contrast, "meant monetary loss." Dobbs § 7.2, at 512; *Doe*, 540 U. S., at 625. Common-law defamation actions falling within the rubric of defamation *per se* allowed successful plaintiffs to recover "general damages." See Dobbs § 7.2, at 513; *Doe*, 540 U. S., at 621. This stood in contrast to actions sounding in defamation *per quod*, which permitted recovery only if the plaintiff established "special damages." See Dobbs § 7.2, at 512; *Doe*, 540 U. S., at 625. Even in defamation *per quod* cases, a plaintiff could recover nonpecuniary injuries upon establishing some pecuniary loss. See Dobbs § 7.2, at 521; *Doe*, 540 U. S., at 625. See also *ante*, at 295.

The majority reads too much into *Doe*. At issue in that case was the question whether the Act's civil-suit provision authorized recovery of a guaranteed minimum award of $1,000 absent proof of some "actual damages." The Court answered in the negative, and in the course of doing so replied to the petitioner's argument that there was "something peculiar in offering some guaranteed damages . . . only to those plaintiffs who can demonstrate actual damages." 540 U. S., at 625. Although the Court cited the Act's parallels to defamation *per quod* actions in noting that nothing was "peculiar" about the Act's remedial scheme, *Doe* did not take the further step of deciding that "actual damages" means economic loss alone. Indeed, it expressly reserved that question. *Id.*, at 627, n. 12.

The majority, moreover, is wrong to conclude that the Act's parallels with defamation *per quod* actions suggest Congress intended "actual damages" to mean "special damages." Quite the opposite. The fact that Congress "would probably have known about" defamation *per quod* actions, *id.*, at 625, makes it all the more significant that Congress did *not* write "special damages" in the civil-remedies provision. This Court is typically not in the business of substituting words we think Congress intended to use for words Congress in fact used. Yet that is precisely what the majority does when it rewrites "actual damages" to mean "special damages."[6] In sum, the statutory context, and in particular the Act's substantive provisions, confirms the ordinary meaning of "actual damages." Although the Act shares parallels with common-law defamation torts, such analogies do

[6] The majority cites a collection of lower court opinions that have used "actual damages" in place of "special damages" to note that Congress would not have been alone in using the former term to refer to the latter. *Ante*, at 297–298. But that a handful of lower courts on occasion have been imprecise in their terminology provides no basis to assume the Legislature has been equally careless in the text of a statute.

not warrant a reading of the phrase that is at odds with the statute's plain text.[7]

C

An uncodified provision of the Act, tied to the Act's drafting history, also reinforces the ordinary meaning of "actual damages." As the majority notes, prior to reconciliation, the Senate and House bills contained civil-remedies provisions that were different in a critical respect: The Senate bill allowed for the recovery of "actual and general damages," whereas the House bill allowed for the recovery of "actual damages" alone.[8] In the reconciliation process, the provision for "general damages" was dropped and an uncodified section of the Act was amended to require the newly established Privacy Protection Study Commission to consider, among its other jobs, "whether the Federal Government should be liable for general damages incurred by an individual as the result of a willful or intentional violation of the provisions of sections 552a(g)(1)(C) or (D)." § 5(c)(2)(B)(iii), 88 Stat. 1907; see also *Doe*, 540 U. S., at 622.

As the Court explained in *Doe*, "[t]he deletion of 'general damages' from the bill is fairly seen . . . as a deliberate elimination of any possibility of imputing harm and awarding presumed damages." *Id.*, at 623; see also *id.*, at 622, n. 5 ("Congress explicitly rejected the proposal to make presumed

[7] There is yet another flaw in the majority's reasoning. At common law a plaintiff who successfully established "special damages" in an action for defamation *per quod* could proceed to recover damages for emotional and mental distress. See *ante*, at 295; n. 5, *supra*. If "Congress intended the term 'actual damages' in the Act to mean special damages," *ante*, at 296, then an individual who successfully establishes some pecuniary loss from a violation of the Act—presumably as trivial as the cost of a bottle of Tylenol—should be permitted to recover for emotional and mental distress. The majority, of course, does not accept that result, and its piecemeal embrace of the common law undermines its assertion that Congress intended "special damages" in place of "actual damages."

[8] See S. 3418, 93d Cong., 2d Sess., § 303(c)(1) (1974); H. R. 16373, 93d Cong., 2d Sess., § 3 (1974).

damages available for Privacy Act violations"). The elimination of presumed damages from the bill can only reasonably imply that what Congress left behind—"actual damages"—comprised damages that are not presumed, *i. e.*, damages proved by competent evidence in the record. See *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 349–350 (1974) (distinguishing in defamation context between presumed damages and damages for actual injuries sustained by competent evidence in the record, which include "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"); *Carey* v. *Piphus*, 435 U. S. 247, 262–264 (1978) (distinguishing between presumed damages and proven damages for mental and emotional distress).

Rather than view the deletion of general damages (presumed damages) as leaving the converse (proven damages), the majority supposes that the deletion leaves only a subset of proven damages—those of an economic nature, *i. e.*, "special damages." Once again, however, the majority's insistence that "Congress intended 'actual damages' in the Privacy Act to mean special damages for proven pecuniary loss," *ante*, at 298, finds no basis in the statutory text, see *supra*, at 311–312. And its response to the conclusion that Congress retained recovery for proven damages when it eliminated presumed damages is singularly unsatisfying. The majority declares such a conclusion "flawed" because "general damages" "includes compensation for proven injuries as well," so that "what distinguishes [general] damages, whether proved or not, from the only other category of compensatory damages available in the relevant common-law suits is the *type* of harm" the term encompasses—which the majority takes to be emotional harm alone. *Ante*, at 300–301. That assertion is defective on two scores. *First*, a plaintiff's ability to present proof of injury in a defamation *per se* action (and to recover for such proven injury) does not alter the definition of "general damages," which we already explained in *Doe*

means "presumed damages." 540 U. S., at 621; see also *id.*, at 623; n. 5, *supra*. *Second*, "general damages" is not limited to a "type" of harm. The majority's contrary assertion that the term permits recovery only for emotional "types" of harm overlooks the fact that "general damages are partly based on the belief that the plaintiff will suffer unprovable *pecuniary losses*." Dobbs § 7.2, at 514 (emphasis added). It thus was established at common law that in a defamation *per se* action, "the plaintiff is usually free to prove whatever actual pecuniary loss he can," and "the jury may be permitted to view the actual pecuniary loss proven as the tip of the iceberg, assume that there is still more unproven, and award damage accordingly." *Ibid.*

At its core, the majority opinion relies on the following syllogism: The common law employed two terms of art in defamation actions. Because Congress excluded recovery for "general damages," it must have meant to retain recovery only for "special damages." That syllogism, of course, ignores that there *is* another category of damages. It is the very category Congress used in the text of the Privacy Act: "actual damages." However much Congress may have drawn "'parallels,'" *ante*, at 295, between the Act and the common-law tort of defamation, the fact remains that Congress expressly chose not to use the words "special damages."[9]

D

I turn finally to the statute's purpose, for "[a]s in all cases of statutory construction, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Organization*, 441 U. S. 600, 608 (1979); see also *Dolan* v. *Postal Serv-*

[9] The majority cites the conclusions of the Privacy Protection Study Commission in support of its interpretation of "actual damages." The majority rightfully does not claim this piece of postenactment, extratextual material is due any deference; nor do I find its unelaborated conclusions persuasive.

ice, 546 U. S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The purposes of the Privacy Act could not be more explicit, and they are consistent with interpreting "actual damages" according to its ordinary meaning.

"The historical context of the Act is important to an understanding of its remedial purposes. In 1974, Congress was concerned with curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal." Dept. of Justice, Office of Privacy and Civil Liberties, Overview of the Privacy Act of 1974, p. 4 (2010). In particular, Congress recognized that "the increasing use of computers and sophisticated information technology . . . has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information." § 2(a)(2), 88 Stat. 1896. Identifying the right to privacy as "a personal and fundamental right," Congress found it "necessary and proper" to enact the Privacy Act "in order to protect the privacy of individuals identified in information systems maintained by Federal agencies." §§ 2(a)(4), (5), *ibid.*

Congress explained that the "purpose of this Act is to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to," *inter alia*, "be subject to civil suit for *any damages* which occur as a result of willful or intentional action which violates any individual's rights under this Act." § 2(b)(6), *ibid.* (emphasis added). That statement is an explicit reference to suits brought under § 552a(g)(4); no other provision speaks to a civil suit based on "willful or intentional" agency misconduct. It signals unmistakably congressional recognition that the civil-remedies provision is integral to realizing the Act's purposes.

Reading "actual damages" to permit recovery for any injury established by competent evidence in the record—pecuniary or not—best effectuates the statute's basic purpose. Although some privacy invasions no doubt result in economic loss, we have recognized time and again that the primary form of injuries is nonpecuniary, and includes mental distress and personal humiliation. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 385, n. 9 (1967) ("In the 'right of privacy' cases the primary damage is the mental distress"); see also *Gertz*, 418 U. S., at 350 ("[A]ctual injury" in defamatory falsehood cases "is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering"). Accord, 2 Dobbs § 7.1(1), at 259 (2d ed. 1993) (privacy is a dignitary interest, and "in a great many of the cases" in which the interest is invaded "the only harm is the affront to the plaintiff's dignity as a human being, the damage to his self-image, and the resulting mental distress"). That accords with common sense.

In interpreting the civil-remedies provision, we must not forget Congress enacted the Privacy Act to protect privacy. The majority's reading of "actual damages" renders the remedial provision impotent in the face of concededly unlawful agency action whenever the injury is solely nonpecuniary. That result is patently at odds with Congress' stated purpose. The majority, however, does not grapple with the ramifications of its opinion. It acknowledges the suggestion that its holding leads to absurd results as it allows individuals suffering relatively minor pecuniary losses to recover $1,000 while others suffering severe mental anguish to recover nothing. But it concludes that "there is nothing absurd about a scheme that limits the Government's Privacy Act liability to harm that can be substantiated by proof of tangible economic loss." *Ante*, at 303. Perhaps; it is certainly within Congress' prerogative to enact the statute the

majority envisions, namely, one that seeks to safeguard against invasions of privacy without remedying the primary harm that results from invasions of privacy. The problem for the majority is that one looks in vain for *any* indication in the text of the statute before us that Congress intended such a result. Nowhere in the Privacy Act does Congress so much as hint that it views a $5 hit to the pocketbook as more worthy of remedy than debilitating mental distress, and the majority's contrary assumption discounts the gravity of emotional harm caused by an invasion of the personal integrity that privacy protects.

* * *

After today, no matter how debilitating and substantial the resulting mental anguish, an individual harmed by a federal agency's intentional or willful violation of the Privacy Act will be left without a remedy unless he or she is able to prove pecuniary harm. That is not the result Congress intended when it enacted an Act with the express purpose of safeguarding individual privacy against Government invasion. And it is not a result remotely suggested by anything in the text, structure, or history of the Act. For those reasons, I respectfully dissent.

Syllabus

FLORENCE *v.* BOARD OF CHOSEN FREEHOLDERS OF COUNTY OF BURLINGTON ET AL.

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

No. 10–945. Argued October 12, 2011—Decided April 2, 2012

Petitioner was arrested during a traffic stop by a New Jersey state trooper who checked a statewide computer database and found a bench warrant issued for petitioner's arrest after he failed to appear at a hearing to enforce a fine. He was initially detained in the Burlington County Detention Center and later in the Essex County Correctional Facility, but was released once it was determined that the fine had been paid. At the first jail, petitioner, like every incoming detainee, had to shower with a delousing agent and was checked for scars, marks, gang tattoos, and contraband as he disrobed. Petitioner claims that he also had to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. At the second jail, petitioner, like other arriving detainees, had to remove his clothing while an officer looked for body markings, wounds, and contraband; had an officer look at his ears, nose, mouth, hair, scalp, fingers, hands, armpits, and other body openings; had a mandatory shower; and had his clothes examined. Petitioner claims that he was also required to lift his genitals, turn around, and cough while squatting. He filed a 42 U. S. C. § 1983 action in the Federal District Court against the government entities that ran the jails and other defendants, alleging Fourth and Fourteenth Amendment violations, and arguing that persons arrested for minor offenses cannot be subjected to invasive searches unless prison officials have reason to suspect concealment of weapons, drugs, or other contraband. The court granted him summary judgment, ruling that "strip-searching" nonindictable offenders without reasonable suspicion violates the Fourth Amendment. The Third Circuit reversed.

Held: The judgment is affirmed.

621 F. 3d 296, affirmed.

JUSTICE KENNEDY delivered the opinion of the Court, except as to Part IV, concluding that the search procedures at the county jails struck a reasonable balance between inmate privacy and the needs of the institutions, and thus the Fourth and Fourteenth Amendments do not require adoption of the framework and rules petitioner proposes. Pp. 326–338, 339–340.

Syllabus

(a) Maintaining safety and order at detention centers requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to problems. A regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U. S. 78, 89. This Court, in *Bell* v. *Wolfish*, 441 U. S. 520, 558, upheld a rule requiring pretrial detainees in federal correctional facilities "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution[s]," deferring to the judgment of correctional officials that the inspections served not only to discover but also to deter the smuggling of weapons, drugs, and other prohibited items. In *Block* v. *Rutherford*, 468 U. S. 576, 586–587, the Court upheld a general ban on contact visits in a county jail, noting the smuggling threat posed by such visits and the difficulty of carving out exceptions for certain detainees. The Court, in *Hudson* v. *Palmer*, 468 U. S. 517, 522–523, also recognized that deterring the possession of contraband depends in part on the ability to conduct searches without predictable exceptions when it upheld the constitutionality of random searches of inmate lockers and cells even without suspicion that an inmate is concealing a prohibited item. These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities, and that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters," *Block*, *supra*, at 584–585.

Persons arrested for minor offenses may be among the detainees to be processed at jails. See *Atwater* v. *Lago Vista*, 532 U. S. 318, 354. Pp. 326–330.

(b) The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of new inmates creates risks for staff, the existing detainee population, and the new detainees themselves. Officials therefore must screen for contagious infections and for wounds or injuries requiring immediate medical attention. It may be difficult to identify and treat medical problems until detainees remove their clothes for a visual inspection. Jails and prisons also face potential gang violence, giving them reasonable justification for a visual inspection of detainees for signs of gang affiliation

as part of the intake process. Additionally, correctional officials have to detect weapons, drugs, alcohol, and other prohibited items new detainees may possess. Drugs can make inmates aggressive toward officers or each other, and drug trading can lead to violent confrontations. Contraband has value in a jail's culture and underground economy, and competition for scarce goods can lead to violence, extortion, and disorder. Pp. 330–334.

(c) Petitioner's proposal—that new detainees not arrested for serious crimes or for offenses involving weapons or drugs be exempt from invasive searches unless they give officers a particular reason to suspect them of hiding contraband—is unworkable. The seriousness of an offense is a poor predictor of who has contraband, and it would be difficult to determine whether individual detainees fall within the proposed exemption. Even persons arrested for a minor offense may be coerced by others into concealing contraband. Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility.

It also may be difficult to classify inmates by their current and prior offenses before the intake search. Jail officials know little at the outset about an arrestee, who may be carrying a false ID or lie about his identity. The officers conducting an initial search often do not have access to criminal history records. And those records can be inaccurate or incomplete. Even with accurate information, officers would encounter serious implementation difficulties. They would be required to determine quickly whether any underlying offenses were serious enough to authorize the more invasive search protocol. Other possible classifications based on characteristics of individual detainees also might prove to be unworkable or even give rise to charges of discriminatory application. To avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population. While the restrictions petitioner suggests would limit the intrusion on the privacy of some detainees, it would be at the risk of increased danger to everyone in the facility, including the less serious offenders. The Fourth and Fourteenth Amendments do not require adoption of the proposed framework. Pp. 334–338, 339.

KENNEDY, J., delivered the opinion of the Court, except as to Part IV. ROBERTS, C. J., and SCALIA and ALITO, JJ., joined that opinion in full, and THOMAS, J., joined as to all but Part IV. ROBERTS, C. J., *post*, p. 340, and ALITO, J., *post*, p. 340, filed concurring opinions. BREYER, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 342.

Counsel

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Susan Chana Lask*, *Amy Howe*, *Kevin K. Russell*, *Jeffrey L. Fisher*, and *Pamela S. Karlan.*

Carter G. Phillips argued the cause for respondents. With him on the brief for respondent Essex County Correctional Facility et al. were *Eamon P. Joyce*, *Ryan C. Morris*, and *Alan Ruddy.* *Alfred W. Putnam, Jr.*, *D. Alicia Hickok*, and *J. Brooks DiDonato* filed a brief for respondent Board of Chosen Freeholders of the County of Burlington et al.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Leondra R. Kruger*, *Barbara L. Herwig*, and *Edward Himmelfarb.**

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*Briefs of *amici curiae* urging reversal were filed for Academics on Gang Behavior by *Evan P. Schultz;* for the American Bar Association by *Stephen N. Zack*, *Elaine J. Goldenberg*, and *Iris E. Bennett;* for Current and Former Jail and Corrections Professionals by *Craig A. Stewart*, *Lisa S. Blatt*, *Anthony J. Franze*, and *Dirk C. Phillips;* for the Domestic Violence Legal Empowerment and Appeals Project et al. by *Catherine E. Stetson* and *Jessica L. Ellsworth;* for the Medical Society of New Jersey et al. by *David J. Bederman;* for the National Police Accountability Project by *Kenneth N. Flaxman* and *Robert L. Herbst;* for Psychiatrists by *Seth P. Waxman* and *Daniel S. Volchok;* for Former Attorney General of New Jersey Robert J. Del Tufo et al. by *Edward Barocas*, *Steven R. Shapiro*, and *David C. Fathi;* and for Sister Bernie Galvin et al. by *Barrett S. Litt*, *Paul J. Estuar*, *Mark E. Merin*, *J. Christopher Mills*, and *Charles J. LaDuca.*

Briefs of *amici curiae* urging affirmance were filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *John W. Suthers* of Colorado, *Lawrence G. Wasden* of Idaho, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Roy Cooper* of North Carolina, *Mike DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Linda L. Kelly* of Pennsylvania, and *Mark L. Shurtleff* of Utah; for Atlantic County et al. by *Sean X. Kelly* and *Sean Robins;* for Cook County by *Anita Alvarez*,

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

Correctional officials have a legitimate interest, indeed a responsibility, to ensure that jails are not made less secure by reason of what new detainees may carry in on their bodies. Facility personnel, other inmates, and the new detainee himself or herself may be in danger if these threats are introduced into the jail population. This case presents the question of what rules, or limitations, the Constitution imposes on searches of arrested persons who are to be held in jail while their cases are being processed. The term "jail" is used here in a broad sense to include prisons and other detention facilities. The specific measures being challenged will be described in more detail; but, in broad terms, the controversy concerns whether every detainee who will be admitted to the general population may be required to undergo a close visual inspection while undressed.

The case turns in part on the extent to which this Court has sufficient expertise and information in the record to mandate, under the Constitution, the specific restrictions and limitations sought by those who challenge the visual search procedures at issue. In addressing this type of constitutional claim courts must defer to the judgment of cor-

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Patrick T. Driscoll, Jr., and *Paul A. Castiglione;* for the City and County of San Francisco et al. by *Dennis J. Herrera*, *Danny Chou*, *Vince Chhabria*, and *Christine Van Aken;* for the County Commissioners Association of Pennsylvania by *Robert L. Knupp* and *Anthony T. McBeth;* for DRI–The Voice of the Defense Bar by *R. Matthew Cairns* and *Mary Massaron Ross;* for the Maine County Commissioners Association by *Peter T. Marchesi;* for the National Sheriffs' Association et al. by *Robert Spence* and *Travis Wisdom;* for the New Jersey County Jail Wardens Association by *Stephen B. Kinnaird;* for the Policemen's Benevolent Association, Local 249, et al. by *James M. Mets;* and for the Texas Association of Counties et al. by *David Iglesias* and *Robert Davis.*

Meir Feder and *David Porter* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

*JUSTICE THOMAS joins all but Part IV of this opinion.

rectional officials unless the record contains substantial evidence showing their policies are an unnecessary or unjustified response to problems of jail security. That necessary showing has not been made in this case.

I

In 1998, seven years before the incidents at issue, petitioner Albert Florence was arrested after fleeing from police officers in Essex County, New Jersey. He was charged with obstruction of justice and use of a deadly weapon. Petitioner entered a plea of guilty to two lesser offenses and was sentenced to pay a fine in monthly installments. In 2003, after he fell behind on his payments and failed to appear at an enforcement hearing, a bench warrant was issued for his arrest. He paid the outstanding balance less than a week later; but, for some unexplained reason, the warrant remained in a statewide computer database.

Two years later, in Burlington County, New Jersey, petitioner and his wife were stopped in their automobile by a state trooper. Based on the outstanding warrant in the computer system, the officer arrested petitioner and took him to the Burlington County Detention Center. He was held there for six days and then was transferred to the Essex County Correctional Facility. It is not the arrest or confinement but the search process at each jail that gives rise to the claims before the Court.

Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. App. to Pet. for Cert. 53a–56a. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. (It is not clear whether this last step was part of the normal practice. See *ibid.*) Petitioner shared a cell with at least one other person and interacted with other inmates following his admission to the jail. Tr. of Oral Arg. 17.

The Essex County Correctional Facility, where petitioner was taken after six days, is the largest county jail in New Jersey. App. 70a. It admits more than 25,000 inmates each year and houses about 1,000 gang members at any given time. When petitioner was transferred there, all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. *Id.*, at 57a–59a; App. to Pet. for Cert. 137a–144a. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. App. 3a–4a, 52a, 258a. He was released the next day, when the charges against him were dismissed.

Petitioner sued the governmental entities that operated the jails, one of the wardens, and certain other defendants. The suit was commenced in the United States District Court for the District of New Jersey. Seeking relief under 42 U. S. C. § 1983 for violations of his Fourth and Fourteenth Amendment rights, petitioner maintained that persons arrested for a minor offense could not be required to remove their clothing and expose the most private areas of their bodies to close visual inspection as a routine part of the intake process. Rather, he contended, officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband. The District Court certified a class of individuals who were charged with a nonindictable offense under New Jersey law, processed at either the Burlington County or Essex County

jail, and directed to strip naked even though an officer had not articulated any reasonable suspicion they were concealing contraband.

After discovery, the court granted petitioner's motion for summary judgment on the unlawful search claim. It concluded that any policy of "strip searching" nonindictable offenders without reasonable suspicion violated the Fourth Amendment. A divided panel of the United States Court of Appeals for the Third Circuit reversed, holding that the procedures described by the District Court struck a reasonable balance between inmate privacy and the security needs of the two jails. 621 F. 3d 296 (2010). The case proceeds on the understanding that the officers searched detainees prior to their admission to the general population, as the Court of Appeals seems to have assumed. See *id.*, at 298, 311. Petitioner has not argued this factual premise is incorrect.

The opinions in earlier proceedings, the briefs on file, and some cases of this Court refer to a "strip search." The term is imprecise. It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position. In the instant case, the term does not include any touching of unclothed areas by the inspecting officer. There are no allegations that the detainees here were touched in any way as part of the searches.

The Federal Courts of Appeals have come to differing conclusions as to whether the Fourth Amendment requires correctional officials to exempt some detainees who will be admitted to a jail's general population from the searches here

at issue. This Court granted certiorari to address the question. 563 U. S. 917 (2011).

II

The difficulties of operating a detention center must not be underestimated by the courts. *Turner* v. *Safley*, 482 U. S. 78, 84–85 (1987). Jails (in the stricter sense of the term, excluding prison facilities) admit about 13 million inmates a year. See, *e. g.*, Dept. of Justice, Bureau of Justice Statistics, T. Minton, Jail Inmates at Midyear 2010—Statistical Tables 2 (2011). The largest facilities process hundreds of people every day; smaller jails may be crowded on weekend nights, after a large police operation, or because of detainees arriving from other jurisdictions. Maintaining safety and order at these institutions requires the expertise of correctional officials, who must have substantial discretion to devise reasonable solutions to the problems they face. The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests." *Turner*, *supra*, at 89; see *Overton* v. *Bazzetta*, 539 U. S. 126, 131–132 (2003). But see *Johnson* v. *California*, 543 U. S. 499, 510–511 (2005) (applying strict scrutiny to racial classifications).

The Court's opinion in *Bell* v. *Wolfish*, 441 U. S. 520 (1979), is the starting point for understanding how this framework applies to Fourth Amendment challenges. That case addressed a rule requiring pretrial detainees in any correctional facility run by the Federal Bureau of Prisons "to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution." *Id.*, at 558. Inmates at the federal Metropolitan Correctional Center in New York City argued there was no security justification for these searches. Officers searched guests before they entered the visiting room, and the inmates were under constant surveillance during the visit. *Id.*, at 577–578 (Marshall, J., dissent-

ing). There had been but one instance in which an inmate attempted to sneak contraband back into the facility. See *id.*, at 559 (majority opinion). The Court nonetheless upheld the search policy. It deferred to the judgment of correctional officials that the inspections served not only to discover but also to deter the smuggling of weapons, drugs, and other prohibited items inside. *Id.*, at 558. The Court explained that there is no mechanical way to determine whether intrusions on an inmate's privacy are reasonable. *Id.*, at 559. The need for a particular search must be balanced against the resulting invasion of personal rights. *Ibid.*

Policies designed to keep contraband out of jails and prisons have been upheld in cases decided since *Bell*. In *Block* v. *Rutherford*, 468 U. S. 576 (1984), for example, the Court concluded that the Los Angeles County Jail could ban all contact visits because of the threat they posed:

> "They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates." *Id.*, at 586.

There were "many justifications" for imposing a general ban rather than trying to carve out exceptions for certain detainees. *Id.*, at 587. Among other problems, it would be "a difficult if not impossible task" to identify "inmates who have propensities for violence, escape, or drug smuggling." *Ibid.* This was made "even more difficult by the brevity of detention and the constantly changing nature of the inmate population." *Ibid.*

The Court has also recognized that deterring the possession of contraband depends in part on the ability to con-

duct searches without predictable exceptions. In *Hudson* v. *Palmer*, 468 U. S. 517 (1984), it addressed the question whether prison officials could perform random searches of inmate lockers and cells even without reason to suspect a particular individual of concealing a prohibited item. *Id.*, at 522–523. The Court upheld the constitutionality of the practice, recognizing that "'[f]or one to advocate that prison searches must be conducted only pursuant to an enunciated general policy or when suspicion is directed at a particular inmate is to ignore the realities of prison operation.'" *Id.*, at 529 (quoting *Marrero* v. *Commonwealth*, 222 Va. 754, 757, 284 S. E. 2d 809, 811 (1981)). Inmates would adapt to any pattern or loopholes they discovered in the search protocol and then undermine the security of the institution. 468 U. S., at 529.

These cases establish that correctional officials must be permitted to devise reasonable search policies to detect and deter the possession of contraband in their facilities. See *Bell*, 441 U. S., at 546 ("[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of retained constitutional rights of both convicted prisoners and pretrial detainees"). The task of determining whether a policy is reasonably related to legitimate security interests is "peculiarly within the province and professional expertise of corrections officials." *Id.*, at 548. This Court has repeated the admonition that, "'in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations courts should ordinarily defer to their expert judgment in such matters.'" *Block*, *supra*, at 584–585; *Bell*, *supra*, at 548.

In many jails officials seek to improve security by requiring some kind of strip search of everyone who is to be detained. These procedures have been used in different places throughout the country, from Cranston, Rhode Island, to Sapulpa, Oklahoma, to Idaho Falls, Idaho. See *Roberts* v.

Rhode Island, 239 F. 3d 107, 108–109 (CA1 2001); *Chapman* v. *Nichols*, 989 F. 2d 393, 394 (CA10 1993); *Giles* v. *Ackerman*, 746 F. 2d 614, 615 (CA9 1984) *(per curiam);* see also, *e. g.*, *Bull* v. *City and Cty. of San Francisco*, 595 F. 3d 964 (CA9 2010) (en banc) (San Francisco, Cal.); *Powell* v. *Barrett*, 541 F. 3d 1298 (CA11 2008) (en banc) (Fulton Cty., Ga.); *Masters* v. *Crouch*, 872 F. 2d 1248, 1251 (CA6 1989) (Jefferson Cty., Ky.); *Weber* v. *Dell*, 804 F. 2d 796, 797–798 (CA2 1986) (Monroe Cty., N. Y.); *Stewart* v. *Lubbock Cty.*, 767 F. 2d 153, 154 (CA5 1985) (Lubbock Cty., Tex.).

Persons arrested for minor offenses may be among the detainees processed at these facilities. This is, in part, a consequence of the exercise of state authority that was the subject of *Atwater* v. *Lago Vista*, 532 U. S. 318 (2001). *Atwater* addressed the perhaps more fundamental question of who may be deprived of liberty and taken to jail in the first place. The case involved a woman who was arrested after a police officer noticed neither she nor her children were wearing their seatbelts. The arrestee argued the Fourth Amendment prohibited her custodial arrest without a warrant when an offense could not result in jail time and there was no compelling need for immediate detention. *Id.*, at 346. The Court held that a Fourth Amendment restriction on this power would put officers in an "almost impossible spot." *Id.*, at 350. Their ability to arrest a suspect would depend in some cases on the precise weight of drugs in his pocket, whether he was a repeat offender, and the scope of what counted as a compelling need to detain someone. *Id.*, at 348–349. The Court rejected the proposition that the Fourth Amendment barred custodial arrests in a set of these cases as a matter of constitutional law. It ruled, based on established principles, that officers may make an arrest based upon probable cause to believe the person has committed a criminal offense in their presence. See *id.*, at 354. The Court stated that "a responsible Fourth Amendment balance is not well served by standards requiring sensitive,

case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.*, at 347.

Atwater did not address whether the Constitution imposes special restrictions on the searches of offenders suspected of committing minor offenses once they are taken to jail. Some Federal Courts of Appeals have held that corrections officials may not conduct a strip search of these detainees, even if no touching is involved, absent reasonable suspicion of concealed contraband. 621 F. 3d, at 303–304, and n. 4. The Courts of Appeals to address this issue in the last decade, however, have come to the opposite conclusion. See 621 F. 3d 296 (case below); *Bame* v. *Dillard*, 637 F. 3d 380 (CADC 2011); *Powell*, *supra; Bull*, *supra.* The current case is set against this precedent and governed by the principles announced in *Turner* and *Bell*.

III

The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The Court has held that deference must be given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. *Block*, 468 U. S., at 584–585 (internal quotation marks omitted). Petitioner has not met this standard, and the record provides full justifications for the procedures used.

A

Correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process. The admission of inmates creates numerous risks for facility staff, for the existing detainee population, and for a new detainee himself or herself. The danger of introducing

lice or contagious infections, for example, is well documented. See, *e. g.*, Deger & Quick, The Enduring Menace of MRSA: Incidence, Treatment, and Prevention in a County Jail, 15 J. Correctional Health Care 174, 174–175, 177–178 (2009); Bick, Infection Control in Jails and Prisons, 45 Healthcare Epidemiology 1047, 1049 (2007). The Federal Bureau of Prisons recommends that staff screen new detainees for these conditions. See Clinical Practice Guidelines, Management of Methicillin-Resistant *Staphylococcus aureus* (MRSA) Infections 2 (2011); Clinical Practice Guidelines, Lice and Scabies Protocol 1 (2011). Persons just arrested may have wounds or other injuries requiring immediate medical attention. It may be difficult to identify and treat these problems until detainees remove their clothes for a visual inspection. See Prison and Jail Administration: Practice and Theory 142 (P. Carlson & G. Garrett eds., 2d ed. 2008) (hereinafter Carlson & Garrett).

Jails and prisons also face grave threats posed by the increasing number of gang members who go through the intake process. See Brief for Policemen's Benevolent Association, Local 249, et al. as *Amici Curiae* 14 (hereinafter PBA Brief); New Jersey Comm'n of Investigation, Gangland Behind Bars: How and Why Organized Criminal Street Gangs Thrive in New Jersey's Prisons . . . And What Can Be Done About It 10–11 (2009). "Gang rivalries spawn a climate of tension, violence, and coercion." Carlson & Garrett 462. The groups recruit new members by force, engage in assaults against staff, and give other inmates a reason to arm themselves. *Ibid.* Fights among feuding gangs can be deadly, and the officers who must maintain order are put in harm's way. PBA Brief 17. These considerations provide a reasonable basis to justify a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process. The identification and isolation of gang members before they are admitted protects everyone in the facility. Cf. *Fraise* v. *Terhune*, 283 F. 3d 506, 509–510 (CA3

2002) (Alito, J.) (describing a statewide policy authorizing the identification and isolation of gang members in prison).

Detecting contraband concealed by new detainees, furthermore, is a most serious responsibility. Weapons, drugs, and alcohol all disrupt the safe operation of a jail. Cf. *Hudson*, 468 U. S., at 528 (recognizing "the constant fight against the proliferation of knives and guns, illicit drugs, and other contraband"). Correctional officers have had to confront arrestees concealing knives, scissors, razor blades, glass shards, and other prohibited items on their person, including in their body cavities. See *Bull*, 595 F. 3d, at 967, 969; Brief for New Jersey County Jail Wardens Association as *Amicus Curiae* 17–18 (hereinafter New Jersey Wardens Brief). They have also found crack, heroin, and marijuana. Brief for City and County of San Francisco et al. as *Amici Curiae* 9–11 (hereinafter San Francisco Brief). The use of drugs can embolden inmates in aggression toward officers or each other; and, even apart from their use, the trade in these substances can lead to violent confrontations. See PBA Brief 11.

There are many other kinds of contraband. The textbook definition of the term covers any unauthorized item. See Prisons: Today and Tomorrow 237 (J. Pollock ed. 1997) ("*Contraband* is any item that is possessed in violation of prison rules. Contraband obviously includes drugs or weapons, but it can also be money, cigarettes, or even some types of clothing"). Everyday items can undermine security if introduced into a detention facility:

> "Lighters and matches are fire and arson risks or potential weapons. Cell phones are used to orchestrate violence and criminality both within and without jailhouse walls. Pills and medications enhance suicide risks. Chewing gum can block locking devices; hairpins can open handcuffs; wigs can conceal drugs and weapons." New Jersey Wardens Brief 8–9.

Something as simple as an overlooked pen can pose a significant danger. Inmates commit more than 10,000 assaults on correctional staff every year and many more among themselves. See Dept. of Justice, Bureau of Justice Statistics, J. Stephan & J. Karberg, Census of State and Federal Correctional Facilities, 2000, p. v (2003).

Contraband creates additional problems because scarce items, including currency, have value in a jail's culture and underground economy. Correctional officials inform us "[t]he competition . . . for such goods begets violence, extortion, and disorder." New Jersey Wardens Brief 2. Gangs exacerbate the problem. They "orchestrate thefts, commit assaults, and approach inmates in packs to take the contraband from the weak." *Id.*, at 9–10. This puts the entire facility, including detainees being held for a brief term for a minor offense, at risk. Gangs do coerce inmates who have access to the outside world, such as people serving their time on the weekends, to sneak things into the jail. *Id.*, at 10; see, *e. g.*, Pugmire, Vegas Suspect Has Term To Serve, Los Angeles Times, Sept. 23, 2005, p. B1 ("Weekend-only jail sentences are a common punishment for people convicted of nonviolent drug crimes . . . "). These inmates, who might be thought to pose the least risk, have been caught smuggling prohibited items into jail. See New Jersey Wardens Brief 10. Concealing contraband often takes little time and effort. It might be done as an officer approaches a suspect's car or during a brief commotion in a group holding cell. Something small might be tucked or taped under an armpit, behind an ear, between the buttocks, in the instep of a foot, or inside the mouth or some other body cavity.

It is not surprising that correctional officials have sought to perform thorough searches at intake for disease, gang affiliation, and contraband. Jails are often crowded, unsanitary, and dangerous places. There is a substantial interest in preventing any new inmate, either of his own will or as a result of coercion, from putting all who live or work at these

institutions at even greater risk when he is admitted to the general population.

B

Petitioner acknowledges that correctional officials must be allowed to conduct an effective search during the intake process and that this will require at least some detainees to lift their genitals or cough in a squatting position. These procedures, similar to the ones upheld in *Bell*, are designed to uncover contraband that can go undetected by a patdown, metal detector, and other less invasive searches. See Brief for United States as *Amicus Curiae* 23 (hereinafter United States Brief); New Jersey Wardens Brief 19, n. 6. Petitioner maintains there is little benefit to conducting these more invasive steps on a new detainee who has not been arrested for a serious crime or for any offense involving a weapon or drugs. In his view these detainees should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband. It is reasonable, however, for correctional officials to conclude this standard would be unworkable. The record provides evidence that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption.

1

People detained for minor offenses can turn out to be the most devious and dangerous criminals. Cf. *Clements* v. *Logan*, 454 U. S. 1304, 1305 (1981) (Rehnquist, J., in chambers) (deputy at a detention center shot by misdemeanant who had not been strip searched). Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Johnston, Suspect Won't Answer Any Questions, N. Y. Times, Apr. 25, 1995, p. A1. Police stopped serial killer Joel Rifkin for the same reason. McQuiston, Confes-

sion Used To Portray Rifkin as Methodical Killer, N. Y. Times, Apr. 26, 1994, p. B6. One of the terrorists involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93. The Terrorists: Hijacker Got a Speeding Ticket, N. Y. Times, Jan. 8, 2002, p. A12. Reasonable correctional officials could conclude these uncertainties mean they must conduct the same thorough search of everyone who will be admitted to their facilities.

Experience shows that people arrested for minor offenses have tried to smuggle prohibited items into jail, sometimes by using their rectal cavities or genitals for the concealment. They may have some of the same incentives as a serious criminal to hide contraband. A detainee might risk carrying cash, cigarettes, or a penknife to survive in jail. Others may make a quick decision to hide unlawful substances to avoid getting in more trouble at the time of their arrest. This record has concrete examples. Officers at the Atlantic County Correctional Facility, for example, discovered that a man arrested for driving under the influence had "2 dime bags of weed, 1 pack of rolling papers, 20 matches and 5 sleeping pills" taped under his scrotum. Brief for Atlantic County et al. as *Amici Curiae* 36 (internal quotation marks omitted). A person booked on a misdemeanor charge of disorderly conduct in Washington State managed to hide a lighter, tobacco, tattoo needles, and other prohibited items in his rectal cavity. See United States Brief 25, n. 15. San Francisco officials have discovered contraband hidden in body cavities of people arrested for trespassing, public nuisance, and shoplifting. San Francisco Brief 3. There have been similar incidents at jails throughout the country. See United States Brief 25, n. 15.

Even if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others. See New Jersey Wardens Brief 16; cf. *Block*, 468 U. S., at 587 ("It is not unreasonable

to assume, for instance, that low security risk detainees would be enlisted to help obtain contraband or weapons by their fellow inmates who are denied contact visits"). This could happen any time detainees are held in the same area, including in a van on the way to the station or in the holding cell of the jail. If, for example, a person arrested and detained for unpaid traffic citations is not subject to the same search as others, this will be well known to other detainees with jail experience. A hardened criminal or gang member can, in just a few minutes, approach the person and coerce him into hiding the fruits of a crime, a weapon, or some other contraband. As an expert in this case explained, "the interaction and mingling between misdemeanants and felons will only increase the amount of contraband in the facility if the jail can only conduct admission searches on felons." App. 381a. Exempting people arrested for minor offenses from a standard search protocol thus may put them at greater risk and result in more contraband being brought into the detention facility. This is a substantial reason not to mandate the exception petitioner seeks as a matter of constitutional law.

2

It also may be difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search. Jails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset. See New Jersey Wardens Brief 11–14. An arrestee may be carrying a false ID or lie about his identity. The officers who conduct an initial search often do not have access to criminal history records. See, *e. g.*, App. 235a; New Jersey Wardens Brief 13. And those records can be inaccurate or incomplete. See *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U. S. 749, 752 (1989). Petitioner's rap sheet is an example. It did not reflect his previous arrest for possession of a deadly weapon. Tr. of Oral Arg. 18–19. In the absence of reliable informa-

tion it would be illogical to require officers to assume the arrestees in front of them do not pose a risk of smuggling something into the facility.

The laborious administration of prisons would become less effective, and likely less fair and evenhanded, were the practical problems inevitable from the rules suggested by petitioner to be imposed as a constitutional mandate. Even if they had accurate information about a detainee's current and prior arrests, officers, under petitioner's proposed regime, would encounter serious implementation difficulties. They would be required, in a few minutes, to determine whether any of the underlying offenses were serious enough to authorize the more invasive search protocol. Other possible classifications based on characteristics of individual detainees also might prove to be unworkable or even give rise to charges of discriminatory application. Most officers would not be well equipped to make any of these legal determinations during the pressures of the intake process. *Bull*, 595 F. 3d, at 985–987 (Kozinski, C. J., concurring); see also *Welsh* v. *Wisconsin*, 466 U. S. 740, 761–762 (1984) (White, J., dissenting) ("[T]he Court's approach will necessitate a case-by-case evaluation of the seriousness of particular crimes, a difficult task for which officers and courts are poorly equipped"). To avoid liability, officers might be inclined not to conduct a thorough search in any close case, thus creating unnecessary risk for the entire jail population. Cf. *Atwater*, 532 U. S., at 351, and n. 22.

The Court addressed an analogous problem in *Atwater*. The petitioner in that case argued the Fourth Amendment prohibited a warrantless arrest when being convicted of the suspected crime "could not ultimately carry any jail time" and there was "no compelling need for immediate detention." *Id.*, at 346. That rule "promise[d] very little in the way of administrability." *Id.*, at 350. Officers could not be expected to draw the proposed lines on a moment's notice, and the risk of violating the Constitution would have discouraged

them from arresting criminals in any questionable circumstances. *Id.*, at 350–351 ("An officer not quite sure the drugs weighed enough to warrant jail time or not quite certain about a suspect's risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial"). The Fourth Amendment did not compel this result in *Atwater*. The Court held that officers who have probable cause to believe even a minor criminal offense has been committed in their presence may arrest the offender. See *id.*, at 354. Individual jurisdictions can of course choose "to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses." *Id.*, at 352.

One of the central principles in *Atwater* applies with equal force here. Officers who interact with those suspected of violating the law have an "essential interest in readily administrable rules." *Id.*, at 347; accord, *New York* v. *Belton*, 453 U. S. 454, 458 (1981). The officials in charge of the jails in this case urge the Court to reject any complicated constitutional scheme requiring them to conduct less thorough inspections of some detainees based on their behavior, suspected offense, criminal history, and other factors. They offer significant reasons why the Constitution must not prevent them from conducting the same search on any suspected offender who will be admitted to the general population in their facilities. The restrictions suggested by petitioner would limit the intrusion on the privacy of some detainees but at the risk of increased danger to everyone in the facility, including the less serious offenders themselves.

IV

This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with

other detainees. This describes the circumstances in *Atwater*. See 532 U. S., at 324 ("Officers took Atwater's 'mug shot' and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on $310 bond"). The accommodations provided in these situations may diminish the need to conduct some aspects of the searches at issue. Cf. United States Brief 30 (discussing the segregation, and less invasive searches, of individuals held by the Federal Bureau of Prisons for misdemeanors or civil contempt). The circumstances before the Court, however, do not present the opportunity to consider a narrow exception of the sort JUSTICE ALITO describes, *post*, at 341–342 (concurring opinion), which might restrict whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here.

Petitioner's *amici* raise concerns about instances of officers engaging in intentional humiliation and other abusive practices. See Brief for Sister Bernie Galvin et al. as *Amici Curiae;* see also *Hudson*, 468 U. S., at 528 ("[I]ntentional harassment of even the most hardened criminals cannot be tolerated by a civilized society"); *Bell*, 441 U. S., at 560. There also may be legitimate concerns about the invasiveness of searches that involve the touching of detainees. These issues are not implicated on the facts of this case, however, and it is unnecessary to consider them here.

V

Even assuming all the facts in favor of petitioner, the search procedures at the Burlington County Detention Center and the Essex County Correctional Facility struck a reasonable balance between inmate privacy and the needs of the institutions. The Fourth and Fourteenth Amendments do not require adoption of the framework of rules petitioner proposes.

The judgment of the Court of Appeals for the Third Circuit is affirmed.

It is so ordered.

CHIEF JUSTICE ROBERTS, concurring.

I join the opinion of the Court. As with JUSTICE ALITO, however, it is important for me that the Court does not foreclose the possibility of an exception to the rule it announces. JUSTICE KENNEDY explains that the circumstances before it do not afford an opportunity to consider that possibility. *Ante,* at 339. Those circumstances include the facts that Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.

Factual nuances have not played a significant role as this case has been presented to the Court. Both courts below regarded acknowledged factual disputes as "immaterial" to their conflicting dispositions, 621 F. 3d 296, 300 (CA3 2010), and before this Court Florence challenged suspicionless strip searches "no matter what the circumstances," Pet. for Cert. i.

The Court makes a persuasive case for the general applicability of the rule it announces. The Court is nonetheless wise to leave open the possibility of exceptions, to ensure that we "not embarrass the future." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 300 (1944) (Frankfurter, J.).

JUSTICE ALITO, concurring.

I join the opinion of the Court but emphasize the limits of today's holding. The Court holds that jail administrators may require all arrestees *who are committed to the general population of a jail* to undergo visual strip searches not involving physical contact by corrections officers. To perform the searches, officers may direct the arrestees to disrobe, shower, and submit to a visual inspection. As part of

the inspection, the arrestees may be required to manipulate their bodies.

Undergoing such an inspection is undoubtedly humiliating and deeply offensive to many, but there are reasonable grounds for strip searching arrestees before they are admitted to the general population of a jail. As the Court explains, there is a serious danger that some detainees will attempt to smuggle weapons, drugs, or other contraband into the jail. Some detainees may have lice, which can easily spread to others in the facility, and some detainees may have diseases or injuries for which the jail is required to provide medical treatment. In addition, if a detainee with gang-related tattoos is inadvertently housed with detainees from a rival gang, violence may ensue.

Petitioner and the dissent would permit corrections officers to conduct the visual strip search at issue here only if the officers have a reasonable basis for thinking that a particular arrestee may present a danger to other detainees or members of the jail staff. But as the Court explains, corrections officers are often in a very poor position to make such a determination, and the threat to the health and safety of detainees and staff, should the officers miscalculate, is simply too great.

It is important to note, however, that the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population. Most of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate. In some cases, the charges are dropped. In others, arrestees are released either on their own recognizance or on minimal bail. In the end, few are sentenced to incarceration. For these persons, admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable, particularly if an

alternative procedure is feasible. For example, the Federal Bureau of Prisons (BOP) and possibly even some local jails appear to segregate temporary detainees who are minor offenders from the general population. See, *e. g.*, Brief for United States as *Amicus Curiae* 30; *Bull* v. *City and Cty. of San Francisco*, 595 F. 3d 964, 968 (CA9 2010) (en banc).*

The Court does not address whether it is always reasonable, without regard to the offense or the reason for detention, to strip search an arrestee before the arrestee's detention has been reviewed by a judicial officer. The lead opinion explicitly reserves judgment on that question. See *ante*, at 339. In light of that limitation, I join the opinion of the Court in full.

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

The petition for certiorari asks us to decide "[w]hether the Fourth Amendment permits a . . . suspicionless strip search of every individual arrested for any minor offense . . . ." Pet. for Cert. i. This question is phrased more broadly than what is at issue. The case is limited to strip searches of those arrestees entering a jail's general population, see 621

*In its *amicus* brief, the United States informs us that, according to BOP policy, prison and jail officials cannot subject persons arrested for misdemeanor or civil contempt offenses to visual body-cavity searches without their consent or without reasonable suspicion that they are concealing contraband. Brief for United States 30. Those who are not searched must be housed separately from the inmates in the general population. *Ibid.* Similarly, as described by the Court of Appeals in *Bull*, 595 F. 3d 964, the San Francisco County jail system distinguishes between arrestees who are eligible for release because, for instance, they can post bail within 12 hours and those who must be housed for an extended period of time. *Id.*, at 968. The former are kept in holding cells at a temporary intake and release facility where they are pat searched and scanned with a metal detector but apparently are not strip searched. *Ibid.* The latter are transported to a jail with custodial housing facilities where they are then strip searched prior to their admission into the general population. *Ibid.*

F. 3d 296, 298 (CA3 2010). And the kind of strip search in question involves more than undressing and taking a shower (even if guards monitor the shower area for threatened disorder). Rather, the searches here involve close observation of the private areas of a person's body and for that reason constitute a far more serious invasion of that person's privacy.

The visually invasive kind of strip search at issue here is not unique. A similar practice is well described in *Dodge* v. *County of Orange*, 282 F. Supp. 2d 41 (SDNY 2003). In that New York case, the "strip search" (as described in a relevant prison manual) involved

> "'a visual inspection of the inmate's naked body. This should include the inmate opening his mouth and moving his tongue up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, lifting his arms to expose his arm pits, lifting his feet to examine the sole, spreading and/or lifting his testicles to expose the area behind them and bending over and/or spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar except females must in addition, squat to expose the vagina.'" *Id.*, at 46.

Because the *Dodge* court obtained considerable empirical information about the need for such a search in respect to minor offenders, and because the searches alleged in this case do not differ significantly, I shall use the succinct *Dodge* description as a template for the kind of strip search to which the question presented refers. See, *e. g.*, 621 F. 3d, at 299 (alleging that officers inspected his genitals from an arm's length away, required him to lift his genitals, and examined his anal cavity).

In my view, such a search of an individual arrested for a minor offense that does not involve drugs or violence—say, a traffic offense, a regulatory offense, an essentially civil

matter, or any other such misdemeanor—is an "unreasonable searc[h]" forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband. And I dissent from the Court's contrary determination.

I

Those confined in prison retain basic constitutional rights. *Bell* v. *Wolfish*, 441 U. S. 520, 545 (1979); *Turner* v. *Safley*, 482 U. S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution"). The constitutional right at issue here is the Fourth Amendment right to be free of "unreasonable searches and seizures." And, as the Court notes, the applicable standard is the Fourth Amendment balancing inquiry announced regarding prison inmates in *Bell* v. *Wolfish*, *supra*. The Court said:

> "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Id.*, at 559.

I have described in general terms, see *supra*, at 342–343, the place, scope, and manner of "the particular intrusion," *Bell*, 441 U. S., at 559. I now explain why I believe that the "invasion of personal rights" here is very serious and lacks need or justification, *ibid.*—at least as to the category of minor offenders at issue.

II

A strip search that involves a stranger peering without consent at a naked individual, and in particular at the most

private portions of that person's body, is a serious invasion of privacy. We have recently said, in respect to a schoolchild (and a less intrusive search), that the "meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions." *Safford Unified School Dist. #1* v. *Redding*, 557 U. S. 364, 377 (2009). The Courts of Appeals have more directly described the privacy interests at stake, writing, for example, that practices similar to those at issue here are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission." *Mary Beth G.* v. *Chicago*, 723 F. 2d 1263, 1272 (CA7 1984) (internal quotation marks omitted); see also, *e. g.*, *Blackburn* v. *Snow*, 771 F. 2d 556, 564 (CA1 1985) ("'[A]ll courts'" have recognized the "'severe if not gross interference with a person's privacy'" that accompany visual body-cavity searches (quoting *Arruda* v. *Fair*, 710 F. 2d 886, 887 (CA1 1983))). These kinds of searches also gave this Court the "most pause" in *Bell*, *supra*, at 558 (guards strip searched prisoners after they received outside visits). Even when carried out in a respectful manner, and even absent any physical touching, see *ante*, at 325, 339, such searches are inherently harmful, humiliating, and degrading. And the harm to privacy interests would seem particularly acute where the person searched may well have no expectation of being subject to such a search, say, because she had simply received a traffic ticket for failing to buckle a seatbelt, because he had not previously paid a civil fine, or because she had been arrested for a minor trespass.

In *Atwater* v. *Lago Vista*, 532 U. S. 318, 323–324 (2001), for example, police arrested a mother driving with her two children because their seatbelts were not buckled. This Court held that the Constitution did not forbid an arrest for a minor seatbelt offense. *Id.*, at 323. But, in doing so, it pointed out that the woman was held for only an hour (before

being taken to a magistrate and released on bond) and that the search—she had to remove her shoes, jewelry, and the contents of her pockets, *id.*, at 355—was not "'unusually harmful to [her] privacy or . . . physical interests.'" *Id.*, at 354 (quoting *Whren* v. *United States*, 517 U. S. 806, 818 (1996)). Would this Court have upheld the arrest had the magistrate not been immediately available, had the police housed her overnight in the jail, and had they subjected her to a search of the kind at issue here? Cf. *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 56 (1991) (presentment must be within 48 hours after arrest).

The petitioner, Albert W. Florence, states that his present arrest grew out of an (erroneous) report that he had failed to pay a minor civil fine previously assessed because he had hindered a prosecution (by fleeing police officers in his automobile). App. 25a–26a. He alleges that he was held for six days in jail before being taken to a magistrate and that he was subjected to two strip searches of the kind in question. 621 F. 3d, at 299.

Amicus briefs present other instances in which individuals arrested for minor offenses have been subjected to the humiliations of a visual strip search. They include a nun, a Sister of Divine Providence for 50 years, who was arrested for trespassing during an antiwar demonstration. Brief for Sister Bernie Galvin et al. as *Amici Curiae* 6. They include women who were strip searched during periods of lactation or menstruation. *Id.*, at 11–12 (describing humiliating experience of female student who was strip searched while menstruating); *Archuleta* v. *Wagner*, 523 F. 3d 1278, 1282 (CA10 2008) (same for woman lactating). They include victims of sexual violence. Brief for Domestic Violence Legal Empowerment and Appeals Project et al. as *Amici Curiae.* They include individuals detained for such infractions as driving with a noisy muffler, driving with an inoperable headlight, failing to use a turn signal, or riding a bicycle without an audible bell. Brief for Petitioner 11, 25; see also *Mary Beth*

G., *supra*, at 1267, n. 2 (considering strip search of a person arrested for having outstanding parking tickets and a person arrested for making an improper left turn); *Jones* v. *Edwards*, 770 F. 2d 739, 741 (CA8 1985) (same for violation of dog leash law). They include persons who perhaps should never have been placed in the general jail population in the first place. See *ante*, at 341 (ALITO, J. concurring) ("admission to the general jail population, with the concomitant humiliation of a strip search, may not be reasonable" for those "whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population").

I need not go on. I doubt that we seriously disagree about the nature of the strip search or about the serious affront to human dignity and to individual privacy that it presents. The basic question before us is whether such a search is nonetheless justified when an individual arrested for a minor offense is involuntarily placed in the general jail or prison population.

III

The majority, like the respondents, argues that strip searches are needed (1) to detect injuries or diseases, such as lice, that might spread in confinement, (2) to identify gang tattoos, which might reflect a need for special housing to avoid violence, and (3) to detect contraband, including drugs, guns, knives, and even pens or chewing gum, which might prove harmful or dangerous in prison. In evaluating this argument, I, like the majority, recognize: that managing a jail or prison is an "inordinately difficult undertaking," *Turner*, 482 U. S., at 85; that prison regulations that interfere with important constitutional interests are generally valid as long as they are "reasonably related to legitimate penological interests," *id.*, at 89; that finding injuries and preventing the spread of disease, minimizing the threat of gang violence, and detecting contraband are "legitimate penological interests," *ibid.;* and that we normally defer to the

expertise of jail and prison administrators in such matters, *id.*, at 85.

Nonetheless, the "particular" invasion of interests, *Bell*, 441 U. S., at 559, must be "'reasonably related'" to the justifying "penological interest" and the need must not be "'exaggerated,'" *Turner*, *supra*, at 87. It is at this point that I must part company with the majority. I have found no convincing reason indicating that, in the absence of reasonable suspicion, involuntary strip searches of those arrested for minor offenses are necessary in order to further the penal interests mentioned. And there are strong reasons to believe they are not justified.

The lack of justification is fairly obvious with respect to the first two penological interests advanced. The searches already employed at Essex and Burlington include: (1) pat frisking all inmates; (2) making inmates go through metal detectors (including the "Body Orifice Screening System (BOSS)" chair used at Essex County Correctional Facility that identifies metal hidden within the body); (3) making inmates shower and use particular delousing agents or bathing supplies; and (4) searching inmates' clothing. In addition, petitioner concedes that detainees could be lawfully subject to being viewed in their undergarments by jail officers or during showering (for security purposes). Brief for Petitioner 9; Tr. of Oral Arg. 7–8 ("Showering in the presence of officers is not something that requires reasonable suspicion"). No one here has offered any reason, example, or empirical evidence suggesting the inadequacy of such practices for detecting injuries, diseases, or tattoos. In particular, there is no connection between the genital lift and the "squat and cough" that Florence was allegedly subjected to and health or gang concerns. See Brief for Academics on Gang Behavior as *Amici Curiae;* Brief for Medical Society of New Jersey et al. as *Amici Curiae.*

The lack of justification for such a strip search is less obvious but no less real in respect to the third interest, namely,

that of detecting contraband. The information demonstrating the lack of justification is of three kinds. First, there are empirically based conclusions reached in specific cases. The New York Federal District Court, to which I have referred, conducted a study of 23,000 persons admitted to the Orange County correctional facility between 1999 and 2003. *Dodge*, 282 F. Supp. 2d, at 69. These 23,000 persons underwent a strip search of the kind described, *supra*, at 343. Of these 23,000 persons, the court wrote, "the County encountered three incidents of drugs recovered from an inmate's anal cavity and two incidents of drugs falling from an inmate's underwear during the course of a strip search." 282 F. Supp. 2d, at 69. The court added that in four of these five instances there may have been "reasonable suspicion" to search, leaving only one instance in 23,000 in which the strip search policy "arguably" detected additional contraband. *Id.*, at 70. The study is imperfect, for search standards changed during the time it was conducted. *Id.*, at 50–51. But the large number of inmates, the small number of "incidents," and the District Court's own conclusions make the study probative though not conclusive.

Similarly, in *Shain* v. *Ellison*, 273 F. 3d 56, 60 (CA2 2001), the court received data produced by the county jail showing that authorities conducted body-cavity strip searches, similar to those at issue here, of 75,000 new inmates over a period of five years. Brief for Plaintiff-Appellee-Cross-Appellant in No. 00–7061 etc. (CA2), p. 16 (citing to its App. 343a–493a). In 16 instances the searches led to the discovery of contraband. The record further showed that 13 of these 16 pieces of contraband would have been detected in a patdown or a search of shoes and outer clothing. In the three instances in which contraband was found on the detainee's body or in a body cavity, there was a drug or felony history that would have justified a strip search on individualized reasonable suspicion. *Ibid.;* Brief for National Police Accountability Project as *Amicus Curiae* 10.

Second, there is the plethora of recommendations of professional bodies, such as correctional associations, that have studied and thoughtfully considered the matter. The American Correctional Association (ACA)—an association that informs our view of "what is obtainable and what is acceptable in corrections philosophy," *Brown* v. *Plata*, 563 U. S. 493, 540 (2011)—has promulgated a standard that forbids suspicionless strip searches. And it has done so after consultation with the American Jail Association, National Sheriffs' Association, National Institute of Corrections of the Department of Justice, and Federal Bureau of Prisons. ACA, Performance-Based Standards for Adult Local Detention Facilities, Standard 4–ALDF–2C–03, p. 36 (4th ed. 2004); Dept. of Justice, Federal Performance-Based Detention Standards Handbook § C.6, p. 99 (rev-2 Feb. 23, 2011), http://www.justice.gov/ofdt/fpbds02232011.pdf (all Internet materials as visited Mar. 30, 2012, and available in Clerk of Court's case file); ACA, Core Jail Standards § 1–CORE–2C–02, pp. vii, 23 (2010). A standard desk reference for general information about sound correctional practices advises against suspicionless strip searches. Dept. of Justice, National Institute of Corrections, M. Martin & T. Rosazza, Resource Guide for Jail Administrators 4, 113 (2004); see also Dept. of Justice, National Institute of Corrections, M. Martin & P. Katsampes, Sheriff's Guide to Effective Jail Operations 50 (2007).

Moreover, many correctional facilities apply a reasonable suspicion standard before strip searching inmates entering the general jail population, including the U. S. Marshals Service, Immigration and Customs Enforcement (ICE), and the Bureau of Indian Affairs. See U. S. Marshals Serv., Policy Directive, Prisoner Custody-Body Searches § 9.1(E)(3) (2010), http://www.usmarshals.gov/foia/Directives-Policy/prisoner_ops/body_searches.pdf; ICE, Office of Detention and Removal Operations (DRO), 2008 Operations Manual ICE Performance-Based National Detention Standard Searches of Detainees 1, http://www.ice.gov/doclib/dro/

detention-standards/pdf/searches_of_detainees.pdf; *id.*, ICE/DRO Detention Standard: Admission and Release 4–5, http://www.ice.gov/doclib/dro/detention-standards/pdf/environmental_health_and_safety.pdf; Bureau of Indian Affairs, Office of Justice Servs., BIA Adult Detention Facility Guidelines 22 (Draft 2010). The Federal Bureau of Prisons (BOP) itself forbids suspicionless strip searches for minor offenders, though it houses separately (and does not admit to the general jail population) a person who does not consent to such a search. See Dept. of Justice, BOP Program Statement 5140.38, p. 5 (2004), http://www.bop.gov/policy/progstat/5140_038.pdf.

Third, there is general experience in areas where the law has forbidden here-relevant suspicionless searches. Laws in at least 10 States prohibit suspicionless strip searches. See, *e. g.*, Mo. Rev. Stat. § 544.193.2 (2011) ("No person arrested or detained for a traffic offense or an offense which does not constitute a felony may be subject to a strip search or a body cavity search . . . unless there is probable cause to believe that such person is concealing a weapon . . . or contraband"); Kan. Stat. Ann. § 22–2521(a) (2007) (similar); Iowa Code § 804.30 (2009) (similar); Ill. Comp. Stat., ch. 725, § 5/103–1(c) (West 2011) (similar but requiring "reasonable belief"); 501 Ky. Admin. Regs. 3:120, § 3(1)(b) (2011) (similar); Tenn. Code Ann. § 40–7–119 (2006) (similar); Colo. Rev. Stat. Ann. § 16–3–405(1) (2011) (no strip search absent individualized suspicion unless person has been arraigned and court orders that suspect be detained); Fla. Stat. § 901.211(2) (2010) (similar); Mich. Comp. Laws Ann. § 764.25a(2) (West 2000) (similar); Wash. Rev. Code § 10.79.130(1) (2010) (similar).

At the same time at least seven Courts of Appeals have considered the question and have required reasonable suspicion that an arrestee is concealing weapons or contraband before a strip search of one arrested for a minor offense can take place. See, *e. g.*, *Roberts* v. *Rhode Island*, 239 F. 3d 107, 112–113 (CA1 2001); *Weber* v. *Dell*, 804 F. 2d 796, 802

(CA2 1986); *Logan* v. *Shealy*, 660 F. 2d 1007, 1013 (CA4 1981); *Stewart* v. *Lubbock Cty., Tex.*, 767 F. 2d 153, 156–157 (CA5 1985); *Masters* v. *Crouch*, 872 F. 2d 1248, 1255 (CA6 1989); *Mary Beth G.*, 723 F. 2d, at 1266, 1273; *Edwards*, 770 F. 2d, at 742; *Hill* v. *Bogans*, 735 F. 2d 391, 394 (CA10 1984). But see 621 F. 3d, at 311 (case below); *Bull* v. *City and County of San Francisco*, 595 F. 3d 964, 975 (CA9 2010) (en banc); *Powell* v. *Barrett*, 541 F. 3d 1298, 1307 (CA11 2008) (en banc). Respondents have not presented convincing grounds to believe that administration of these legal standards has increased the smuggling of contraband into prison.

Indeed, neither the majority's opinion nor the briefs set forth any clear example of an instance in which contraband was smuggled into the general jail population during intake that could not have been discovered if the jail was employing a reasonable suspicion standard. The majority does cite general examples from Atlantic County and Washington State where contraband has been recovered in correctional facilities from inmates arrested for driving under the influence and disorderly conduct. *Ante*, at 335. Similarly, the majority refers to information, provided by San Francisco jail authorities, stating that they have found handcuff keys, syringes, crack pipes, drugs, and knives during body-cavity searches, including during searches of minor offenders, including a man arrested for illegally lodging (drugs), and a woman arrested for prostitution and public nuisance ("'bindles of crack cocaine'"). Brief for City and County of San Francisco et al. as *Amici Curiae* 7–13; *Bull*, *supra*, at 969; *ante*, at 335. And associated statistics indicate that the policy of conducting visual cavity searches of *all* those admitted to the general population in San Francisco may account for the discovery of contraband in approximately 15 instances per year. *Bull*, *supra*, at 969.

But neither San Francisco nor the respondents tell us *whether reasonable suspicion was present or absent* in *any* of the 15 instances. Nor is there any showing by the major-

ity that the few unclear examples of contraband recovered in Atlantic County, Washington State, or anywhere else could not have been discovered through a policy that required reasonable suspicion for strip searches. And without some such indication, I am left without an example of any instance in which contraband was found on an individual through an inspection of their private parts or body cavities which could not have been found under a policy requiring reasonable suspicion. Hence, at a minimum these examples, including San Francisco's statistics, do not provide a significant counterweight to those presented in *Dodge* and *Shain*.

Nor do I find the majority's lack of examples surprising. After all, those arrested for minor offenses are often stopped and arrested unexpectedly. And they consequently will have had little opportunity to hide things in their body cavities. Thus, the widespread advocacy by prison experts and the widespread application in many States and federal circuits of "reasonable suspicion" requirements indicate an ability to apply such standards in practice without unduly interfering with the legitimate penal interest in preventing the smuggling of contraband.

The majority is left with the word of prison officials in support of its contrary proposition. And though that word is important, it cannot be sufficient. Cf. Dept. of Justice, National Institute of Corrections, W. Collins, Jails and the Constitution: An Overview 28–29 (2d ed. 2007) (Though prison officials often "passionately believed" similar requirements would lead to contraband-related security problems, once those requirements were imposed those "problems did not develop").

The majority also relies upon *Bell*, 441 U. S. 520, itself. *Ante*, at 326–327. In that case, the Court considered a prison policy requiring a strip search of *all* detainees after "contact visits" with unimprisoned visitors. 441 U. S., at 558. The Court found that policy justified. *Id.*, at 560. Contrary to the majority's suggestion, that case does not provide prece-

dent for the proposition that the word of prison officials (accompanied by "one instance" of empirical example) is sufficient to support a strip search policy. *Ante*, at 327. The majority correctly points out that there was but "one instance" in which the policy had led to the discovery of an effort to smuggle contraband. *Bell*, 441 U. S., at 558. But the Court understood that the prison had been open only four months. *Id.*, at 526. And the Court was also presented with other examples where inmates attempted to smuggle contraband during contact visits. *Id.*, at 559.

It is true that in *Bell* the Court found the prison justified in conducting postcontact searches even as to pretrial detainees who had been brought before a magistrate, denied bail, and "committed to the detention facility only because no other less drastic means [could] reasonably assure [their] presence at trial." *Id.*, at 546, n. 28. The Court recognized that those ordered detained by a magistrate were often those "charged with serious crimes, or who have prior records." *Ibid.* For that reason, those detainees posed at least the same security risk as convicted inmates, if not "a greater risk to jail security and order," and a "greater risk of escape." *Ibid.* And, of course, in *Bell*, both the inmates at issue and their visitors had the time to plan to smuggle contraband in that case, unlike those persons at issue here (imprisoned soon after an unexpected arrest).

The *Bell* Court had no occasion to focus upon those arrested for minor crimes, prior to a judicial officer's determination that they should be committed to prison. I share JUSTICE ALITO's intuition that the calculus may be different in such cases, given that "[m]ost of those arrested for minor offenses are not dangerous, and most are released from custody prior to or at the time of their initial appearance before a magistrate." *Ante*, at 341 (concurring opinion). As he notes, this case does not address, and "reserves judgment on," whether it is always reasonable "to strip search an arrestee before the arrestee's detention has been reviewed by

a judicial officer." *Ante,* at 342. In my view, it is highly questionable that officials would be justified, for instance, in admitting to the dangerous world of the general jail population and subjecting to a strip search someone with no criminal background arrested for jaywalking or another similarly minor crime, *supra,* at 346–347. Indeed, that consideration likely underlies why the Federal Government and many States segregate such individuals even when admitted to jail, and several jurisdictions provide that such individuals be released without detention in the ordinary case. See, *e. g.*, Cal. Penal Code Ann. § 853.6 (West Supp. 2012).

In an appropriate case, therefore, it remains open for the Court to consider whether it would be reasonable to admit an arrestee for a minor offense to the general jail population, and to subject her to the "humiliation of a strip search," prior to any review by a judicial officer. *Ante,* at 341 (ALITO, J., concurring).

* * *

For the reasons set forth, I cannot find justification for the strip search policy at issue here—a policy that would subject those arrested for minor offenses to serious invasions of their personal privacy. I consequently dissent.

Syllabus

REHBERG *v.* PAULK

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

No. 10–788. Argued November 1, 2011—Decided April 2, 2012

Respondent, the chief investigator for a district attorney's office, testified at grand jury proceedings that resulted in petitioner's indictment. After the indictments were dismissed, petitioner brought an action under 42 U. S. C. § 1983, alleging that respondent had conspired to present and did present false testimony to the grand jury. The Federal District Court denied respondent's motion to dismiss on immunity grounds, but the Eleventh Circuit reversed, holding that respondent had absolute immunity from a § 1983 claim based on his grand jury testimony.

Held: A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under § 1983 as a witness who testifies at trial. Pp. 361–375.

(a) Section 1983, which derives from § 1 of the Civil Rights Act of 1871, was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits. See, *e. g.*, *Burns* v. *Reed*, 500 U. S. 478, 484. This interpretation of § 1983 has been reaffirmed by the Court time and again. Thus, the Court looks to the common law for guidance in determining the scope of the immunities available in actions brought under § 1983. See *Kalina* v. *Fletcher*, 522 U. S. 118, 123. Taking a "functional approach," see, *e. g.*, *Forrester* v. *White*, 484 U. S. 219, 224, the Court identifies those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed " 'with independence and without fear of consequences,' " *Pierson* v. *Ray*, 386 U. S. 547, 554.

The Court's functional approach is tied to the common law's identification of functions meriting the protection of absolute immunity, but the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity the common law provided to protect those functions. For example, it was common in 1871 for cases to be prosecuted by private parties, who did not enjoy absolute immunity from suit. But as the prosecutorial function was increasingly assumed by public officials, common-law courts held that public prosecutors, unlike their

private predecessors, were absolutely immune from the types of tort claims that an aggrieved or vengeful criminal defendant was most likely to assert. This adaptation of prosecutorial immunity accommodated the special needs of public, as opposed to private, prosecutors. Thus, when the issue of prosecutorial immunity under § 1983 reached this Court in *Imbler* v. *Pachtman*, 424 U. S. 409, the Court did not simply apply the scope of immunity recognized by common-law courts as of 1871 but instead relied substantially on post-1871 cases extending broad immunity to public prosecutors sued for common-law torts. Neither has the Court suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims. The new federal claim created by § 1983 differs in important ways from pre-existing common-law torts. Accordingly, both the scope of the new tort and the scope of the absolute immunity available in § 1983 actions differ in some respects from the common law. Pp. 361–366.

(b) A trial witness sued under § 1983 enjoys absolute immunity from any claim based on his testimony. *Briscoe* v. *LaHue*, 460 U. S. 325. Without absolute immunity, the truth-seeking process would be impaired as witnesses might be reluctant to testify, and even a witness who took the stand "might be inclined to shade his testimony in favor of the potential plaintiff" for "fear of subsequent liability." *Id.*, at 333. These factors apply with equal force to grand jury witnesses. In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent false testimony because other sanctions, chiefly prosecution for perjury, provide a sufficient deterrent.

For the reasons identified in *Briscoe*, *supra*, at 342–344, there is no reason to distinguish law enforcement witnesses from lay witnesses in § 1983 actions. And the rule that a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony may not be circumvented by claiming that a grand jury witness conspired to present false testimony, or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution. Were it otherwise, a criminal defendant turned civil plaintiff could reframe a claim to attack the preparatory activity—such as a preliminary discussion in which the witness relates the substance of his intended testimony—rather than the absolutely immune actions themselves. Pp. 366–370.

(c) Petitioner's main argument is that under *Malley* v. *Briggs*, 475 U. S. 335, 340–341, and *Kalina*, *supra*, at 131, grand jury witnesses who

are "complaining witnesses" are not entitled to absolute immunity. But at the time § 1983's predecessor was enacted, a "complaining witness" was a party who procured an arrest and initiated a criminal prosecution. A "complaining witness" *might* testify, either before a grand jury or at trial, but testifying was not a necessary characteristic of a "complaining witness." Thus, testifying, whether before a grand jury or at trial, was not the distinctive function performed by a "complaining witness." A "complaining witness" cannot be held liable for perjurious *trial* testimony, see *Briscoe*, *supra*, at 326, and there is no more reason why a "complaining witness" should be subject to liability for testimony before a grand jury.

Once the distinctive function performed by a "complaining witness" is understood, it is apparent that a law enforcement officer who testifies before a grand jury is not comparable to a "complaining witness" because it is not the officer who makes the critical decision to press criminal charges, but the prosecutor. It would be anomalous to permit a police officer testifying before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to initiate a prosecution. Petitioner also contends that the deterrent effect of civil liability is more needed in grand jury proceedings because trial witnesses face cross-examination. But the force of that argument is more than offset by the problem that allowing such civil actions would create—subversion of grand jury secrecy, which is essential to the proper functioning of the grand jury system. See *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424. And finally, contrary to petitioner's suggestion, recognizing absolute immunity for grand jury witnesses does not create an insupportable distinction between States that use grand juries and States that permit felony prosecutions to be brought by complaint or information. Most States that do not require an indictment for felonies provide a preliminary hearing at which witnesses testify, and the lower courts have held that preliminary hearing witnesses are protected by the same immunity accorded grand jury witnesses. Pp. 370–375.

611 F. 3d 828, affirmed.

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

Andrew J. Pincus argued the cause for petitioner. With him on the briefs were *Charles A. Rothfeld* and *Jeffrey A. Meyer*.

John C. Jones argued the cause for respondent. With him on the brief were *Theodore Freeman*, *Sun S. Choy*, and *Jacob E. Daly*.*

JUSTICE ALITO delivered the opinion of the Court.

This case requires us to decide whether a "complaining witness" in a grand jury proceeding is entitled to the same immunity in an action under 42 U. S. C. § 1983 as a witness who testifies at trial. We see no sound reason to draw a distinction for this purpose between grand jury and trial witnesses.

I

Petitioner Charles Rehberg, a certified public accountant, sent anonymous faxes to several recipients, including the management of a hospital in Albany, Georgia, criticizing the hospital's management and activities. In response, the local district attorney's office, with the assistance of its chief investigator, respondent James Paulk, launched a criminal investigation of petitioner, allegedly as a favor to the hospital's leadership.

Respondent testified before a grand jury, and petitioner was then indicted for aggravated assault, burglary, and six counts of making harassing telephone calls. The indictment charged that petitioner had assaulted a hospital physician, Dr. James Hotz, after unlawfully entering the doctor's home. Petitioner challenged the sufficiency of the indictment, and it was dismissed.

A few months later, respondent returned to the grand jury, and petitioner was indicted again, this time for assaulting

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Solicitor General Verrilli, *Assistant Attorney General West*, *Deputy Solicitor General Katyal*, *Eric D. Miller*, and *Barbara L. Herwig* filed a brief for the United States as *amicus curiae* in support of vacatur and remand.

Lawrence Rosenthal filed a brief for the International Municipal Lawyers Association et al. as *amici curiae* urging affirmance.

Dr. Hotz on August 22, 2004, and for making harassing phone calls. On this occasion, both the doctor and respondent testified. Petitioner challenged the sufficiency of this second indictment, claiming that he was "'nowhere near Dr. Hotz'" on the date in question and that "'[t]here was no evidence whatsoever that [he] committed an assault on anybody.'" 611 F. 3d 828, 836 (CA11 2010). Again, the indictment was dismissed.

While the second indictment was still pending, respondent appeared before a grand jury for a third time, and yet another indictment was returned. Petitioner was charged with assault and making harassing phone calls. This final indictment was ultimately dismissed as well.

Petitioner then brought this action against respondent under Rev. Stat. § 1979, 42 U. S. C. § 1983. Petitioner alleged that respondent conspired to present and did present false testimony to the grand jury. Respondent moved to dismiss, arguing, among other things, that he was entitled to absolute immunity for his grand jury testimony. The United States District Court for the Middle District of Georgia denied respondent's motion to dismiss, but the Court of Appeals reversed, holding, in accordance with Circuit precedent, that respondent was absolutely immune from a § 1983 claim based on his grand jury testimony.

The Court of Appeals noted petitioner's allegation that respondent was the sole "complaining witness" before the grand jury, but the Court of Appeals declined to recognize a "complaining witness" exception to its precedent on grand jury witness immunity. See 611 F. 3d, at 839–840. "[A]llowing civil suits for false grand jury testimony," the court reasoned, "would . . . emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings." *Id.*, at 840. The court went on to hold that respondent was entitled to absolute immunity, not only with respect to claims based directly on his grand jury testimony, but also with

respect to the claim that he conspired to present such testimony. *Id.*, at 841. To allow liability to be predicated on the alleged conspiracy, the court concluded, "'would be to permit through the back door what is prohibited through the front.'" *Ibid.* (quoting *Jones* v. *Cannon*, 174 F. 3d 1271, 1289 (CA11 1999)).

We granted certiorari to resolve a Circuit conflict regarding the immunity of a "complaining witness" in a grand jury proceeding, 562 U. S. 1286 (2011), and we now affirm.

II

Section 1983, which derives from § 1 of the Civil Rights Act of 1871, 17 Stat. 13, creates a private right of action to vindicate violations of "rights, privileges, or immunities secured by the Constitution and laws" of the United States. Under the terms of the statute, "'[e]very person' who acts under color of state law to deprive another of a constitutional right [is] answerable to that person in a suit for damages." *Imbler* v. *Pachtman*, 424 U. S. 409, 417 (1976) (citing 42 U. S. C. § 1983).

A

Despite the broad terms of § 1983, this Court has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits. See, *e. g.*, *Burns* v. *Reed*, 500 U. S. 478, 484 (1991). More than 60 years ago, in *Tenney* v. *Brandhove*, 341 U. S. 367 (1951), the Court held that § 1983 did not abrogate the long-established absolute immunity enjoyed by legislators for actions taken within the legitimate sphere of legislative authority. Immunities "well grounded in history and reason," the Court wrote, were not somehow eliminated "by covert inclusion in the general language" of § 1983. *Id.*, at 376.

This interpretation has been reaffirmed by the Court time and again and is now an entrenched feature of our § 1983 jurisprudence. See, *e. g.*, *Pierson* v. *Ray*, 386 U. S. 547, 554–

555 (1967) ("The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held . . . that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine"); *Imbler*, *supra*, at 418 (statute must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them"); *Procunier* v. *Navarette*, 434 U. S. 555, 561 (1978) ("Although the Court has recognized that in enacting § 1983 Congress must have intended to expose state officials to damages liability in some circumstances, the section has been consistently construed as not intending wholesale revocation of the common-law immunity afforded government officials"); *Briscoe* v. *LaHue*, 460 U. S. 325, 330 (1983) (" 'It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. . . . One important assumption underlying the Court's decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary' " (quoting *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 258 (1981))); *Pulliam* v. *Allen*, 466 U. S. 522, 529 (1984) ("The starting point in our own analysis is the common law. Our cases have proceeded on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so").

B

Recognizing that "Congress intended [§ 1983] to be construed in the light of common-law principles," the Court has looked to the common law for guidance in determining the

scope of the immunities available in a § 1983 action. *Kalina* v. *Fletcher*, 522 U. S. 118, 123 (1997). We do not simply make our own judgment about the need for immunity. We have made it clear that it is not our role "to make a free-wheeling policy choice," *Malley* v. *Briggs*, 475 U. S. 335, 342 (1986), and that we do not have a license to create immunities based solely on our view of sound policy, see *Tower* v. *Glover*, 467 U. S. 914, 922–923 (1984). Instead, we conduct "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, *supra*, at 421.

We take what has been termed a "functional approach." See *Forrester* v. *White*, 484 U. S. 219, 224 (1988); *Burns*, *supra*, at 486. We consult the common law to identify those governmental functions that were historically viewed as so important and vulnerable to interference by means of litigation that some form of absolute immunity from civil liability was needed to ensure that they are performed "'with independence and without fear of consequences.'" *Pierson*, *supra*, at 554 (quoting *Bradley* v. *Fisher*, 13 Wall. 335, 350, n. ‡ (1872)). Taking this approach, we have identified the following functions that are absolutely immune from liability for damages under § 1983: actions taken by legislators within the legitimate scope of legislative authority, see *Tenney*, *supra;* actions taken by judges within the legitimate scope of judicial authority, see *Pierson*, *supra;* actions taken by prosecutors in their role as advocates, see *Imbler*, *supra*, at 430–431; and the giving of testimony by witnesses at trial, see *Briscoe*, *supra*. By contrast, the Court has found no absolute immunity for the acts of the chief executive officer of a State, the senior and subordinate officers of a State's National Guard, the president of a state university, see *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974); school board members, see *Wood* v. *Strickland*, 420 U. S. 308, 318 (1975); the superintendent of a state hospital, see *O'Connor* v. *Donaldson*, 422 U. S. 563, 577 (1975); police officers, see *Pierson*,

386 U. S., at 555; prison officials and officers, *Procunier*, *supra*, at 561; and private co-conspirators of a judge, see *Dennis* v. *Sparks*, 449 U. S. 24, 27 (1980).

C

While the Court's functional approach is tied to the common law's identification of the functions that merit the protection of absolute immunity, the Court's precedents have not mechanically duplicated the precise scope of the absolute immunity that the common law provided to protect those functions. See, *e. g.*, *Burns*, 500 U. S., at 493 ("'[T]he precise contours of official immunity' need not mirror the immunity at common law" (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 645 (1987))).

This approach is illustrated by the Court's analysis of the absolute immunity enjoyed today by public prosecutors. When § 1983's predecessor was enacted in 1871, it was common for criminal cases to be prosecuted by private parties. See, *e. g.*, *Stewart* v. *Sonneborn*, 98 U. S. 187, 198 (1879) (Bradley, J., dissenting) ("[E]very man in the community, if he has probable cause for prosecuting another, has a perfect right, by law, to institute such prosecution, subject only, in the case of private prosecutions, to the penalty of paying the costs if he fails in his suit"). And private prosecutors, like private plaintiffs in civil suits, did not enjoy absolute immunity from suit. See *Malley*, 475 U. S., at 340–341, and n. 3 (citing cases). Instead, "the generally accepted rule" was that a private complainant who procured an arrest or prosecution could be held liable in an action for malicious prosecution if the complainant acted with malice and without probable cause. See *id.*, at 340–341; see also *Briscoe*, *supra*, at 351 (Marshall, J., dissenting) ("Both English and American courts routinely permitted plaintiffs to bring actions alleging that the defendant had made a false and malicious accusation of a felony to a magistrate or other judicial officer"); *Wheeler* v. *Nesbitt*, 24 How. 544, 550 (1861) ("Undoubtedly, every person who puts the criminal law in force

maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation"); *Dinsman* v. *Wilkes*, 12 How. 390, 402 (1852) (no immunity "where a party had maliciously, and without probable cause, procured the plaintiff to be indicted or arrested for an offence of which he was not guilty").

In the decades after the adoption of the 1871 Civil Rights Act, however, the prosecutorial function was increasingly assumed by public officials, and common-law courts held that public prosecutors, unlike their private predecessors, were absolutely immune from the types of tort claims that an aggrieved or vengeful criminal defendant was most likely to assert, namely, claims for malicious prosecution or defamation. See *Imbler*, 424 U. S., at 441–442 (White, J., concurring in judgment); *Kalina*, *supra*, at 124, n. 11 (noting that cases "decided after 1871 . . . granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law"); see also *Burns*, *supra*, at 505 (SCALIA, J., concurring in judgment in part and dissenting in part) (noting that the "common-law tradition of prosecutorial immunity . . . developed much later than 1871").

This adaptation of prosecutorial immunity accommodated the special needs of public, as opposed to private, prosecutors. Because the daily function of a public prosecutor is to bring criminal charges, tort claims against public prosecutors "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Imbler*, 424 U. S., at 425. Such "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties," and would result in a severe interference with the administration of an important public office. *Id.*, at 423. Constant vulnerability to vexatious litigation would give rise to the "possibility that

[the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Ibid.*

Thus, when the issue of prosecutorial immunity under § 1983 reached this Court in *Imbler*, the Court did not simply apply the scope of immunity recognized by common-law courts as of 1871 but instead placed substantial reliance on post-1871 cases extending broad immunity to public prosecutors sued for common-law torts.

While the Court has looked to the common law in determining the scope of the absolute immunity available under § 1983, the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more. The new federal claim created by § 1983 differs in important ways from those pre-existing torts. It is broader in that it reaches constitutional and statutory violations that do not correspond to any previously known tort. See *Kalina*, 522 U. S., at 123. But it is narrower in that it applies only to tortfeasors who act under color of state law. See *Briscoe*, 460 U. S., at 329. Section 1983 "ha[s] no precise counterpart in state law. . . . [I]t is the purest coincidence when state statutes or the common law provide for equivalent remedies; any analogies to those causes of action are bound to be imperfect." *Wilson* v. *Garcia*, 471 U. S. 261, 272 (1985) (internal quotation marks and citation omitted). Thus, both the scope of the new tort and the scope of the absolute immunity available in § 1983 actions differ in some respects from the common law.

III

A

At common law, trial witnesses enjoyed a limited form of absolute immunity for statements made in the course of a judicial proceeding: They had complete immunity against

slander and libel claims, even if it was alleged that the statements in question were maliciously false. *Kalina*, *supra*, at 133 (SCALIA, J., concurring) (citing F. Hilliard, Law of Torts 319 (1866)); see *Briscoe*, *supra*, at 351 (Marshall, J., dissenting); *Burns*, 500 U. S., at 501 (opinion of SCALIA, J.).

In *Briscoe*, however, this Court held that the immunity of a trial witness sued under § 1983 is broader: In such a case, a trial witness has absolute immunity with respect to *any* claim based on the witness' testimony. When a witness is sued because of his testimony, the Court wrote, "'the claims of the individual must yield to the dictates of public policy.'" 460 U. S., at 332–333 (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)). Without absolute immunity for witnesses, the Court concluded, the truth-seeking process at trial would be impaired. Witnesses "might be reluctant to come forward to testify," and even if a witness took the stand, the witness "might be inclined to shade his testimony in favor of the potential plaintiff" for "fear of subsequent liability." 460 U. S., at 333.

The factors that justify absolute immunity for trial witnesses apply with equal force to grand jury witnesses. In both contexts, a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence. And in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony. In *Briscoe*, the Court concluded that the possibility of civil liability was not needed to deter false testimony at trial because other sanctions—chiefly prosecution for perjury—provided a sufficient deterrent. *Id.*, at 342. Since perjury before a grand jury, like perjury at trial, is a serious criminal offense, see, *e. g.*, 18 U. S. C. § 1623(a), there is no reason to think that this deterrent is any less effective in preventing false grand jury testimony.

B

Neither is there any reason to distinguish law enforcement witnesses from lay witnesses. In *Briscoe*, it was argued

that absolute immunity was not needed for police officer witnesses, but the Court refused to draw that distinction. The Court wrote:

> "When a police officer appears as a witness, he may reasonably be viewed as acting like any other witness sworn to tell the truth—in which event he can make a strong claim to witness immunity; alternatively, he may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other governmental participants in the same proceeding. Nothing in the language of the statute suggests that such a witness belongs in a narrow, special category lacking protection against damages suits." 460 U. S., at 335–336 (footnote omitted).

See also *id.*, at 342 ("A police officer on the witness stand performs the same functions as any other witness").

The *Briscoe* Court rebuffed two arguments for distinguishing between law enforcement witnesses and lay witnesses for immunity purposes: first, that absolute immunity is not needed for law enforcement witnesses because they are less likely to be intimidated by the threat of suit and, second, that such witnesses should not be shielded by absolute immunity because false testimony by a police officer is likely to be more damaging than false testimony by a lay witness. See *ibid.* The Court observed that there are other factors not applicable to lay witnesses that weigh in favor of extending absolute immunity to police officer witnesses.

First, police officers testify with some frequency. *Id.*, at 343. "Police officers testify in scores of cases every year," the Court noted, "and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses." *Ibid.* If police officer witnesses were routinely forced to defend against claims

based on their testimony, their "'energy and attention would be diverted from the pressing duty of enforcing the criminal law.'" *Id.*, at 343–344 (quoting *Imbler*, 424 U. S., at 425).

Second, a police officer witness' potential liability, if conditioned on the exoneration of the accused, could influence decisions on appeal and collateral relief. 460 U. S., at 344. Needless to say, such decisions should not be influenced by the likelihood of a subsequent civil rights action. But the possibility that a decision favorable to the accused might subject a police officer witness to liability would create the "'risk of injecting extraneous concerns'" into appellate review and postconviction proceedings. *Ibid.* (quoting *Imbler*, *supra*, at 428, n. 27). In addition, law enforcement witnesses face the possibility of sanctions not applicable to lay witnesses, namely, loss of their jobs and other employment-related sanctions.

For these reasons, we conclude that grand jury witnesses should enjoy the same immunity as witnesses at trial. This means that a grand jury witness has absolute immunity from any § 1983 claim based on the witness' testimony. In addition, as the Court of Appeals held, this rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution. Were it otherwise, "a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves." *Buckley* v. *Fitzsimmons*, 509 U. S. 259, 283 (1993) (KENNEDY, J., concurring in part and dissenting in part); see also *Dykes* v. *Hosemann*, 776 F. 2d 942, 946 (CA11 1985) *(per curiam)* ("[J]udges, on mere allegations of conspiracy or prior agreement, could be hauled into court and made to defend their judicial acts, the precise result judicial immunity was designed to avoid"). In the vast majority of cases involving a claim against a grand

jury witness, the witness and the prosecutor conducting the investigation engage in preparatory activity, such as a preliminary discussion in which the witness relates the substance of his intended testimony. We decline to endorse a rule of absolute immunity that is so easily frustrated.[1]

IV

A

Petitioner's main argument is that our cases, chiefly *Malley* and *Kalina*, already establish that a "complaining witness" is not shielded by absolute immunity. See Brief for Petitioner 17–22. In those cases, law enforcement officials who submitted affidavits in support of applications for arrest warrants were denied absolute immunity because they "performed the function of a complaining witness." *Kalina*, 522 U. S., at 131; see *Malley*, 475 U. S., at 340–341. Relying on these cases, petitioner contends that certain grand jury witnesses—namely, those who qualify as "complaining witnesses"—are not entitled to absolute immunity. Petitioner's argument is based on a fundamental misunderstanding of the distinctive function played by a "complaining witness" during the period when § 1983's predecessor was enacted.

At that time, the term "complaining witness" was used to refer to a party who procured an arrest and initiated a criminal prosecution, see *Kalina*, 522 U. S., at 135 (SCALIA, J., concurring). A "complaining witness" might not actually ever testify, and thus the term "'witness' in 'complaining witness' is misleading." *Ibid.* See also *Malley*, *supra*, at 340 (complaining witness "procure[s] the issuance of an arrest warrant by submitting a complaint"); *Wyatt* v. *Cole*, 504 U. S.

[1] Of course, we do not suggest that absolute immunity extends to *all* activity that a witness conducts outside of the grand jury room. For example, we have accorded only qualified immunity to law enforcement officials who falsify affidavits, see *Kalina* v. *Fletcher*, 522 U. S. 118, 129–131 (1997); *Malley* v. *Briggs*, 475 U. S. 335, 340–345 (1986), and fabricate evidence concerning an unsolved crime, see *Buckley*, 509 U. S., at 272–276.

158, 164–165 (1992) (complaining witness "set[s] the wheels of government in motion by instigating a legal action").

It is true that a mid-19th-century complaining witness *might* testify, either before a grand jury or at trial. But testifying was not a necessary characteristic of a "complaining witness." See M. Newell, Malicious Prosecution 368 (1892). Nor have we been presented with evidence that witnesses who did no more than testify before a grand jury were regarded as complaining witnesses and were successfully sued for malicious prosecution. See Tr. of Oral Arg. 14–15, 24–25.

In sum, testifying, whether before a grand jury or at trial, was not the distinctive function performed by a complaining witness. It is clear—and petitioner does not contend otherwise—that a complaining witness cannot be held liable for perjurious *trial* testimony. *Briscoe*, *supra*, at 326. And there is no more reason why a complaining witness should be subject to liability for testimony before a grand jury.

Once the distinctive function performed by a "complaining witness" is understood, it is apparent that a law enforcement officer who testifies before a grand jury is not at all comparable to a "complaining witness." By testifying before a grand jury, a law enforcement officer does not perform the function of applying for an arrest warrant; nor does such an officer make the critical decision to initiate a prosecution. It is of course true that a detective or case agent who has performed or supervised most of the investigative work in a case may serve as an important witness in the grand jury proceeding and may very much want the grand jury to return an indictment. But such a witness, unlike a complaining witness at common law, does not make the decision to press criminal charges.

Instead, it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury, and in many jurisdictions, even if an indictment is handed up, a prosecution cannot proceed unless the prosecutor signs the

indictment.[2] It would thus be anomalous to permit a police officer who testifies before a grand jury to be sued for maliciously procuring an unjust prosecution when it is the prosecutor, who is shielded by absolute immunity, who is actually responsible for the decision to prosecute. See *Albright* v. *Oliver*, 510 U. S. 266, 279, n. 5 (1994) (GINSBURG, J., concurring) (the prosecutor is the "principal player in carrying out a prosecution"); see *ibid.* ("[T]he star player is exonerated, but the supporting actor is not").[3]

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[2] The federal courts have concluded uniformly that Rule 7(c) of the Federal Rules of Criminal Procedure, providing that an indictment "must be signed by an attorney for the government," precludes federal grand juries from issuing an indictment without the prosecutor's signature, signifying his or her approval. See 4 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 15.1(d) (3d ed. 2007) (hereinafter LaFave). However, in some jurisdictions, the grand jury may return an indictment and initiate a prosecution without the prosecutor's signature, but such cases are rare. See 1 S. Beale, W. Bryson, J. Felman, & M. Elston, Grand Jury Law and Practice, p. 4–76, and n. 2 (2d ed. 2001).

[3] Petitioner says there is no reason to distinguish between a person who goes to the police to swear out a criminal complaint and a person who testifies to facts before a grand jury for the same purpose and with the same effect. Brief for Petitioner 2, 23. But this is like saying that a bicycle and an F–16 are the same thing. Even if the functions are similar as a general matter, the entities are quite different. Grand juries, by tradition, statute, and sometimes constitutional mandate, have a status and entitlement to information that absolute immunity furthers. See, *e. g.*, *Imbler* v. *Pachtman*, 424 U. S. 409, 423, n. 20 (1976) ("It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well"); see also *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 423 (1983) ("The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution"). Our holding today supports the functioning of the grand jury system. The importance of the grand jury cannot be underestimated: In the federal system and many States, see LaFave § 15.1(d), a felony cannot be charged without the consent of community representatives, a vital protection from unwarranted prosecutions.

Precisely because no grand jury witness has the power to initiate a prosecution, petitioner is unable to provide a workable standard for determining whether a particular grand jury witness is a "complaining witness." Here, respondent was the only witness to testify in two of the three grand jury sessions that resulted in indictments. But where multiple witnesses testify before a grand jury, identifying the "complaining witness" would often be difficult. Petitioner suggests that a "complaining witness" is "someone who sets the prosecution in motion." Tr. of Oral Arg. 8; see Reply Brief for Petitioner 15. And petitioner maintains that the same distinction made at common law between complaining witnesses and other witnesses applies in § 1983 actions. See *id.*, at 14–16. But, as we have explained, a complaining witness played a distinctive role, and therefore even when a "complaining witness" testified, there was a clear basis for distinguishing between the "complaining witness" and other witnesses. Because no modern grand jury witness plays a comparable role, petitioner's proposed test would be of little use. Consider a case in which the case agent or lead detective testifies before the grand jury and provides a wealth of background information and then a cooperating witness appears and furnishes critical incriminating testimony. Or suppose that two witnesses each provide essential testimony regarding different counts of an indictment or different elements of an offense. In these cases, which witnesses would be "complaining witnesses" and thus vulnerable to suit based on their testimony?

B

Petitioner contends that the deterrent effect of civil liability is more needed in the grand jury context because trial witnesses are exposed to cross-examination, which is designed to expose perjury. See Brief for Petitioner 21, 25–26. This argument overlooks the fact that a critical grand jury witness is likely to testify again at trial and may be

cross-examined at that time. But in any event, the force of petitioner's argument is more than offset by a special problem that would be created by allowing civil actions against grand jury witnesses—subversion of grand jury secrecy.

"'We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings.'" *United States* v. *Sells Engineering, Inc.*, 463 U. S. 418, 424 (1983) (quoting *Douglas Oil Co. of Cal.* v. *Petrol Stops Northwest*, 441 U. S. 211, 218–219 (1979)). "'[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution.'" 463 U. S., at 424.

Allowing § 1983 actions against grand jury witnesses would compromise this vital secrecy. If the testimony of witnesses before a grand jury could provide the basis for, or could be used as evidence supporting, a § 1983 claim, the identities of grand jury witnesses could be discovered by filing a § 1983 action and moving for the disclosure of the transcript of grand jury proceedings. Especially in cases involving violent criminal organizations or other subjects who might retaliate against adverse grand jury witnesses, the threat of such disclosure might seriously undermine the grand jury process.

C

Finally, contrary to petitioner's suggestion, recognizing absolute immunity for grand jury witnesses does not create an insupportable distinction between States that use grand juries and those that do not. Petitioner argues that it would make no sense to distinguish for purposes of § 1983 immunity between prosecutions initiated by the return of a grand jury indictment and those initiated by the filing of a complaint or information, and he notes that 26 States permit felony

prosecutions to be brought by information. Brief for Petitioner 23–24. But petitioner draws the wrong analogy. In States that permit felony prosecutions to be initiated by information, the closest analog to a grand jury witness is a witness at a preliminary hearing. Most of the States that do not require an indictment for felonies provide a preliminary hearing at which witnesses testify. See LaFave § 14.2(d), at 304, and n. 47, 307, and n. 60. The lower courts have held that witnesses at a preliminary hearing are protected by the same immunity accorded grand jury witnesses, see, *e. g.*, *Brice* v. *Nkaru*, 220 F. 3d 233, 239, n. 6 (CA4 2000); *Curtis* v. *Bembenek*, 48 F. 3d 281, 284–285 (CA7 1995) (citing cases), and petitioner does not argue otherwise, see Tr. of Oral Arg. 51.

* * *

For these reasons, we hold that a grand jury witness is entitled to the same immunity as a trial witness. Accordingly, the judgment of the Court of Appeals for the Eleventh Circuit is

Affirmed.

Per Curiam

VASQUEZ *v.* UNITED STATES

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

No. 11–199. Argued March 21, 2012—Decided April 2, 2012
Certiorari dismissed. Reported below: 635 F. 3d 889.

Beau B. Brindley argued the cause for petitioner. With him on the briefs were *Joshua J. Jones* and *Blair T. Westover.*

Anthony A. Yang argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

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*Briefs of *amici curiae* urging reversal were filed for the National Association of Criminal Defense Lawyers by *John D. Cline* and *Jeffrey T. Green;* and for Jeffrey K. Skilling by *Daniel M. Petrocelli*, *M. Randall Oppenheimer*, *Matthew T. Kline*, *David J. Marroso*, *Jonathan D. Hacker*, and *Anton Metlitsky.*

A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, and *Don Clemmer*, Deputy Attorney General, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Alan Wilson* of South Carolina, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming.

Syllabus

FILARSKY *v.* DELIA

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

No. 10–1018. Argued January 17, 2012—Decided April 17, 2012

Respondent Delia, a firefighter employed by the city of Rialto, California (City), missed work after becoming ill on the job. Suspicious of Delia's extended absence, the City hired a private investigation firm to conduct surveillance on him. When Delia was seen buying fiberglass insulation and other building supplies, the City initiated an internal affairs investigation. It hired petitioner Filarsky, a private attorney, to interview Delia. At the interview, which Delia's attorney and two fire department officials also attended, Delia acknowledged buying the supplies, but denied having done any work on his home. To verify Delia's claim, Filarsky asked Delia to allow a fire department official to enter his home and view the unused materials. When Delia refused, Filarsky ordered him to bring the materials out of his home for the official to see. This prompted Delia's attorney to threaten a civil rights action against the City and Filarsky. Nonetheless, after the interview concluded, officials followed Delia to his home, where he produced the materials.

Delia brought an action under 42 U. S. C. § 1983 against the City, the fire department, Filarsky, and other individuals, alleging that the order to produce the building materials violated his Fourth and Fourteenth Amendment rights. The District Court granted summary judgment to the individual defendants on the basis of qualified immunity. The Court of Appeals for the Ninth Circuit affirmed with respect to all individual defendants except Filarsky, concluding that he was not entitled to seek qualified immunity because he was a private attorney, not a City employee.

Held: A private individual temporarily retained by the government to carry out its work is entitled to seek qualified immunity from suit under § 1983. Pp. 383–394.

(a) In determining whether the Court of Appeals made a valid distinction between City employees and Filarsky for qualified immunity purposes, this Court looks to the general principles of tort immunities and defenses applicable at common law, and the reasons the Court has afforded protection from suit under § 1983. See *Imbler* v. *Pachtman*, 424 U. S. 409, 418. The common law as it existed in 1871, when Congress enacted § 1983, did not draw a distinction between full-time public

servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government at that time was smaller in both size and reach, had fewer responsibilities, and operated primarily at the local level. Government work was carried out to a significant extent by individuals who did not devote all their time to public duties, but instead pursued private callings as well. In according protection from suit to individuals doing the government's work, the common law did not draw distinctions based on the nature of a worker's engagement with the government. Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself. Common law principles of immunity were incorporated into § 1983 and should not be abrogated absent clear legislative intent. See *Pulliam* v. *Allen*, 466 U. S. 522, 529. Immunity under § 1983 therefore should not vary depending on whether an individual working for the government does so as a permanent or full-time employee, or on some other basis. Pp. 383–389.

(b) Nothing about the reasons this Court has given for recognizing immunity under § 1983 counsels against carrying forward the common law rule. First, the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business—which has been called "the most important special government immunity-producing concern," *Richardson* v. *McKnight*, 521 U. S. 399, 409—is equally implicated regardless of whether the individual sued as a state actor works for the government full time or on some other basis. Second, affording immunity to those acting on the government's behalf serves to "'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.'" *Id.*, at 408. The government, in need of specialized knowledge or expertise, may look outside its permanent work force to secure the services of private individuals. But because those individuals are free to choose other work that would not expose them to liability for government actions, the most talented candidates might decline public engagements if they did not receive the same immunity enjoyed by their public employee counterparts. Third, the public interest in ensuring performance of government duties free from the distractions that can accompany lawsuits is implicated whether those duties are discharged by private individuals or permanent government employees. Finally, distinguishing among those who carry out the public's business based on their particular relationship with the government creates significant line-drawing problems and can deprive state actors of the ability to "'reasonably anticipate when their conduct may give rise to liability for damages,'" *Anderson* v. *Creighton*, 483 U. S. 635, 646. Pp. 389–392.

Syllabus

(c) This conclusion is not contrary to *Wyatt* v. *Cole*, 504 U. S. 158, or *Richardson* v. *McKnight*, *supra*. *Wyatt* did not implicate the reasons underlying recognition of qualified immunity because the defendant in that case had no connection to government and pursued purely private ends. *Richardson* involved the unusual circumstances of prison guards employed by a private company who worked in a privately run prison facility. Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work. Pp. 392–393.

621 F. 3d 1069, reversed.

ROBERTS, C. J., delivered the opinion for a unanimous Court. GINSBURG, J., *post*, p. 394, and SOTOMAYOR, J., *post*, p. 397, filed concurring opinions.

Patricia A. Millett argued the cause for petitioner. With her on the briefs were *James E. Sherry*, *James E. Tysse*, *Barry Chasnoff*, *Jon H. Tisdale*, *Jennifer Calderon*, and *Amit Kurlekar*.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Srinivasan*, *Barbara L. Herwig*, and *Teal Luthy Miller*.

Michael A. McGill argued the cause for respondent. With him on the brief were *Dieter C. Dammeier* and *Michael A. Morguess*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Kansas et al. by *Derek Schmidt*, Attorney General of Kansas, *Stephen R. McAllister*, Solicitor General, and *Kristafer Ailslieger*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *John J. Burns* of Alaska, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Chris Koster* of Missouri, *Gary K. King* of New Mexico, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *John R. Kroger* of Oregon, *Linda L. Kelly* of Pennsylvania, *Robert E.*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Section 1983 provides a cause of action against state actors who violate an individual's rights under federal law. 42 U. S. C. § 1983. At common law, those who carried out the work of government enjoyed various protections from liability when doing so, in order to allow them to serve the government without undue fear of personal exposure. Our decisions have looked to these common law protections in affording either absolute or qualified immunity to individuals sued under § 1983. The question in this case is whether an individual hired by the government to do its work is prohibited from seeking such immunity, solely because he works for the government on something other than a permanent or full-time basis.

I

A

Nicholas Delia, a firefighter employed by the city of Rialto, California (or City), became ill while responding to a toxic spill in August 2006. Under a doctor's orders, Delia missed three weeks of work. The City became suspicious of Delia's extended absence, and hired a private investigation firm to conduct surveillance on him. The private investigators observed Delia purchasing building supplies—including several rolls of fiberglass insulation—from a home improvement store. The City surmised that Delia was missing work to

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Cooper, Jr., of Tennessee, *Mark L. Shurtleff* of Utah, *Kenneth Cuccinelli II* of Virginia, *Rob McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Gregory A. Phillips* of Wyoming; for the American Bar Association by *Wm. T. Robinson III*, *Michael T. Kamprath*, and *Robert H. Thomas;* for DRI–The Voice of the Defense Bar by *Carter G. Phillips* and *Jonathan F. Cohn;* for the League of California Cities et al. by *Kent L. Richland* and *Kent J. Bullard;* and for the National School Boards Association et al. by *Geoffrey P. Eaton* and *Francisco M. Negrón, Jr.*

Jeffrey R. White filed a brief for the American Association for Justice as *amicus curiae* urging affirmance.

do construction on his home rather than because of illness, and it initiated a formal internal affairs investigation of him.

Delia was ordered to appear for an administrative investigation interview. The City hired Steve Filarsky to conduct the interview. Filarsky was an experienced employment lawyer who had previously represented the City in several investigations. Delia and his attorney attended the interview, along with Filarsky and two fire department officials, Mike Peel and Frank Bekker. During the interview, Filarsky questioned Delia about the building supplies. Delia acknowledged that he had purchased the supplies, but claimed that he had not yet done the work on his home.

During a break, Filarsky met with Peel, Bekker, and Fire Chief Stephen Wells. Filarsky proposed resolving the investigation by verifying Delia's claim that he had not done any work on his home. To do so, Filarsky recommended asking Delia to produce the building materials. Chief Wells approved the plan.

When the meeting resumed, Filarsky requested permission for Peel to enter Delia's home to view the materials. On the advice of counsel, Delia refused. Filarsky then asked Delia if he would be willing to bring the materials out onto his lawn, so that Peel could observe them without entering his home. Delia again refused to consent. Unable to obtain Delia's cooperation, Filarsky ordered him to produce the materials for inspection.

Delia's counsel objected to the order, asserting that it would violate the Fourth Amendment. When that objection proved unavailing, Delia's counsel threatened to sue the City. He went on to tell Filarsky that "[w]e might quite possibly find a way to figure if we can name you Mr. Filarsky. . . . If you want to take that chance, you go right ahead." App. 131–132. The threat was repeated over and over: "[E]verybody is going to get named, and they are going to sweat it out as to whether or not they have individual liability . . . ." "[Y]ou order him and you will be named and that is not an

idle threat." "Whoever issues that order is going to be named in the lawsuit." "[W]e will seek any and all damages including individual liability. . . . [W]e are coming if you order this." "[M]ake sure the spelling is clear [in the order] so we know who to sue." *Id.*, at 134–136, 148–149. Despite these threats, Filarsky prepared an order directing Delia to produce the materials, which Chief Wells signed.

As soon as the interview concluded, Peel and Bekker followed Delia to his home. Once there, Delia, his attorney, and a union representative went into Delia's house, brought out the four rolls of insulation, and placed them on Delia's lawn. Peel and Bekker, who remained in their car during this process, thanked Delia for showing them the insulation and drove off.

B

Delia brought an action under 42 U. S. C. § 1983 against the City, its fire department, Chief Wells, Peel, Bekker, Filarsky, and 10 unidentified individuals, alleging that the order to produce the building materials violated his rights under the Fourth and Fourteenth Amendments. The District Court granted summary judgment to all the individual defendants, concluding that they were protected by qualified immunity. The court held that Delia had "not demonstrated a violation of a clearly established constitutional right," because "Delia was not threatened with insubordination or termination if he did not comply with any order given and none of these defendants entered [his] house." *Delia* v. *Rialto*, No. CV 08–03359 (CD Cal., Mar. 9, 2009), App. to Pet. for Cert. 42, 48.

The Court of Appeals for the Ninth Circuit affirmed with respect to all defendants except Filarsky. The Court of Appeals concluded that the order violated the Fourth Amendment, but agreed with the District Court that Delia "ha[d] not demonstrated that a constitutional right was clearly established as of the date of Chief Wells's order, such that defendants would have known that their actions were unlaw-

ful." *Delia* v. *Rialto*, 621 F. 3d 1069, 1079 (2010). As to Filarsky, however, the court concluded that because he was a private attorney and not a City employee, he was not entitled to seek the protection of qualified immunity. *Id.*, at 1080–1081. The court noted that its decision conflicted with a decision of the Court of Appeals for the Sixth Circuit, see *Cullinan* v. *Abramson*, 128 F. 3d 301, 310 (1997), but considered itself bound by Circuit precedent and therefore "not free to follow the *Cullinan* decision." 621 F. 3d, at 1080 (citing *Gonzalez* v. *Spencer*, 336 F. 3d 832 (CA9 2003) (*per curiam*)).

Filarsky filed a petition for certiorari, which we granted. 564 U. S. 1066 (2011).

II

Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights "under color" of state law. 42 U. S. C. § 1983. Anyone whose conduct is "fairly attributable to the State" can be sued as a state actor under § 1983. See *Lugar* v. *Edmondson Oil Co.*, 457 U. S. 922, 937 (1982). At common law, government actors were afforded certain protections from liability, based on the reasoning that "the public good can best be secured by allowing officers charged with the duty of deciding upon the rights of others, to act upon their own free, unbiased convictions, uninfluenced by any apprehensions." *Wasson* v. *Mitchell*, 18 Iowa 153, 155–156 (1864) (internal quotation marks omitted); see also W. Prosser, Law of Torts § 25, p. 150 (1941) (common law protections derived from the need to avoid the "impossible burden [that] would fall upon all our agencies of government" if those acting on behalf of the government were "unduly hampered and intimidated in the discharge of their duties" by a fear of personal liability). Our decisions have recognized similar immunities under § 1983, reasoning that common law protections "'well grounded in history and reason' had not been abrogated 'by covert inclusion in the general language' of § 1983." *Imbler*

v. *Pachtman*, 424 U. S. 409, 418 (1976) (quoting *Tenney* v. *Brandhove*, 341 U. S. 367, 376 (1951)).

In this case, there is no dispute that qualified immunity is available for the sort of investigative activities at issue. See *Pearson* v. *Callahan*, 555 U. S. 223, 243–244 (2009). The Court of Appeals granted this protection to Chief Wells, Peel, and Bekker, but denied it to Filarsky, because he was not a public employee but was instead a private individual "retained by the City to participate in internal affairs investigations." 621 F. 3d, at 1079–1080. In determining whether this distinction is valid, we look to the "general principles of tort immunities and defenses" applicable at common law, and the reasons we have afforded protection from suit under § 1983. *Imbler*, *supra*, at 418.

A

Under our precedent, the inquiry begins with the common law as it existed when Congress passed § 1983 in 1871. *Tower* v. *Glover*, 467 U. S. 914, 920 (1984). Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time. In the mid-19th century, government was smaller in both size and reach. It had fewer responsibilities, and operated primarily at the local level. Local governments faced tight budget constraints, and generally had neither the need nor the ability to maintain an established bureaucracy staffed by professionals. See B. Campbell, The Growth of American Government: Governance From the Cleveland Era to the Present 14–16, 20–21 (1995); *id.*, at 20 (noting that in the 1880's "[t]he governor's office staff in Wisconsin . . . totaled five workers if we count the lieutenant governor and the janitor").

As one commentator has observed, there was at that time "no very clear conception of a professional office, that is, an office the incumbent of which devotes his entire time to the discharge of public functions, who has no other occupa-

tion, and who receives a sufficiently large compensation to enable him to live without resorting to other means." F. Goodnow, Principles of the Administrative Law of the United States 227 (1905). Instead, to a significant extent, government was "administered by members of society who temporarily or occasionally discharge[d] public functions." *Id.*, at 228. Whether government relied primarily upon professionals or occasional workers obviously varied across the country and across different government functions. But even at the turn of the 20th century, a public servant was often one who "does not devote his entire time to his public duties, but is, at the same time that he is holding public office, permitted to carry on some other regular business, and as a matter of fact finds his main means of support in such business or in his private means since he receives from his office a compensation insufficient to support him." *Id.*, at 227.

Private citizens were actively involved in government work, especially where the work most directly touched the lives of the people. It was not unusual, for example, to see the owner of the local general store step behind a window in his shop to don his postman's hat. See, *e. g.*, Stole Stamps, Maysville, Ky., The Evening Bulletin, p. 1, Sept. 25, 1895 (reporting that "[t]he postoffice and general store at Mount Hope was broken into," resulting in the loss of $400 worth of cutlery and stamps). Nor would it have been a surprise to find, on a trip to the docks, the local ferryman collecting harbor fees as public wharfmaster. See 3 E. Johnson, A History of Kentucky and Kentuckians 1346 (1912).

Even such a core government activity as criminal prosecution was often carried out by a mixture of public employees and private individuals temporarily serving the public. At the time § 1983 was enacted, private lawyers were regularly engaged to conduct criminal prosecutions on behalf of the State. See, *e. g.*, *Commonwealth* v. *Gibbs*, 70 Mass. 146 (1855); *White* v. *Polk County*, 17 Iowa 413 (1864). Abraham

Lincoln himself accepted several such appointments. See, *e. g.*, An Awful Crime and Speedy Punishment, Springfield Daily Register, May 14, 1853 (reporting that "A. Lincoln, esq. was appointed prosecutor" in a rape case). In addition, private lawyers often assisted public prosecutors in significant cases. See, *e. g.*, *Commonwealth* v. *Knapp*, 10 Mass. 477, 490–491 (1830); *Chambers* v. *State*, 22 Tenn. 237 (1842). And public prosecutors themselves continued to represent private clients while in office—sometimes creating odd conflicts of interest. See *People* v. *Bussey*, 82 Mich. 49, 46 N. W. 97, 98 (1890) (public prosecutor employed as private counsel by the defendant's wife in several civil suits against the defendant); *Phillip* v. *Waller*, 5 Haw. 609, 617 (1886) (public prosecutor represented plaintiff in a suit for malicious prosecution); *Oliver* v. *Pate*, 43 Ind. 132, 139 (1873) (public prosecutor who conducted a state prosecution against a defendant later served as counsel for the defendant in a malicious prosecution suit against the complaining witness).

This mixture of public responsibility and private pursuits extended even to the highest levels of government. Until the position became full time in 1853, for example, the Attorney General of the United States was expected to and did maintain an active private law practice. To cite a notable illustration, in *Hayburn's Case*, 2 Dall. 409 (1792), the first Attorney General, Edmund Randolph, sought a writ of mandamus from this Court to compel a lower court to hear William Hayburn's petition to be put on the pension list. When this Court did not allow the Attorney General to seek the writ in his official capacity, Randolph readily solved the problem by arguing the case as Hayburn's private lawyer. *Ibid.*; see also Letter from Edmund Randolph to James Madison (Aug. 12, 1792), reprinted in 14 The Papers of James Madison 348, 349 (R. Rutland, T. Mason, R. Brugger, J. Sisson, & F. Teute eds. 1983); Bloch, The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism, 1989 Duke L. J. 561, 598–599, n. 121, 619.

Given all this, it should come as no surprise that the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities. Government actors involved in adjudicative activities, for example, were protected by an absolute immunity from suit. See *Bradley* v. *Fisher*, 13 Wall. 335, 347–348 (1872); J. Bishop, Commentaries on the Non-Contract Law § 781 (1889). This immunity applied equally to "the highest judge in the State or nation" and "the lowest officer who sits as a court and tries petty causes," T. Cooley, Law of Torts 409 (1879), including those who served as judges on a part-time or episodic basis. Justices of the peace, for example, often maintained active private law practices (or even had nonlegal livelihoods), and generally served in a judicial capacity only part time. See *Hubbell* v. *Harbeck*, 54 Hun. 147, 7 N. Y. S. 243 (1889); *Ingraham* v. *Leland*, 19 Vt. 304 (1847). In fact, justices of the peace were not even paid a salary by the government, but instead received compensation through fees payable by the parties that came before them. See W. Murfree, The Justice of the Peace § 1145 (1886). Yet the common law extended the same immunity "to a justice of the peace as to any other judicial officer." *Pratt* v. *Gardner*, 56 Mass. 63, 70 (1848); see also *Mangold* v. *Thorpe*, 33 N. J. L. 134, 137–138 (1868).

The common law also extended certain protections to individuals engaged in law enforcement activities, such as sheriffs and constables. At the time § 1983 was enacted, however, "[t]he line between public and private policing was frequently hazy. Private detectives and privately employed patrol personnel often were publicly appointed as special policemen, and the means and objects of detective work, in particular, made it difficult to distinguish between those on the public payroll and private detectives." Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1210 (1999) (footnote and internal quotation marks omitted). The protections

provided by the common law did not turn on whether someone we today would call a police officer worked for the government full time or instead for both public and private employers. Rather, at common law, "[a] special constable, duly appointed according to law, ha[d] all the powers of a regular constable so far as may be necessary for the proper discharge of the special duties intrusted to him, and in the lawful discharge of those duties, [was] as fully protected as any other officer." W. Murfree, A Treatise on the Law of Sheriffs and Other Ministerial Officers § 1121, p. 609 (1884).

Sheriffs executing a warrant were empowered by the common law to enlist the aid of the able-bodied men of the community in doing so. See 1 W. Blackstone, Commentaries on the Laws of England 332 (1765); *In re Quarles*, 158 U. S. 532, 535 (1895). While serving as part of this "posse comitatus," a private individual had the same authority as the sheriff, and was protected to the same extent. See, *e. g.*, *Robinson* v. *State*, 93 Ga. 77, 83, 18 S. E. 1018, 1019 (1893) ("A member of a *posse comitatus* summoned by the sheriff to aid in the execution of a warrant for [a] felony in the sheriff's hands, is entitled to the same protection in the discharge of his duties as the sheriff himself"); *State* v. *Mooring*, 115 N. C. 709, 710–711, 20 S. E. 182 (1894) (considering it "well settled by the Courts" that a sheriff may break open the doors of a house to execute a search warrant and that "if he act in good faith in doing so, both he and his *posse comitatus* will be protected"); *North Carolina* v. *Gosnell*, 74 F. 734, 738–739 (CC WDNC 1896) ("Both judicial and ministerial officers, in the execution of the duties of their office, are under the strong protection of the law; and their legally summoned assistants, for such time as in service, are officers of the law"); *Reed* v. *Rice*, 25 Ky. 44, 46–47 (App. 1829) (private individuals summoned by a constable to execute a search warrant were protected from a suit based on the invalidity of the warrant).

Indeed, examples of individuals receiving immunity for actions taken while engaged in public service on a temporary

or occasional basis are as varied as the reach of government itself. See, *e. g.*, *Gregory* v. *Brooks*, 37 Conn. 365, 372 (1870) (public wharfmaster not liable for ordering removal of a vessel unless the order was issued maliciously); *Henderson* v. *Smith*, 26 W. Va. 829, 836–838 (1885) (notaries public given immunity for discretionary acts taken in good faith); *Chamberlain* v. *Clayton*, 56 Iowa 331, 9 N. W. 237 (1881) (trustees of a public institution for the disabled not liable absent a showing of malice); *McCormick* v. *Burt*, 95 Ill. 263, 265–266 (1880) (school board members not liable for suspending a student in good faith); *Donahoe* v. *Richards*, 38 Me. 379, 392 (1854) (same); *Downer* v. *Lent*, 6 Cal. 94, 95 (1856) (members of a Board of Pilot Commissioners given immunity for official acts); *Rail* v. *Potts & Baker*, 27 Tenn. 225, 228–230 (1847) (private individuals appointed by the sheriff to serve as judges of an election were not liable for refusing a voter absent a showing of malice); *Jenkins* v. *Waldron*, 11 Johns. 114, 120–121 (NY Sup. Ct. 1814) (same).

We read § 1983 "in harmony with general principles of tort immunities and defenses." *Imbler*, 424 U. S., at 418. And we "proceed[ ] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Pulliam* v. *Allen*, 466 U. S. 522, 529 (1984). Under this assumption, immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis.

B

Nothing about the reasons we have given for recognizing immunity under § 1983 counsels against carrying forward the common-law rule. As we have explained, such immunity "protect[s] government's ability to perform its traditional functions." *Wyatt* v. *Cole*, 504 U. S. 158, 167 (1992). It does so by helping to avoid "unwarranted timidity" in performance of public duties, ensuring that talented candidates are

not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits. *Richardson* v. *McKnight*, 521 U. S. 399, 409–411 (1997).

We have called the government interest in avoiding "unwarranted timidity" on the part of those engaged in the public's business "the most important special government immunity-producing concern." *Id.*, at 409. Ensuring that those who serve the government do so "with the decisiveness and the judgment required by the public good," *Scheuer* v. *Rhodes*, 416 U. S. 232, 240 (1974), is of vital importance regardless whether the individual sued as a state actor works full time or on some other basis.

Affording immunity not only to public employees but also to others acting on behalf of the government similarly serves to "'ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.'" *Richardson*, *supra*, at 408 (quoting *Wyatt*, *supra*, at 167). The government's need to attract talented individuals is not limited to full-time public employees. Indeed, it is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals. This case is a good example: Filarsky had 29 years of specialized experience as an attorney in labor, employment, and personnel matters, with particular expertise in conducting internal affairs investigations. App. to Pet. for Cert. 59, 89; App. 156. The City of Rialto certainly had no permanent employee with anything approaching those qualifications. To the extent such private individuals do not depend on the government for their livelihood, they have freedom to select other work—work that will not expose them to liability for government actions. This makes it more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts.

Sometimes, as in this case, private individuals will work in close coordination with public employees, and face threatened legal action for the same conduct. See App. 134 (Delia's lawyer: "everybody is going to get named" in threatened suit). Because government employees will often be protected from suit by some form of immunity, those working alongside them could be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity. Under such circumstances, any private individual with a choice might think twice before accepting a government assignment.

The public interest in ensuring performance of government duties free from the distractions that can accompany even routine lawsuits is also implicated when individuals other than permanent government employees discharge these duties. See *Richardson*, *supra*, at 411. Not only will such individuals' performance of any ongoing government responsibilities suffer from the distraction of lawsuits, but such distractions will also often affect any public employees with whom they work by embroiling those employees in litigation. This case is again a good example: If the suit against Filarsky moves forward, it is highly likely that Chief Wells, Bekker, and Peel will all be required to testify, given their roles in the dispute. Allowing suit under § 1983 against private individuals assisting the government will substantially undermine an important reason immunity is accorded public employees in the first place.

Distinguishing among those who carry out the public's business based on the nature of their particular relationship with the government also creates significant line-drawing problems. It is unclear, for example, how Filarsky would be categorized if he regularly spent half his time working for the City, or worked exclusively on one City project for an entire year. See Tr. of Oral Arg. 34–36. Such questions deprive state actors of the ability to "reasonably anticipate

when their conduct may give rise to liability for damages," *Anderson* v. *Creighton*, 483 U. S. 635, 646 (1987) (alteration and internal quotation marks omitted), frustrating the purposes immunity is meant to serve. An uncertain immunity is little better than no immunity at all.

III

Our decisions in *Wyatt* v. *Cole*, *supra*, and *Richardson* v. *McKnight*, *supra*, are not to the contrary. In *Wyatt*, we held that individuals who used a state replevin law to compel the local sheriff to seize disputed property from a former business partner were not entitled to seek qualified immunity. Cf. *Lugar*, 457 U. S. 922 (holding that an individual who uses a state replevin, garnishment, or attachment statute later declared to be unconstitutional acts under color of state law for purposes of § 1983). We explained that the reasons underlying recognition of qualified immunity did not support its extension to individuals who had no connection to government and pursued purely private ends. Because such individuals "hold no office requiring them to exercise discretion; nor are they principally concerned with enhancing the public good," we concluded that extending immunity to them would "have no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service." 504 U. S., at 168.

Wyatt is plainly not implicated by the circumstances of this case. Unlike the defendants in *Wyatt*, who were using the mechanisms of government to achieve their own ends, individuals working for the government in pursuit of government objectives are "principally concerned with enhancing the public good." *Ibid.* Whether such individuals have assurance that they will be able to seek protection if sued under § 1983 directly affects the government's ability to achieve its objectives through their public service. Put sim-

ply, *Wyatt* involved no government agents, no government interests, and no government need for immunity.

In *Richardson*, we considered whether guards employed by a privately run prison facility could seek the protection of qualified immunity. Although the Court had previously determined that public-employee prison guards were entitled to qualified immunity, see *Procunier* v. *Navarette*, 434 U. S. 555 (1978), it determined that prison guards employed by a private company and working in a privately run prison facility did not enjoy the same protection. We explained that the various incentives characteristic of the private market in that case ensured that the guards would not perform their public duties with unwarranted timidity or be deterred from entering that line of work. 521 U. S., at 410–411.

Richardson was a self-consciously "narrow[ ]" decision. *Id.*, at 413 ("[W]e have answered the immunity question narrowly, in the context in which it arose"). The Court made clear that its holding was not meant to foreclose all claims of immunity by private individuals. *Ibid.* Instead, the Court emphasized that the particular circumstances of that case—"a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms"—combined sufficiently to mitigate the concerns underlying recognition of governmental immunity under § 1983. *Ibid.* Nothing of the sort is involved here, or in the typical case of an individual hired by the government to assist in carrying out its work.

* * *

A straightforward application of the rule set out above is sufficient to resolve this case. Though not a public employee, Filarsky was retained by the City to assist in conducting an official investigation into potential wrongdoing. There is no dispute that government employees performing

such work are entitled to seek the protection of qualified immunity. The Court of Appeals rejected Filarsky's claim to the protection accorded Wells, Bekker, and Peel solely because he was not a permanent, full-time employee of the City. The common law, however, did not draw such distinctions, and we see no justification for doing so under § 1983.

New York City has a Department of Investigation staffed by full-time public employees who investigate city personnel, and the resources to pay for it. The City of Rialto has neither, and so must rely on the occasional services of private individuals such as Filarsky. There is no reason Rialto's internal affairs investigator should be denied the qualified immunity enjoyed by the ones who work for New York.

In light of the foregoing, the judgment of the Court of Appeals denying qualified immunity to Filarsky is reversed.

It is so ordered.

JUSTICE GINSBURG, concurring.

The Court addresses a sole question in this case: Is a private attorney retained by a municipality to investigate a personnel matter eligible for qualified immunity in a suit under 42 U. S. C. § 1983 alleging a constitutional violation committed in the course of the investigation? I agree that the answer is yes and that the judgment of the Court of Appeals holding private attorney Filarsky categorically ineligible for qualified immunity must be reversed. Qualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right "clearly established" at the time of the episode in suit. See *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). Because the Ninth Circuit did not consider the application of that standard to Filarsky, the matter, as I see it, may be pursued on remand.

Filarsky was retained by the City of Rialto to investigate whether city firefighter Delia was taking time off from work under the false pretense of a disabling physical condition.

In pursuit of the investigation, Filarsky asked Delia to consent to a search of his home to determine what Delia had done with several rolls of insulation he had recently purchased at a home improvement store. When Delia, on counsel's advice, refused to consent to the search, Filarsky "hatch[ed] a plan" to overcome Delia's resistance. *Delia* v. *Rialto*, 621 F. 3d 1069, 1077 (CA9 2010). "[W]e will do it a different way," Filarsky informed Delia. App. 129; see 621 F. 3d, at 1077 ("Unable to obtain Delia's consent to a warrantless search of his house . . . , Filarsky tried a different tactic.").

Following Filarsky's advice, Fire Chief Wells ordered Delia to bring the insulation out of his house and place the rolls on his lawn for inspection. App. 158. Filarsky recommended this course, the Ninth Circuit observed, mindful that "an individual does not have an expectation of privacy in items exposed to the public, thereby eliminating the need for a search warrant." 621 F. 3d, at 1077. Delia complied with Chief Wells's order by producing the rolls, all of them unused, App. 78, 85, after which the investigation into the legitimacy of Delia's absence from work apparently ended.

In explaining why the individual defendants other than Filarsky were entitled to summary judgment on their qualified immunity pleas, the Ninth Circuit stated that "no . . . threat to [Delia's] employment" attended Fire Chief Wells's order. 621 F. 3d, at 1079. The District Court similarly stated that "Delia was not threatened with insubordination or termination if he did not comply with [the] order." App. to Pet. for Cert. 48.

These statements are at odds with the facts, as recounted by the Court of Appeals. "At the onset of the interview," the Ninth Circuit stressed, "Filarsky warned Delia that he was obligated to fully cooperate," and that "[i]f at any time it is deemed you are not cooperating then you can be held to be insubordinate and subject to disciplinary action, up to and including termination." 621 F. 3d, at 1072 (internal quota-

tion marks omitted). Continuing in this vein, the Court of Appeals concluded that "Delia's actions were involuntary and coerced by the direct threat of sanctions including loss of his firefighter position." *Id.*, at 1077; see *id.*, at 1085 ("Delia's actions were involuntary and occurred as a result of the direct threat of sanctions.").

In further proceedings upon return of this case to the Court of Appeals, these questions bear attention. First, if it is "clearly established," as the Ninth Circuit thought it was, that "the warrantless search of a home is presumptively unreasonable," *id.*, at 1075, and that a well-trained investigating officer would so comprehend,[1] may an official circumvent the warrant requirement by ordering the person under investigation to cart his personal property out of the house for inspection?[2] And if it is "clearly established" that an employee may not be fired for exercising a constitutional right, see *id.*, at 1079,[3] is it not equally plain that discipline or discharge may not be threatened to induce surrender of such a right?

In short, the Court has responded appropriately to the question tendered for our review, but the Circuit's law will

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[1] Delia also suggests that Filarsky's conduct should be measured against a "reasonable attorney" standard: whether an attorney providing advice in a public-employee investigation should have known that the search of Delia's personal property, stored in his home, would be lawless. See Brief for Respondent 45–46.

[2] An additional inquiry may be appropriate: Although conceived as a substitute for a warrantless entry, should the inspection order Filarsky counseled pass muster as a permissible discovery device? Cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 195, 208–211 (1946) (subpoena *duces tecum* for a corporation's business records, authorized by § 9 of the Fair Labor Standards Act, encountered no Fourth Amendment shoal).

[3] The Ninth Circuit referred to cases holding that public employees' job retention cannot be conditioned on relinquishing the Fifth Amendment's safeguard against self-incrimination: *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280 (1968), and *Gardner* v. *Broderick*, 392 U. S. 273 (1968).

remain muddled absent the Court of Appeals' focused attention to the question whether Filarsky's conduct violated "clearly established" law.

JUSTICE SOTOMAYOR, concurring.

The Court of Appeals denied qualified immunity to Filarsky solely because, as retained outside counsel, he was not a formal employee of the city of Rialto. I agree with and join today's opinion holding that this distinction is not a sound basis on which to deny immunity.

I add only that it does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity when sued under 42 U. S. C. § 1983. Such individuals must satisfy our usual test for conferring immunity. As the Court explains, that test "look[s] to the 'general principles of tort immunities and defenses' applicable at common law, and the reasons we have afforded protection from suit under § 1983." *Ante*, at 384 (quoting *Imbler* v. *Pachtman*, 424 U. S. 409, 418 (1976)).

Thus in *Richardson* v. *McKnight*, 521 U. S. 399 (1997), we denied qualified immunity to prison guards who were privately employed, despite their quintessentially public function. We did so because we found "no special reasons significantly favoring an extension of governmental immunity" in that context. *Id.*, at 412. We left open, however, the question whether immunity would be appropriate for "a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.*, at 413.

Filarsky, supported by the United States as *amicus curiae*, contends that he fits into this coda because he worked in close coordination with and under the supervision of city employees. Whether Filarsky was supervised by those employees, and did not himself do the supervising, is unclear. But there is no doubt that Filarsky worked alongside the

employees in investigating Delia. In such circumstances, I agree that Filarsky should be allowed to claim qualified immunity from a § 1983 suit. As the Court's opinion persuasively explains, there is a "'firmly rooted' tradition of immunity" applicable to individuals who perform government work in capacities other than as formal employees. *Id.*, at 404; see *ante*, at 384–390. And conferring qualified immunity on individuals like Filarsky helps "protec[t] government's ability to perform its traditional functions," and thereby helps "protect the public at large." *Wyatt* v. *Cole*, 504 U. S. 158, 167–168 (1992). When a private individual works closely with immune government employees, there is a real risk that the individual will be intimidated from performing his duties fully if he, and he alone, may bear the price of liability for collective conduct. See *ante*, at 391; see also *ibid.* (noting distraction caused to immune public employees by § 1983 litigation brought against nonimmune associates).

This does not mean that a private individual may assert qualified immunity *only* when working in close coordination with government employees. For example, *Richardson*'s suggestion that immunity is also appropriate for individuals "serving as an adjunct to government in an essential governmental activity," 521 U. S., at 413, would seem to encompass modern-day special prosecutors and comparable individuals hired for their independence. There may yet be other circumstances in which immunity is warranted for private actors. The point is simply that such cases should be decided as they arise, as is our longstanding practice in the field of immunity law.

Syllabus

CARACO PHARMACEUTICAL LABORATORIES, LTD., ET AL. *v.* NOVO NORDISK A/S ET AL.

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

No. 10–844. Argued December 5, 2011—Decided April 17, 2012

The Food and Drug Administration (FDA) regulates the manufacture, sale, and labeling of prescription drugs. A brand-name drug manufacturer seeking FDA approval for a drug submits a new drug application (NDA) containing, among other things, a statement of the drug's components and proposed labeling describing the uses for which the drug may be marketed. See 21 U. S. C. §§ 355(b)(1), (d). Once the FDA has approved a brand manufacturer's drug, another company may seek permission to market a generic version by filing an abbreviated new drug application (ANDA). See §§ 355(j)(2)(A)(ii), (iv). But the FDA cannot authorize a generic drug that would infringe a brand manufacturer's patent. To facilitate the approval of generic drugs as soon as patents allow, the Hatch-Waxman Amendments require a brand manufacturer to submit its patent numbers and expiration dates, § 355(b)(1); and FDA regulations require a description of any method-of-use patent, known as a use code, see 21 CFR §§ 314.53(c)(2)(ii)(P)(3), (e). The FDA does not attempt to verify the accuracy of the use codes that brand manufacturers supply. Instead, it simply publishes the codes, patent numbers, and expiration dates in a large volume known as the Orange Book.

After consulting the Orange Book, an ANDA applicant enters one of several certifications to assure the FDA that its generic drug will not infringe the brand's patent. If the patent has not expired, an applicant may fulfill this requirement in one of two ways. First, it may submit a so-called section viii statement asserting that it will market the drug for only those methods of use not covered by the brand's patent, see 21 U. S. C. § 355(j)(2)(A)(viii), and proposing a label that "carves out" the still-patented method(s) of use, see 21 CFR § 314.94(a)(8)(iv). The FDA will not approve an ANDA with a section viii statement if the proposed label overlaps at all with the brand's use code. Second, the ANDA applicant may file a so-called paragraph IV certification stating that the brand's patent "is invalid or will not be infringed by the [generic drug's] manufacture, use, or sale." 21 U. S. C. § 355(j)(2)(A)(vii)(IV). Such filing is treated as an act of infringement, giving the brand an immediate right to sue and resulting in a delay in the generic drug's approval.

In 2002, the Federal Trade Commission issued a study detailing evidence that brands were submitting inaccurate patent information to the FDA in order to prevent or delay the marketing of generic drugs. In response, Congress created a statutory counterclaim available to generic manufacturers sued for patent infringement. The provision allows a generic manufacturer to "assert a counterclaim seeking an order requiring the [brand] to correct or delete the patent information submitted by the [brand] under subsection (b) or (c) [of 21 U. S. C. § 355] on the ground that the patent does not claim . . . an approved method of using the drug." 21 U. S. C. § 355(j)(5)(C)(ii)(I). This case concerns the scope of the counterclaim provision.

Respondents (collectively Novo) manufacture the brand-name version of the diabetes drug repaglinide. The FDA has approved three uses of the drug, but Novo's method-of-use patent claims only one. Petitioners (collectively Caraco) wish to market a generic version of the drug for the other two approved methods of use. Caraco initially filed a paragraph IV certification and, considering this an act of infringement, Novo brought suit. Caraco then submitted a section viii statement and a proposed label carving out Novo's patented therapy. But before the FDA could approve Caraco's ANDA, Novo changed its use code to indicate that it held a patent on all three approved methods of using repaglinide. Because Caraco's proposed label now overlapped with Novo's use code, the FDA would not permit Caraco to employ section viii to bring its drug to market.

Caraco filed a statutory counterclaim in the ongoing infringement action, seeking an order requiring Novo to "correct" its use code because the patent did not claim two of the three approved methods of using repaglinide. The District Court granted Caraco summary judgment, but the Federal Circuit reversed. It read the counterclaim's phrase "the patent does not claim . . . an approved method of using the drug" as requiring Caraco to demonstrate that Novo's patent does not claim *any* approved method of use; because the patent covers one approved method, the counterclaim was unavailable. The court also ruled that the counterclaim provision does not reach use codes because they are not "patent information submitted by the [brand] under subsection (b) or (c)" of § 355. That information, the court concluded, consists only of the patent number and expiration date expressly required by the statutory provisions.

Held: A generic manufacturer may employ the counterclaim provision to force correction of a use code that inaccurately describes the brand's patent as covering a particular method of using a drug. Pp. 412–426.

(a) The parties first dispute the meaning of "not an" in the phrase "the patent does *not* claim . . . *an* approved method of using the drug."

claims no approved method of use, the remedy will always be to delete the patent information. And if the counterclaim reaches only patent numbers and expiration dates, the Orange Book will include few if any mistakes in need of correction. Pp. 419–421.

(d) Novo advances two arguments relating to the counterclaim's drafting history, but neither overcomes the statutory text and context. The company first points out that Congress failed to pass an earlier bill that would have required brands to file descriptions of method-of-use patents and would have allowed generic companies to bring civil actions to "delete" or "correct" the information filed. Because that bill would have allowed a generic applicant to challenge overbroad descriptions of a patent, Novo contends that this Court cannot read the statute that was eventually enacted as doing the same. But the earlier bill contained numerous items that may have caused its failure. And the limited criticism of its mechanism for challenging brands' descriptions of their patents focused on the creation of an independent cause of action—stronger medicine than the counterclaim at issue here. Finally, between that bill's demise and the counterclaim's enactment, the FDA issued a rule requiring brands to supply use codes. The counterclaim provision's drafters thus had no need to require this information.

Novo next contends that Congress established the counterclaim only to address the impossibility of deleting an improperly listed patent from the Orange Book—a problem that had come to light when the Federal Circuit held in *Mylan Pharmaceuticals, Inc.* v. *Thompson*, 268 F. 3d 1323, that generics had no cause of action to delist a patent. Novo thus contends that the counterclaim is a mere delisting provision. But this Court thinks *Mylan* alerted Congress to a broader problem: that generic companies generally had no avenue to challenge the accuracy of brands' patent listings, and that the FDA therefore could not approve proper applications to bring inexpensive drugs to market. Again, the proof of that lies in the statute itself—its text and context demonstrate that the counterclaim is available not only (as in *Mylan*) when the patent listing is baseless, but also (as here) when it is overbroad. Moreover, Congress's equation of the two situations makes perfect sense. In either case, the brand submits misleading patent information to the FDA, delaying or blocking approval of a generic drug that infringes no patent and thus, under the statute, should go to market. Pp. 421–425.

601 F. 3d 1359, reversed and remanded.

KAGAN, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 426.

James F. Hurst argued the cause for petitioners. With him on the briefs were *Charles B. Klein*, *Steffen N. Johnson*, *Andrew C. Nichols*, *William P. Ferranti*, and *David S. Bloch*.

Benjamin J. Horwich argued the cause for the United States as *amicus curiae* urging vacatur. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Deputy Assistant Attorney General Brinkmann*, *Douglas N. Letter*, and *Daniel Tenny*.

Mark A. Perry argued the cause for respondents. With him on the brief were *Scott P. Martin*, *Michael A. Sitzman*, and *Josh A. Krevitt*.*

JUSTICE KAGAN delivered the opinion of the Court.

When the Food and Drug Administration (FDA) evaluates an application to market a generic drug, it considers whether the proposed drug would infringe a patent held by the manufacturer of the brand-name version. To assess that matter, the FDA requires brand manufacturers to submit descriptions of the scope of their patents, known as use codes. The FDA does not attempt to determine if that information is accurate. Rather, the FDA assumes that it is so and decides whether to approve a generic drug on that basis. As a result, the breadth of the use code may make the difference between approval and denial of a generic company's application.

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*Briefs of *amici curiae* urging reversal were filed for AARP et al. by *David A. Balto*, *Stacy Canan*, and *Michael Schuster;* for the Generic Pharmaceutical Association by *Roy T. Englert, Jr.*, and *Mark T. Stancil;* for Mylan Pharmaceuticals, Inc., by *Dan L. Bagatell* and *David J. Harth;* and for Representative Henry A. Waxman by *Carlos T. Angulo*.

Briefs of *amici curiae* urging affirmance were filed for Allergan, Inc., et al. by *Jonathan E. Singer*, *Terry G. Mahn*, and *Ellen A. Scordino;* for Pharmaceutical Research and Manufacturers of America by *Robert A. Long, Jr.*, and *Natalie M. Derzko;* and for the Washington Legal Foundation by *Daniel J. Popeo* and *Richard A. Samp*.

Novo contends that the counterclaim is available only if the patent claims no approved method of use, but Caraco reads this language to permit a counterclaim whenever a patent does not claim the particular method that the ANDA applicant seeks to market. In isolation, either of these readings is plausible, so the meaning of the phrase "not an" turns on statutory context, see *Johnson* v. *United States*, 559 U. S. 133, 139. This context favors Caraco: Congress understood that a drug may have multiple methods of use, not all of which a patent covers; and a section viii statement allows the FDA to approve a generic drug for unpatented uses so that it can quickly come to market. The statute thus contemplates that one patented use will not foreclose marketing a generic drug for other unpatented ones. Within this scheme, the counterclaim naturally functions to challenge the brand's assertion of rights over whichever discrete uses the generic company wishes to pursue; the counterclaim's availability matches the availability of FDA approval under the statute. Pp. 413–417.

(b) The parties further dispute whether use codes qualify as "patent information submitted by the [brand] under subsection (b) or (c)" of § 355. A use code, which is a description of the patent, surely qualifies as "patent information." Novo nonetheless contends that use codes are not "submitted under" subsections (b) and (c) because those provisions expressly require an NDA applicant to provide only "the patent number and the expiration date of any patent" claiming the drug or a method of its use. But §§ 355(b) and (c) also govern the regulatory process by which brands provide additional patent information to the FDA. The term "under" is broad enough to include patent information, like use codes, that brands submit as required by this scheme. This reading draws support from the Court's prior decisions in, *e. g.*, *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 665–668, and *Ardestani* v. *INS*, 502 U. S. 129, 135; and it is bolstered by Congress's use of the narrower phrases "described in" and "prescribed by" in neighboring provisions. See §§ 355(c)(2), (d)(6). Again, the conclusion that use codes are "submitted under" §§ 355(b) and (c) fits the broader statutory context. Use codes are pivotal to the FDA's implementation of the Hatch-Waxman Amendments, and so it is unsurprising that the counterclaim provision's language sweeps widely enough to embrace them. Pp. 417–419.

(c) The counterclaim provision's description of available remedies dispatches whatever remains of Novo's arguments. The Court's reading gives content to both remedies: It "delete[s]" a listing from the Orange Book when the brand holds no relevant patent and "correct[s]" the listing when the brand has misdescribed the patent's scope. By contrast, Novo's interpretation would all but read "correct" out of the statute. If, as Novo contends, the counterclaim is available only where the patent

In this case, we consider whether Congress has authorized a generic company to challenge a use code's accuracy by bringing a counterclaim against the brand manufacturer in a patent infringement suit. The relevant statute provides that a generic company "may assert a counterclaim seeking an order requiring the [brand manufacturer] to correct or delete the patent information [it] submitted . . . under [two statutory subsections] on the ground that the patent does not claim . . . an approved method of using the drug." 117 Stat. 2452, 21 U. S. C. § 355(j)(5)(C)(ii)(I). We hold that a generic manufacturer may employ this provision to force correction of a use code that inaccurately describes the brand's patent as covering a particular method of using the drug in question.

I

A

The FDA regulates the manufacture, sale, and labeling of prescription drugs under a complex statutory scheme. To begin at the beginning: When a brand manufacturer wishes to market a novel drug, it must submit a new drug application (NDA) to the FDA for approval. The NDA must include, among other things, a statement of the drug's components, scientific data showing that the drug is safe and effective, and proposed labeling describing the uses for which the drug may be marketed. See §§ 355(b)(1), (d). The FDA may approve a brand-name drug for multiple methods of use—either to treat different conditions or to treat the same condition in different ways.

Once the FDA has approved a brand manufacturer's drug, another company may seek permission to market a generic version pursuant to legislation known as the Hatch-Waxman Amendments. See Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585. Those amendments allow a generic competitor to file an abbreviated new

drug application (ANDA) piggy-backing on the brand's NDA. Rather than providing independent evidence of safety and efficacy, the typical ANDA shows that the generic drug has the same active ingredients as, and is biologically equivalent to, the brand-name drug. See §§ 355(j)(2)(A)(ii), (iv). As we have previously recognized, this process is designed to speed the introduction of low-cost generic drugs to market. See *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 676 (1990).

Because the FDA cannot authorize a generic drug that would infringe a patent, the timing of an ANDA's approval depends on the scope and duration of the patents covering the brand-name drug. Those patents come in different varieties. One type protects the drug compound itself. Another kind—the one at issue here—gives the brand manufacturer exclusive rights over a particular method of using the drug. In some circumstances, a brand manufacturer may hold such a method-of-use patent even after its patent on the drug compound has expired.

To facilitate the approval of generic drugs as soon as patents allow, the Hatch-Waxman Amendments and FDA regulations direct brand manufacturers to file information about their patents. The statute mandates that a brand submit in its NDA "the patent number and the expiration date of any patent which claims the drug for which the [brand] submitted the [NDA] or which claims a method of using such drug." § 355(b)(1). And the regulations issued under that statute require that, once an NDA is approved, the brand provide a description of any method-of-use patent it holds. See 21 CFR §§ 314.53(c)(2)(ii)(P)(3), (e) (2011). That description is known as a use code, and the brand submits it on FDA Form 3542. As later discussed, the FDA does not attempt to verify the accuracy of the use codes that brand manufacturers supply. It simply publishes the codes, along with the corresponding patent numbers and expiration dates, in a fat,

brightly hued volume called the Orange Book (less colorfully but more officially denominated Approved Drug Products With Therapeutic Equivalence Evaluations).

After consulting the Orange Book, a company filing an ANDA must assure the FDA that its proposed generic drug will not infringe the brand's patents. When no patents are listed in the Orange Book or all listed patents have expired (or will expire prior to the ANDA's approval), the generic manufacturer simply certifies to that effect. See 21 U. S. C. §§ 355(j)(2)(A)(vii)(I)–(III). Otherwise, the applicant has two possible ways to obtain approval.

One option is to submit a so-called section viii statement, which asserts that the generic manufacturer will market the drug for one or more methods of use not covered by the brand's patents. See § 355(j)(2)(A)(viii). A section viii statement is typically used when the brand's patent on the drug compound has expired and the brand holds patents on only some approved methods of using the drug. If the ANDA applicant follows this route, it will propose labeling for the generic drug that "carves out" from the brand's approved label the still-patented methods of use. See 21 CFR § 314.94(a)(8)(iv). The FDA may approve such a modified label, see § 314.127(a)(7), as an exception to the usual rule that a generic drug must bear the same label as the brand-name product, see 21 U. S. C. §§ 355(j)(2)(A)(v), (j)(4)(G). FDA acceptance of the carve-out label allows the generic company to place its drug on the market (assuming the ANDA meets other requirements), but only for a subset of approved uses—*i. e.*, those not covered by the brand's patents.

Of particular relevance here, the FDA will not approve such an ANDA if the generic's proposed carve-out label overlaps at all with the brand's use code. See 68 Fed. Reg. 36682–36683 (2003). The FDA takes that code as a given: It does not independently assess the patent's scope or otherwise look behind the description authored by the brand. According to the agency, it lacks "both [the] expertise and

[the] authority" to review patent claims; although it will forward questions about the accuracy of a use code to the brand,[1] its own "role with respect to patent listing is ministerial." *Id.*, at 36683; see *ibid.* ("A fundamental assumption of the Hatch-Waxman Amendments is that the courts are the appropriate mechanism for the resolution of disputes about the scope and validity of patents").[2] Thus, whether section viii is available to a generic manufacturer depends on how the brand describes its patent. Only if the use code provides sufficient space for the generic's proposed label will the FDA approve an ANDA with a section viii statement.

The generic manufacturer's second option is to file a so-called paragraph IV certification, which states that a listed patent "is invalid or will not be infringed by the manufacture, use, or sale of the [generic] drug." 21 U. S. C. § 355(j)(2)(A)(vii)(IV). A generic manufacturer will typically take this path in either of two situations: if it wants to market the drug for all uses, rather than carving out those still allegedly under patent; or if it discovers, as described above, that any carve-out label it is willing to adopt cannot avoid the brand's use code. Filing a paragraph IV certification means provoking litigation. The patent statute treats such a filing as itself an act of infringement, which gives the brand an immediate right to sue. See 35 U. S. C. § 271(e)(2)(A). Assuming the brand does so, the FDA generally may not approve the ANDA until 30 months pass or the court finds the patent invalid or not infringed. See 21 U. S. C. § 355(j)(5)(B)(iii). Accordingly, the paragraph IV

[1] Under the FDA's regulations, any person may dispute the accuracy of patent information listed in the Orange Book by notifying the agency in writing. See 21 CFR § 314.53(f). The FDA will then request that the brand verify the information, but will make no changes "[u]nless the [brand] withdraws or amends" the listing. *Ibid.*

[2] Several courts have affirmed the FDA's view of its ministerial role. See, *e. g.*, *Apotex, Inc.* v. *Thompson*, 347 F. 3d 1335, 1349 (CA Fed. 2003); *aaiPharma Inc.* v. *Thompson*, 296 F. 3d 227, 242–243 (CA4 2002). That question is not before us, and we express no view on it.

process is likely to keep the generic drug off the market for a lengthy period, but may eventually enable the generic company to market its drug for all approved uses.

In the late 1990's, evidence mounted that some brands were exploiting this statutory scheme to prevent or delay the marketing of generic drugs, and the Federal Trade Commission (FTC) soon issued a study detailing these anticompetitive practices. See FTC, Generic Drug Entry Prior to Patent Expiration: An FTC Study, pp. iii–vi (July 2002) (hereinafter FTC Study). That report focused attention on brands' submission of inaccurate patent information to the FDA. In one case cited by the FTC, *Mylan Pharmaceuticals, Inc.* v. *Thompson*, 268 F. 3d 1323 (CA Fed. 2001), a brand whose original patent on a drug was set to expire listed a new patent ostensibly extending its rights over the drug, but in fact covering neither the compound nor any method of using it. The FDA, as was (and is) its wont, accepted the listing at its word and accordingly declined to approve a generic product. The generic manufacturer sued to delete the improper listing from the Orange Book, but the Federal Circuit held that the Hatch-Waxman Amendments did not allow such a right of action. See *id.*, at 1330–1333. As the FTC noted, that ruling meant that the only option for generic manufacturers in Mylan's situation was to file a paragraph IV certification (triggering an infringement suit) and then wait out the usual 30-month period before the FDA could approve an ANDA. See FTC Study 40–45.

Congress responded to these abuses by creating a mechanism, in the form of a legal counterclaim, for generic manufacturers to challenge patent information a brand has submitted to the FDA. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, 117 Stat. 2452. The provision authorizes an ANDA applicant sued for patent infringement to

> "assert a counterclaim seeking an order requiring the [brand] to correct or delete the patent information sub-

> mitted by the [brand] under subsection (b) or (c) [of § 355] on the ground that the patent does not claim either—
>
> "(aa) the drug for which the [brand's NDA] was approved; or
>
> "(bb) an approved method of using the drug." 21 U. S. C. § 355(j)(5)(C)(ii)(I).

The counterclaim thus enables a generic competitor to obtain a judgment directing a brand to "correct or delete" certain patent information that is blocking the FDA's approval of a generic product. This case raises the question whether the counterclaim is available to fix a brand's use code.

B

The parties to this case sell or seek to sell the diabetes drug repaglinide. Respondents (collectively Novo) manufacture Prandin, the brand-name version of the drug. The FDA has approved three uses of Prandin to treat diabetes: repaglinide by itself; repaglinide in combination with metformin; and repaglinide in combination with thiazolidinediones (TZDs). Petitioners (collectively Caraco) wish to market a generic version of the drug for two of those uses.

Novo originally owned a patent for the repaglinide compound, known as the '035 patent, but it expired in 2009. In 2004, Novo also acquired a method-of-use patent for the drug, called the '358 patent, which does not expire until 2018. That patent—the one at issue here—claims a "method for treating [diabetes by] administering . . . repaglinide in combination with metformin." 601 F. 3d 1359, 1362 (CA Fed. 2010). Thus, Novo currently holds a patent for one of the three FDA-approved uses of repaglinide—its use with metformin. But Novo holds *no* patent for the use of repaglinide with TZDs or its use alone.

In 2005, Caraco filed an ANDA seeking to market a generic version of repaglinide. At that time, the Orange Book entry for Prandin listed both the '035 patent (the drug

compound) and the '358 patent (the use of the drug with metformin). Caraco assured the FDA that it would not market its generic drug until the '035 patent expired, thus making that patent irrelevant to the FDA's review of the ANDA. Caraco filed a paragraph IV certification for the remaining, '358 patent, stating that it was "invalid or [would] not be infringed." § 355(j)(2)(A)(vii)(IV); see *supra*, at 407–408. In accord with the patent statute, Novo treated this filing as an act of infringement and brought suit.

When Caraco filed its ANDA, Novo's use code for the '358 patent represented that the patent covered "'[u]se of repaglinide in combination with metformin to lower blood glucose.'" 601 F. 3d, at 1362–1363. The FDA therefore advised Caraco that if it did not seek to market repaglinide for use with metformin, it could submit a section viii statement. That would allow Caraco, assuming its ANDA was otherwise in order, to market its generic drug for the other two uses. Caraco took the FDA's cue and in 2008 submitted a section viii statement, with proposed labeling carving out Novo's patented metformin therapy. See App. 166–176.

Before the FDA took further action, however, Novo changed its use code for the '358 patent. The new use code describes "'[a] method for improving glycemic control in adults with type 2 diabetes.'"[3] 601 F. 3d, at 1363. Because that code indicates that the '358 patent protects all three approved methods of using repaglinide to treat diabetes, Caraco's proposed carve-out of metformin therapy was no longer sufficient; even with that exclusion, Caraco's label now overlapped with Novo's use code on the other two uses.

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[3] Novo asserts that it made the change so that its use code would mirror its label, which the FDA had just asked it to alter. See Brief for Respondents 14. But the FDA, in calling for new labeling, neither requested nor required Novo to amend its use code. And indeed, Novo's counsel conceded before the Federal Circuit that Novo modified its use code in part as "'a response to the [FDA's] section viii'" suggestion. 601 F. 3d, at 1380–1381 (Dyk, J., dissenting).

And Caraco could not carve out those uses as well, because at that point nothing would be left for it to market. The FDA has approved repaglinide for only three uses, and Novo's use code encompassed them all. The FDA accordingly informed Caraco that it could no longer employ section viii to bring its drug to market.

Caraco responded to Novo's new, preclusive use code by filing a statutory counterclaim in the ongoing infringement suit. The counterclaim sought an order requiring Novo to "correct" its use code "on the ground that [the '358] patent does not claim" two approved methods of using repaglinide—alone and in combination with TZDs. § 355(j)(5)(C)(ii)(I); see *supra*, at 408–409. That order would permit the FDA to accept Caraco's proposed carve-out label and approve the company's ANDA. The District Court granted summary judgment to Caraco, enjoining Novo to "correct . . . its inaccurate description of the '358 patent" by submitting a new Form 3542 to the FDA that would "reinstat[e] its former" use code. App. to Pet. for Cert. 65a–66a.

The Court of Appeals reversed, holding that Caraco lacked "a statutory basis to assert a counterclaim." 601 F. 3d, at 1360. The court first read the statutory phrase "the patent does not claim . . . an approved method of using the drug" to require Caraco to demonstrate that the '358 patent does not claim *any* approved method of use. See *id.*, at 1365 ("'[A]n approved method' means 'any approved method'"). Because the patent covers one approved method of use—repaglinide in combination with metformin—the counterclaim was unavailable. The court further ruled that the counterclaim provision does not reach use codes because they are not "patent information submitted by the [brand] under subsection (b) or (c)." On the Federal Circuit's view, that information consists only of the patent number and expiration date. See *id.*, at 1366–1367. Judge Dyk dissented. He would have read the phrase "the patent does not claim . . . an approved method of using the drug" to include situations

where, as here, the use code wrongly indicates that the patent covers one or more particular approved methods of use. See *id.*, at 1376–1378. And he would have construed "patent information submitted . . . under subsection (b) or (c)" to include use codes. See *id.*, at 1370–1376.[4]

We granted certiorari, 564 U. S. 1035 (2011), and now reverse.

II

We begin "where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989). This case requires us to construe two statutory phrases. First, we must decide when a "patent does not claim . . . an approved method of using" a drug. Second, we must determine the content of "patent information submitted . . . under subsection (b) or (c)" of § 355. We consider both of those questions against the backdrop of yet a third statutory phrase, providing that the remedy for a prevailing counterclaimant is an order requiring the brand "to correct or delete" that patent information. And we consider each question in the context of the entire statute. See *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 341 (1997) (Statutory interpretation focuses on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). We cannot say that the counterclaim clause is altogether free of ambiguity. But when we consider statutory text and context together, we conclude that a generic manufacturer in Caraco's position can use the counterclaim.[5]

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[4] On remand from the Federal Circuit's decision, the District Court determined that the '358 patent was invalid and unenforceable. See 775 F. Supp. 2d 985 (ED Mich. 2011). The Federal Circuit stayed Novo's appeal from that judgment pending the decision here.

[5] Before proceeding to the merits, we dispose of a recently raised jurisdictional argument. Novo now contends that the federal courts lost subject-matter jurisdiction over this infringement action (including the counterclaim) at the moment Caraco filed its section viii statement. On

A

An ANDA applicant sued for patent infringement may bring a counterclaim "on the ground that the patent does not claim . . . an approved method of using the drug." 21 U. S. C. § 355(j)(5)(C)(ii)(I). The parties debate the meaning of this language. Novo (like the Federal Circuit) reads "not an" to mean "not any," contending that "the counterclaim is available only if the listed patent does not claim *any* (or, equivalently, claims *no*) approved method of using the drug." Brief for Respondents 29 (internal quotation marks omitted). By that measure, Caraco may not bring a counterclaim because Novo's '358 patent claims the use of repaglinide with metformin. In contrast, Caraco reads "not an" to mean "not a particular one," so that the statute permits a counterclaim whenever the patent does not claim a method of use for which the ANDA applicant seeks to market the drug. On that view, the counterclaim is available here—indeed, is available twice over—because the '358 patent does not claim the use of repaglinide with TZDs or its use alone.

Truth be told, the answer to the general question "What does 'not an' mean?" is "It depends": The meaning of the phrase turns on its context. See *Johnson* v. *United States*, 559 U. S. 133, 139 (2010) ("Ultimately, context determines

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Novo's theory, such a statement (unlike a paragraph IV certification) does not count as an act of infringement under the patent statute, see 35 U. S. C. § 271(e)(2)(A), and so cannot provide a jurisdictional basis for the suit. But that argument is wrong even assuming (as Novo contends) that Caraco's section viii filing terminated its paragraph IV certification and that a section viii filing is not an act of infringement. The want of an infringing act is a merits problem, not a jurisdictional one. Nothing in the section of the statute defining certain filings as acts of infringement suggests anything to the contrary. And "we are not inclined to interpret statutes as creating a jurisdictional bar when they are not framed as such." *Stern* v. *Marshall*, 564 U. S. 462, 480 (2011). In the absence of such a bar, the federal courts have jurisdiction over this suit for a single, simple reason: It "ar[ose] under a[n] Act of Congress relating to patents." 28 U. S. C. § 1338(a).

meaning"). "Not an" sometimes means "not any," in the way Novo claims. If your spouse tells you he is late because he "did not take a cab," you will infer that he took no cab at all (but took the bus instead). If your child admits that she "did not read a book all summer," you will surmise that she did not read any book (but went to the movies a lot). And if a sports-fan friend bemoans that "the New York Mets do not have a chance of winning the World Series," you will gather that the team has no chance whatsoever (because they have no hitting). But now stop a moment. Suppose your spouse tells you that he got lost because he "did not make a turn." You would understand that he failed to make a particular turn, not that he drove from the outset in a straight line. Suppose your child explains her mediocre grade on a college exam by saying that she "did not read an assigned text." You would infer that she failed to read a specific book, not that she read nothing at all on the syllabus. And suppose a lawyer friend laments that in her last trial, she "did not prove an element of the offense." You would grasp that she is speaking not of all the elements, but of a particular one. The examples could go on and on, but the point is simple enough: When it comes to the meaning of "not an," context matters.[6]

And the statutory context here supports Caraco's position. As described earlier (and as Congress understood), a single drug may have multiple methods of use, only one or some of which a patent covers. See, *e. g.*, 21 U. S. C. § 355(b)(1) (requiring that an NDA applicant file information about "any patent which claims the drug . . . or which claims *a* method

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[6] For this reason, we find Novo's reliance on the occasional dictionary definition of "a[n]" unconvincing. Although "an" sometimes means "any" when used in negative structures, see, *e. g.*, Microsoft Encarta College Dictionary 1 (2001) (fifth definition), it sometimes does not. Cf. *FCC* v. *AT&T Inc.*, 562 U. S. 397, 402–407 (2011) (rejecting a proposed definition of "personal" because it did not always hold in ordinary usage and the statutory context suggested it did not apply).

of using such drug" (emphasis added)). The Hatch-Waxman Amendments authorize the FDA to approve the marketing of a generic drug for particular unpatented uses; and section viii provides the mechanism for a generic company to identify those uses, so that a product with a label matching them can quickly come to market. The statutory scheme, in other words, contemplates that one patented use will not foreclose marketing a generic drug for other unpatented ones. Within that framework, the counterclaim naturally functions to challenge the brand's assertion of rights over whichever discrete use (or uses) the generic company wishes to pursue. That assertion, after all, is the thing blocking the generic drug's entry on the market. The availability of the counterclaim thus matches the availability of FDA approval under the statute: A company may bring a counterclaim to show that a method of use is unpatented because establishing that fact allows the FDA to authorize a generic drug via section viii.

Consider the point as applied to this case. Caraco wishes to market a generic version of repaglinide for two (and only two) uses. Under the statute, the FDA could approve Caraco's application so long as no patent covers those uses, regardless whether a patent protects yet a third method of using the drug. Novo agrees that Caraco could bring a counterclaim if Novo's assertion of patent protection for repaglinide lacked any basis—for example, if Novo held no patent, yet claimed rights to the pair of uses for which Caraco seeks to market its drug. But because Novo has a valid patent on a *different* use, Novo argues that Caraco's counterclaim evaporates. And that is so even though, once again, Caraco has no wish to market its product for that patented use and the FDA stands ready, pursuant to the statute, to approve Caraco's product for the other two. To put the matter simply, Novo thinks the counterclaim disappears because it has a patent for a method of use in which neither Caraco nor the FDA is interested at all. "It would take strong evi-

dence to persuade us that this is what Congress wrought." *Eli Lilly*, 496 U. S., at 673. That "not an" sometimes (but sometimes not) means "not any" is not enough.

Novo argues that our reading must be wrong because Congress could have expressly "impose[d] additional . . . qualifications" on the term "an approved method of us[e]"—and indeed did so in another place in the statute. Brief for Respondents 31; 21 U. S. C. § 355(j)(5)(C)(ii)(I). Novo points here to section viii itself, which applies when the brand's patent "does not claim a use *for which the [ANDA] applicant is seeking approval*." § 355(j)(2)(A)(viii) (emphasis added). But the mere possibility of clearer phrasing cannot defeat the most natural reading of a statute; if it could (with all due respect to Congress), we would interpret a great many statutes differently than we do. Nor does Congress's use of more detailed language in another provision, enacted years earlier, persuade us to put the counterclaim clause at odds with its statutory context. That is especially so because we can turn this form of argument back around on Novo. Congress, after all, could have more clearly expressed Novo's proposed meaning in the easiest of ways—by adding a single letter to make clear that "not an" really means "not any." And indeed, Congress used a "not any" construction in the very next subclause, enacted at the very same time. See § 355(j)(5)(C)(ii)(II) ("Subclause (I) does not authorize the assertion of a claim . . . in any [other] civil action"). So if we needed any proof that Congress knew how to say "not any" when it meant "not any," here we find it. We think that sees, raises, and bests Novo's argument.

Our more essential point, though, has less gamesmanship about it: We think that the "not any" construction does not appear in the relevant counterclaim provision because Congress did not mean what Novo wishes it had. And we think that is so because Congress meant (as it usually does) for the provision it enacted to fit within the statutory scheme—here,

by facilitating the approval of non-infringing generic drugs under section viii.

B

Novo contends that Caraco's counterclaim must fail for another, independent reason: On its view (as on the Federal Circuit's), the counterclaim does not provide a way to correct use codes because they are not "patent information submitted by the [brand] under subsection (b) or (c)" of § 355. Once again, we disagree.

The statute does not define "patent information," but a use code must qualify. It describes the method of use claimed in a patent. See 21 CFR §§ 314.53(c)(2)(ii)(P)(3), (e). That fits under any ordinary understanding of the language.[7]

The more difficult question arises from the "submitted under" phrase. The subsections mentioned there—(b) and (c) of § 355—require an NDA applicant to submit specified information: "the patent number and the expiration date of any patent" claiming the drug or a method of its use. 21

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[7] Novo's only counter is to redefine a use code. Novo argues that a use code need not be tied to the patent at all—that "[t]he relevant regulation requires [NDA] applicants to provide [only] 'a description of each approved method of use *or indication*.'" Brief for Respondents 48 (quoting 21 CFR § 314.53(c)(2)(ii)(P)(1)). Because an "indication" refers generally to what a drug does (here, treat diabetes), see § 201.57(c)(2), Novo claims that a use code may sweep more broadly than the patent. But that is incorrect. First, Novo does not cite the regulations that specify the information required for publication—*i. e.*, use codes. See § 314.53(c)(2)(ii)(P)(3) (requiring a "description of the patented method of use as required for publication"); § 314.53(e) ("[F]or each use patent," the FDA will publish "the approved indications or other conditions of use covered by a patent"). Those provisions (whether referring to methods of use, conditions of use, or indications) all demand a description of the patent. And second, even the provision Novo cites—which mandates the submission of additional material, not listed in the Orange Book—ties information about indications to patent coverage; that regulation requires (when quoted in full) that the brand provide "a description of each approved method of use or indication and related patent claim of the patent being submitted." § 314.53(c)(2)(ii)(P)(1).

U. S. C. §§ 355(b)(1), (c)(2). According to Novo, only that information comes within the counterclaim provision. But subsections (b) and (c) as well govern the regulatory process by which brands provide additional patent information to the FDA, both before and after an NDA is approved. In particular, those subsections provide the basis for the regulation requiring brands to submit use codes, see 21 CFR § 314.53; in issuing that regulation, the FDA noted that "[o]ur principal legal authority . . . is section 505 of the act [codified at § 355], in conjunction with our general rulemaking authority," 68 Fed. Reg. 36697–36698 (specifically referring to subsections (b) and (c)). And the form (Form 3542) on which brands submit their use codes states that the information appearing there is "provided in accordance with Section [355](b) and (c)." App. 97. So use codes fall within the counterclaim's ambit if the phrase "submitted under" reaches filings that not only subsections (b) and (c) themselves but also their implementing regulations require.

Several of our cases support giving "under" this broad meaning. For example, in *Eli Lilly*, 496 U. S., at 665–668, we examined a similar statutory reference to the "submission of information under a Federal law which regulates the manufacture, use, or sale of drugs," 35 U. S. C. § 271(e)(1). We noted there that submitting information "under a Federal law" suggests doing so "in furtherance of or compliance with a comprehensive scheme of regulation." 496 U. S., at 667. Likewise, in *Ardestani* v. *INS*, 502 U. S. 129, 135 (1991), we held that a regulatory proceeding "under section 554," 5 U. S. C. § 504(b)(1)(C)(i), meant any proceeding "subject to," "governed by," or conducted "by reason of the authority of" that statutory provision.

So too here. "Patent information submitted . . . under subsection (b) or (c)" most naturally refers to patent information provided as part of the "comprehensive scheme of regulation" premised on those subsections. *Eli Lilly*, 496 U. S., at 667. It includes everything (about patents) that the FDA

requires brands to furnish in the proceedings "subject to," "governed by," or conducted "by reason of the authority of" §§ 355(b) and (c). *Ardestani*, 502 U. S., at 135. The breadth of the term "under" becomes particularly clear when compared with other phrases—"described in" and "prescribed by"—appearing in neighboring provisions. See, *e. g.*, 21 U. S. C. § 355(c)(2) ("patent information described in subsection (b)"); § 355(d)(6) ("patent information prescribed by subsection (b)"). Those phrases denote a patent number and expiration date and nothing more. In contrast, the word "under" naturally reaches beyond that most barebones information to other patent materials the FDA demands in the regulatory process.

Once again, that congressional choice fits the broader statutory context. Use codes are pivotal to the FDA's implementation of the Hatch-Waxman Amendments—and no less so because a regulation, rather than the statute itself, requires their submission. Recall that those Amendments instruct the FDA (assuming other requirements are met) to approve an ANDA filed with a section viii statement when it proposes to market a drug for only unpatented methods of use. To fulfill that charge, the FDA must determine whether any patent covers a particular method of use; and to do that, the agency (which views itself as lacking expertise in patent matters, see *supra*, at 406–407, and n. 2) relies on the use codes submitted in the regulatory process. See 68 Fed. Reg. 36682–36683. An overbroad use code therefore throws a wrench into the FDA's ability to approve generic drugs as the statute contemplates. So it is not surprising that the language Congress used in the counterclaim provision sweeps widely enough to embrace that filing.

C

Another aspect of the counterclaim provision—its description of available remedies—dispatches whatever remains of Novo's arguments. According to the statute, a successful

claimant may obtain an order requiring the brand to "correct or delete" its patent information. § 355(j)(5)(C)(ii)(I). Our interpretation of the statute gives content to both those remedies: It deletes a listing from the Orange Book when the brand holds no relevant patent and corrects the listing when the brand has misdescribed the patent's scope. By contrast, Novo's two arguments would all but read the term "correct" out of the statute.

Consider first how Novo's an-means-any contention would accomplish that result. Recall that on Novo's view, a counterclaim can succeed only if the patent challenged does not claim either the drug or any approved method of using it. See *supra*, at 413. But when a generic manufacturer makes that showing, the remedy must be to "delete" the listing; no correction would be enough. Novo agrees with that proposition; "[a]t bottom," Novo avers, "the counterclaim is a delisting provision." Brief for Respondents 20. But that raises the obvious question: Why did Congress also include the term "correct" in the statute?

Novo can come up with just one answer: The counterclaim, it proposes, can correct erroneous patent numbers. Imagine, for example, that Novo mistakenly entered the number '359, instead of '358, when submitting information about its repaglinide patent for publication in the Orange Book. Then, Novo suggests, Caraco could bring a counterclaim to challenge the inaccurate listing (on the ground that '359 does not claim any method of use), and the remedy would be "correct[ion]" (substituting an 8 for a 9). But we think Novo's admission that this scenario would be "unusual," Tr. of Oral Arg. 41, considerably understates the matter. As Novo concedes, brands have every incentive to provide the right patent number in the first place, and to immediately rectify any error brought to their attention. See *id.*, at 40–41. By doing so, they place both generic companies and the FDA on notice of their patents and thereby prevent infringement. And conversely, generics have little or no incentive to bring

a counterclaim that will merely replace one digit in the Orange Book with another. So we doubt Congress created a legal action to "correct" patent information just to fix such scrivener's errors. See, *e. g.*, *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (refusing to adopt an interpretation of a statute that would render a piece of it "insignificant, if not wholly superfluous" (internal quotation marks omitted)). That would have been, in the most literal sense, to make a federal case out of nothing.

The same problem afflicts Novo's alternative contention—that "patent information submitted . . . under subsection (b) or (c)" includes only numbers and expiration dates (and not use codes). Once again, we cannot think Congress included the remedy of "correct[ion]" so that courts could expunge typos in patent numbers. And not even Novo has proffered a way for the counterclaim to "correct" an erroneous expiration date. Suppose, for example, that a brand incorrectly lists the expiration date of a valid patent as 2018 rather than 2015. The counterclaim would be useless: It authorizes a remedy only "on the ground that" the listed patent does not claim the drug or an approved method of using it—and notwithstanding the wrong expiration date, this patent does so. Alternatively, suppose the brand lists a patent as having a 2018 expiration date when in fact the patent has already lapsed. Then, a generic manufacturer could bring a counterclaim alleging that the patent no longer claims the drug or a method of using it—but the appropriate remedy would be deletion, not correction, of the brand's listing. Novo's reading of "patent information," like its reading of "not an," effectively deletes the term "correct" from the statute.

III

Novo finally advances two arguments relating to the counterclaim's drafting history. Neither contention, however, overcomes the statutory text and context. Indeed, consid-

eration of the provision's background only strengthens our view of its meaning.

A

Novo first contends that our interpretation of the statute "effectively resurrect[s] the scheme rejected by Congress." Brief for Respondents 44 (quoting *Smith* v. *United States*, 507 U. S. 197, 203, n. 4 (1993)). In 2002, Novo notes, Congress failed to pass a bill that would have required brands to file specified "patent information," including, for method-of-use patents, a description of "the approved use covered by the [patent] claim." S. 812, 107th Cong., 2d Sess., § 103(a)(1), p. 7 (engrossed bill). That bill would have allowed a generic company to bring its own civil action—not merely a counterclaim in ongoing litigation—to "delete" or "correct" the information filed. *Id.*, at 8. The Senate approved the bill, but the House of Representatives took no action on it. Novo argues that because this failed legislation would have allowed a generic company to challenge overbroad descriptions of a patent, we cannot read the statute Congress eventually enacted as doing so.

We disagree. We see no reason to assume, as Novo does, that Congress rejected S. 812 because it required brands to submit patent information beyond a number and expiration date. Indeed, Novo's argument highlights the perils of relying on the fate of prior bills to divine the meaning of enacted legislation. "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 170 (2001). S. 812 contained numerous items, including a title on importing prescription drugs (no controversy there!), that may have caused its failure. See S. 812, Tit. II. Moreover, what criticism there was of the bill's mechanism for challenging brands' patent claims focused not on the specification of "patent information," but instead on the creation of an independent cause of action—stronger medicine than the counterclaim Congress ulti-

mately adopted.[8] And finally, Novo ignores a likely cause for the redrafting of the provision on submitting information. Between S. 812's demise and the counterclaim's enactment, the FDA issued a rule requiring brands to supply material concerning method-of-use patents, including use codes. The drafters of the counterclaim provision knew about that rule,[9] and had no need to duplicate its list of mandated filings. So the drafting history does not support Novo's conclusion. If anything, the statute's evolution indicates that Congress determined to enforce the FDA's new listing provisions, including its use-code requirement, through the new counterclaim.

B

Novo next argues that Congress established the counterclaim only to solve the problem raised by the Federal Circuit's decision in *Mylan*, 268 F. 3d 1323—the impossibility of deleting an improperly listed patent from the Orange Book. In *Mylan*, as earlier described, a generic company alleged that a brand had listed a patent that covered neither the approved drug nor any method of using it, and brought an action seeking delisting. See *supra*, at 408. The Federal Circuit held that no such action was available, even assuming the allegation was true. Because several legislators saw *Mylan* as "exemplif[ying]" brands' "perceived abuse" of the FDA's patent listing practices, Brief for Respondents 35, Novo contends that we should construe the counterclaim provision to aid only a generic company that "finds itself in the

[8] See, *e. g.*, 148 Cong. Rec. 15424 (2002) (remarks of Sen. Gregg) ("Probably the most significant issue is the fact that it creates a new cause of action"); *id.*, at 15431–15432 (remarks of Sen. Grassley) (similar); *id.*, at 14434 (remarks of Sen. Hatch) (similar).

[9] See, *e. g.*, Hearings on Barriers to Entry in the Pharmaceutical Marketplace before the Senate Committee on the Judiciary, 108th Cong., 1st Sess., 5–8 (2003) (statement of Daniel Troy, Chief Counsel to the FDA); *id.*, at 19 (statement of Sen. Schumer) ("The bill provides a critical complement to the work FDA has done in clarifying its regulations on patent listing, but it goes much further").

same position as Mylan was in *Mylan*," Supp. Brief in Opposition 5–6.

Once again, we think not. Maybe *Mylan* triggered the legislative effort to enact a counterclaim, or maybe it didn't: By the time Congress acted, it also had at hand an FTC study broadly criticizing brands' patent listings and an FDA rule designed to address the very same issue. See *supra*, at 408, 423. But even assuming *Mylan* "prompted the proposal" of the counterclaim, "whether that alone accounted for its enactment is quite a different question." *Eli Lilly*, 496 U. S., at 670, n. 3 (emphasis deleted). Here, we think *Mylan* alerted Congress to a broader problem—that generic companies generally had no avenue to challenge the accuracy of brands' patent listings, and that the FDA therefore could not approve proper applications to bring inexpensive drugs to market. The proof of that lies in the statute itself (where the best proof of what Congress means to address almost always resides). As we have described, the statute's text and context demonstrate that the counterclaim is available not only (as in *Mylan*) when the patent listing is baseless, but also (as here) when it is overbroad. See *supra*, at 412–421. In particular, Congress's decision to allow a counterclaimant to seek "correct[ion]" of patent information explodes Novo's theory, because the remedy for a *Mylan*-type impropriety is complete delisting.

And to make matters still easier, Congress's equation of the two situations—the one in *Mylan* and the one here—makes perfect sense. Whether a brand lists a patent that covers no use or describes a patent on one use as extending to others, the brand submits misleading patent information to the FDA. In doing so, the brand equally exploits the FDA's determination that it cannot police patent claims. And the brand's action may in either case delay or block approval of a generic drug that infringes no patent—and that under the statute should go to market. See *supra*, at 406–407. That is the danger Caraco faces here, as much as it

was the threat in *Mylan*: Novo seeks to preclude Caraco from selling repaglinide for unpatented uses until 2018, when Novo's patent on a *different* use expires.

Indeed, the need for the counterclaim is greater here than in *Mylan*. When a brand lists a patent that covers no use, a generic company has a pathway aside from the counterclaim to challenge the listing. As described earlier, the company may make a paragraph IV certification stating that the listed patent "is invalid or will not be infringed" by the generic drug. 21 U. S. C. §355(j)(2)(A)(vii)(IV); see *supra*, at 407–408. If the brand sues, the generic company can argue that its product would not infringe the patent. Using the counterclaim may enable a generic manufacturer to obtain delisting more quickly, see Tr. of Oral Arg. 54; but even without it, the company can eventually get a judgment of noninfringement enabling the FDA to approve its ANDA. In contrast, where (as here) a brand files an overbroad use code, a generic company cannot use paragraph IV litigation to that end. A paragraph IV certification (unlike a section viii statement) requires the generic company to propose labeling identical to the brand's; it cannot carve out any uses. See *supra*, at 406. And that proposed label will necessarily infringe because it will include the use(s) on which the brand does have a patent. So here, a paragraph IV suit cannot lead to a judgment enabling FDA approval; the counterclaim offers the *only* route to bring the generic drug to market for non-infringing uses. Novo's view eliminates the counterclaim where it has the greatest value.

IV

The statutory counterclaim we have considered enables courts to resolve patent disputes so that the FDA can fulfill its statutory duty to approve generic drugs that do not infringe patent rights. The text and context of the provision demonstrate that a generic company can employ the counterclaim to challenge a brand's overbroad use code. We accord-

ingly hold that Caraco may bring a counterclaim seeking to "correct" Novo's use code "on the ground that" the '358 patent "does not claim . . . an approved method of using the drug"—indeed, does not claim two.

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

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

The Court today interprets the counterclaim set forth in 21 U. S. C. § 355(j)(5)(C)(ii)(I) to permit generic manufacturers to force brand manufacturers to "correct" inaccurate use codes. While I too find the counterclaim not "free of ambiguity," *ante,* at 412, I join the Court's opinion because I agree this is the most sensible reading in light of the existing regulatory scheme. I write separately to add the following observations.

I

I first underscore that the counterclaim can only lessen the difficulties created by an overly broad use code; it cannot fix them. The statutory scheme is designed to speed the introduction of low-cost generic drugs to market. See *ante,* at 405 (citing *Eli Lilly & Co.* v. *Medtronic, Inc.*, 496 U. S. 661, 676 (1990)). To that end, the statute provides for the rapid approval of a drug that a generic manufacturer seeks to market for unpatented methods of use. The manufacturer need only submit an abbreviated new drug application (ANDA) with a section viii statement and a proposed label that "carves out" from the brand manufacturer's label any patented methods of use. See *ante,* at 406. So long as the use code is not overly broad (and all else is in order), the Federal Food and Drug Administration (FDA) may approve the application without requiring any further steps relating to the patent, and the generic drug may reach the public without undue delay. See *ibid.*

An overly broad use code "throws a wrench" into that scheme. *Ante*, at 419. The reason why is simple: FDA relies on use codes in determining whether to approve an ANDA, but it refuses to evaluate the accuracy of those use codes. See *ante*, at 406–407. Thus, if the use code overlaps with the generic manufacturer's proposed carve-out label (*i. e.*, if the use code is overly broad), FDA will not approve an ANDA with a section viii statement. See *ibid.*

After today's opinion, the generic manufacturer can respond to this situation by taking the following steps: submit an ANDA with a paragraph IV certification (which requires a proposed label materially identical to the brand manufacturer's label, see *ante*, at 425), wait for the brand manufacturer to institute suit, file a counterclaim, litigate the counterclaim, and, if successful in securing the correction of the use code, return to the start of the process and do what it always wanted to do—file an ANDA with a section viii statement and a carve-out label.

The problem with this process is twofold. First, it results in delay and expense the statutory scheme does not envision. Second, there is no guarantee the process will work. It depends on the brand manufacturer initiating paragraph IV litigation, but it is not obvious the brand will have any incentive to do so. In light of today's holding, the upshot of such litigation will be the correction of the use code through the assertion of a counterclaim—an outcome that is desirable, to be sure, for the generic manufacturer, but perhaps less so for the brand manufacturer.

Meanwhile, it is not clear what happens if the brand manufacturer does not file suit. FDA may approve the generic manufacturer's application, see 21 U. S. C. § 355(j)(5)(B)(iii), "without prejudice to infringement claims the patent owner might assert when the ANDA applicant produces or markets the generic drug." Brief for United States as *Amicus Curiae* 6 (hereinafter United States Brief). But the generic manufacturer, having been forced to proceed with a para-

graph IV certification, will have secured approval to market a drug with a label materially identical to the brand manufacturer's. That is not a position I imagine a generic manufacturer wants to be in: As the Solicitor General's Office informed us at argument, "[i]t would be inducement of infringement to sell a product with labeling that suggests that the product be used for a patented method of use." Tr. of Oral Arg. 24; see also United States Brief 32 (noting that in this situation, if a generic manufacturer proceeded with a paragraph IV certification, "[s]o long as the [new drug application (NDA)] holder's patent covers some approved method of using the approved drug, the proposed labeling will be infringing" (emphasis deleted)).

In short, the counterclaim cannot restore the smooth working of a statutory scheme thrown off kilter by an overly broad use code. At best, it permits the generic manufacturer to do what the scheme contemplates it should do—file an ANDA with a section viii statement—but only after expensive and time-consuming litigation. A fix is in order, but it must come from Congress or FDA.

II

Precisely because the regulatory scheme depends on the accuracy and precision of use codes, I find FDA's guidance as to what is required of brand manufacturers in use codes remarkably opaque. The relevant regulation states simply that a brand manufacturer must provide "[t]he description of the patented method of use as required for publication." 21 CFR § 314.53(c)(2)(ii)(P)(3) (2011). The form on which brand manufacturers submit that information provides some additional detail, explaining that "[e]ach approved use claimed by the patent should be separately identified . . . and contain adequate information to assist . . . applicants in determining whether a listed method of use patent claims a use for which the . . . applicant is not seeking approval." App. to Pet. for Cert. 214a. But it also provides that brand manufacturers

may "us[e] no more than 240 total characters including spaces," *id.*, at 213a, and elsewhere FDA acknowledges "that in some cases 240 characters may not fully describe the use as claimed in the patent," 68 Fed. Reg. 36683 (2003); see also *ibid.* (indicating for this reason that use codes "are not meant to substitute for the applicant's review of the patent").

Indeed, in some respects we are here today because of FDA's opacity in describing what is required of brand manufacturers. In its initial NDA filing, Novo submitted a use code for the '358 patent that was not "overly broad": It described narrowly the single patented method of use. App. 54–55, 99. Some years later FDA required that Novo amend its label to "[r]eplace all the separate indications" "with the following sentence: 'Prandin is indicated as an adjunct to diet and exercise to improve glycemic control in adults with type 2 diabetes mellitus.' " *Id.*, at 163–164, 215. Novo then amended its use code to track the new label, *id.*, at 482–486, explaining that the amendment "correspond[ed] with the change in labeling required by FDA," *id.*, at 483. Novo understood its amended use code to comply with FDA regulations, likely on the ground it pressed before us: that the regulations permit a brand manufacturer to submit for publication in the Orange Book a description of *either* the patented method of use *or* the indication (which refers to "what a drug does," *ante*, at 417, n. 7). Brief for Respondents 10, 22, 48–50.

For the reasons explained by the Court, see *ante*, at 417, n. 7, Novo is mistaken. But the company can hardly be faulted for so thinking. The regulations also require submission of "a description of each approved method of use or indication," 21 CFR §314.53(c)(2)(ii)(P)(1), and the form on which brand manufacturers submit use codes requires "information on the indication or method of use for the Orange Book 'Use Code' description," App. to Pet. for Cert. 213a; see also *ibid.* (explaining brand manufacturers should "[s]ubmit the description of the approved indication or method of

use that you propose FDA include as the 'Use Code' in the Orange Book"). Those sources at the least suggest (as Novo thought) that a method of use here is distinct from an indication and that either suffices as a use code.

Prior to enactment of the counterclaim provision, Congress considered a bill that required brand manufacturers to submit a "description of 'the approved use covered by the [patent] claim,' " and that allowed a generic manufacturer to bring a civil action to correct that information. See *ante*, at 422. Congress rejected the bill, in part over criticism that it would encourage excess litigation.* Absent greater clarity from FDA concerning what is required of brand manufacturers in use codes, Congress' fears of undue litigation may be realized.

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*See, *e. g.*, 148 Cong. Rec. 13481 (2002) (remarks of Sen. Hatch); *id.*, at 15433 (remarks of Sen. McCain); Office of Management and Budget, S. 812—Greater Access to Affordable Pharmaceuticals Act (July 18, 2002) (statement of administration policy), online at http://www.whitehouse.gov/omb/legislative_sap_107-2_S812-S (as visited Apr. 13, 2012, and available in Clerk of Court's case file).

Syllabus

KAPPOS, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR, PATENT AND TRADEMARK OFFICE *v.* HYATT

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

No. 10–1219. Argued January 9, 2012—Decided April 18, 2012

Under the Patent Act of 1952, if a Patent and Trademark Office (PTO) examiner denies a patent application, 35 U. S. C. § 131, the applicant may file an administrative appeal with the PTO's Board of Patent Appeals and Interferences, § 134. If the Board also denies the application, the applicant may appeal directly to the Court of Appeals for the Federal Circuit under § 141. Alternatively, the applicant may file a civil action against the PTO Director under § 145, which permits the applicant to present evidence that was not presented to the PTO.

Respondent Hyatt filed a patent application covering multiple claims. The patent examiner denied all of the claims for lack of an adequate written description. Hyatt appealed to the Board, which approved some claims but denied others. Pursuant to § 145, Hyatt filed a civil action against the Director, but the District Court declined to consider Hyatt's newly proffered written declaration in support of the adequacy of his description, thus limiting its review to the administrative record. Applying the deferential "substantial evidence" standard of the Administrative Procedure Act (APA) to the PTO's factual findings, the court granted summary judgment to the Director. On appeal, the Federal Circuit vacated the judgment, holding that patent applicants can introduce new evidence in § 145 proceedings, subject only to the limitations in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. It also reaffirmed its precedent that when new, conflicting evidence is introduced, the district court must make *de novo* findings to take such evidence into account.

Held: There are no limitations on a patent applicant's ability to introduce new evidence in a § 145 proceeding beyond those already present in the Federal Rules of Evidence and the Federal Rules of Civil Procedure. If new evidence is presented on a disputed question of fact, the district court must make *de novo* factual findings that take account of both the new evidence and the administrative record before the PTO. Pp. 437–446.

(a) Section 145, by its express terms, neither imposes unique evidentiary limits in district court proceedings nor establishes a heightened

standard of review for PTO factual findings. Nonetheless, the Director contends that background principles of administrative law govern the admissibility of new evidence and impose a deferential standard of review in § 145 proceedings. As the Director concedes, however, judicial review in § 145 proceedings is not limited to the administrative record because the district court may consider new evidence. If it does so, the district court must act as a factfinder and cannot apply the APA's deferential standard to PTO factual findings when those findings are contradicted by new evidence. Moreover, the doctrine of administrative exhaustion—the primary purpose of which is "the avoidance of premature interruption of the administrative process," *McKart* v. *United States*, 395 U. S. 185, 193—does not apply because the PTO process is complete by the time a § 145 proceeding occurs. Pp. 437–439.

(b) The core language of the 1870 Patent Act, codified as Revised Statute § 4915 (R. S. 4915), remains largely unchanged in § 145. Decisions interpreting R. S. 4915 thus inform this Court's understanding of § 145. Both *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50, and *Morgan* v. *Daniels*, 153 U. S. 120, describe the nature of R. S. 4915 proceedings, but the two opinions can be perceived as being in some tension. *Butterworth* described the proceeding as an original civil action seeking *de novo* adjudication of the merits of a patent application, while *Morgan* described it as a suit for judicial review of agency action under a deferential standard. The cases are distinguishable, however, because they addressed different circumstances. *Butterworth* discussed a patent applicant's challenge to the denial of his application, whereas *Morgan* involved an interference proceeding that would now be governed by § 146, not § 145, and in which no new evidence was presented. Here, this Court is concerned only with a § 145 proceeding in which new evidence was presented to the District Court, so *Butterworth* guides this Court's decision. Thus, a district court conducting a § 145 proceeding may consider all competent evidence adduced and is not limited to considering only new evidence that could not have been presented to the PTO. The introduction of new evidence in § 145 proceedings is subject only to the Federal Rules of Evidence and the Federal Rules of Civil Procedure, and if new evidence is presented to the district court on a disputed factual question, *de novo* findings by the district court will be necessary for that new evidence to be taken into account along with the evidence before the Board. Pp. 439–445.

(c) The district court may, however, consider whether the applicant had an opportunity to present the newly proffered evidence before the PTO in deciding what weight to afford that evidence. P. 445.

625 F. 3d 1320, affirmed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 446.

Ginger D. Anders argued the cause for petitioner. With her on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Deputy Assistant Attorney General Brinkmann*, *Raymond T. Chen*, *Robert J. McManus*, and *Thomas W. Krause*.

Aaron M. Panner argued the cause and filed a brief for respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

The Patent Act of 1952, 35 U. S. C. § 100 *et seq.*, grants a patent applicant whose claims are denied by the Patent and Trademark Office (PTO) the opportunity to challenge the PTO's decision by filing a civil action against the Director of the PTO in federal district court. In such a proceeding, the applicant may present evidence to the district court that he did not present to the PTO. This case requires us to consider two questions. First, we must decide whether there are any limitations on the applicant's ability to introduce new evidence before the district court. For the reasons set forth below, we conclude that there are no evidentiary restrictions beyond those already imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Second, we must determine what standard of review the district court should apply when considering new evidence. On this

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John A. Dragseth, Lauren A. Degnan, Tina M. Chappell, Kevin T. Kramer, and *Horacio E. Gutiérrez* filed a brief for Intel Corp. et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* were filed for the American Intellectual Property Law Association by *Vernon M. Winters* and *William G. Barber;* for IEEE–USA by *Chris J. Katopis;* for the Intellectual Property Owners Association by *Robert M. Isackson*, *Douglas K. Norman*, and *Kevin H. Rhodes;* for the New York Intellectual Property Law Association by *Charles E. Miller*, *Theresa M. Gillis*, *John M. Hintz*, and *David F. Ryan;* and for Verizon Communications, Inc., et al. by *Daryl Joseffer*, *Adam Conrad*, *John Thorne*, and *Paul H. Roeder*.

question, we hold that the district court must make a *de novo* finding when new evidence is presented on a disputed question of fact. In deciding what weight to afford that evidence, the district court may, however, consider whether the applicant had an opportunity to present the evidence to the PTO.

I

The Patent Act of 1952 establishes the process by which the PTO examines patent applications. A patent examiner first determines whether the application satisfies the statutory prerequisites for granting a patent. 35 U. S. C. § 131. If the examiner denies the application, the applicant may file an administrative appeal with the PTO's Board of Patent Appeals and Interferences (Board). § 134. If the Board also denies the application, the Patent Act gives the disappointed applicant two options for judicial review of the Board's decision. The applicant may either: (1) appeal the decision directly to the United States Court of Appeals for the Federal Circuit, pursuant to § 141; or (2) file a civil action against the Director of the PTO in the United States District Court for the District of Columbia pursuant to § 145.[1]

In a § 141 proceeding, the Federal Circuit must review the PTO's decision on the same administrative record that was before the PTO. § 144. Thus, there is no opportunity for the applicant to offer new evidence in such a proceeding. In

[1] On September 16, 2011, the President signed the Leahy-Smith America Invents Act, 125 Stat. 284, into law. That Act made significant changes to Title 35 of the United States Code, some of which are related to the subject matter of this case. For example, the Act changed the venue for § 145 actions from the United States District Court for the District of Columbia to the United States District Court for the Eastern District of Virginia, *id.*, at 316, changed the name of the Board of Patent Appeals and Interferences to the Patent Trial and Appeal Board, *id.*, at 290, and changed the name of interferences to derivation proceedings, *ibid.* Neither party contends that the Act has any effect on the questions before us, and all references and citations in this opinion are to the law as it existed prior to the Act.

Dickinson v. *Zurko*, 527 U. S. 150 (1999), we addressed the standard that governs the Federal Circuit's review of the PTO's factual findings. We held that the Administrative Procedure Act (APA), 5 U. S. C. § 701 *et seq.*, applies to § 141 proceedings and that the Federal Circuit therefore should set aside the PTO's factual findings only if they are " 'unsupported by substantial evidence.' " 527 U. S., at 152 (quoting 5 U. S. C. § 706).

In *Zurko*, we also noted that, unlike § 141, § 145 permits the applicant to present new evidence to the district court that was not presented to the PTO. 527 U. S., at 164. This opportunity to present new evidence is significant, not the least because the PTO generally does not accept oral testimony. See Brief for Petitioner 40, n. 11. We have not yet addressed, however, whether there are any limitations on the applicant's ability to introduce new evidence in such a proceeding or the appropriate standard of review that a district court should apply when considering such evidence.

II

In 1995, respondent Gilbert Hyatt filed a patent application that, as amended, included 117 claims. The PTO's patent examiner denied each claim for lack of an adequate written description. See 35 U. S. C. § 112 (requiring patent applications to include a "specification" that provides, among other information, a written description of the invention and of the manner and process of making and using it). Hyatt appealed the examiner's decision to the Board, which eventually approved 38 claims, but denied the rest. Hyatt then filed a § 145 action in Federal District Court against the Director of the PTO (Director), petitioner here.

To refute the Board's conclusion that his patent application lacked an adequate written description, Hyatt submitted a written declaration to the District Court. In the declaration, Hyatt identified portions of the patent specification that, in his view, supported the claims that the Board held

were not patentable. The District Court determined that it could not consider Hyatt's declaration because applicants are "'precluded from presenting new issues, at least in the absence of some reason of justice put forward for failure to present the issue to the Patent Office.'" *Hyatt* v. *Dudas*, Civ. Action No. 03–0901 (D DC, Sept. 30, 2005), p. 9, App. to Pet. for Cert. 182a (quoting *DeSeversky* v. *Brenner*, 424 F. 2d 857, 858 (CADC 1970) *(per curiam)*). Because the excluded declaration was the only additional evidence submitted by Hyatt in the § 145 proceeding, the evidence remaining before the District Court consisted entirely of the PTO's administrative record. Therefore, the District Court reviewed all of the PTO's factual findings under the APA's deferential "substantial evidence" standard. See *Mazzari* v. *Rogan*, 323 F. 3d 1000, 1004–1005 (CA Fed. 2003). Applying that standard, the District Court granted summary judgment to the Director.

Hyatt appealed to the Federal Circuit. A divided panel affirmed, holding that the APA imposed restrictions on the admission of new evidence in a § 145 proceeding and that the district court's review is not "wholly de novo." *Hyatt* v. *Doll*, 576 F. 3d 1246, 1269–1270 (2009). The Federal Circuit granted rehearing en banc and vacated the District Court's grant of summary judgment. The en banc court first held "that Congress intended that applicants would be free to introduce new evidence in § 145 proceedings subject only to the rules applicable to all civil actions, the Federal Rules of Evidence and the Federal Rules of Civil Procedure," even if the applicant had no justification for failing to present the evidence to the PTO. 625 F. 3d 1320, 1331 (2010). Reaffirming its precedent, the court also held that when new, conflicting evidence is introduced in a § 145 proceeding, the district court must make *de novo* findings to take such evidence into account. *Id.*, at 1336. We granted certiorari, 564 U. S. 1036 (2011), and now affirm.

III

The Director challenges both aspects of the Federal Circuit's decision. First, the Director argues that a district court should admit new evidence in a § 145 action only if the proponent of the evidence had no reasonable opportunity to present it to the PTO in the first instance. Second, the Director contends that, when new evidence is introduced, the district court should overturn the PTO's factual findings only if the new evidence clearly establishes that the agency erred. Both of these arguments share the premise that § 145 creates a special proceeding that is distinct from a typical civil suit filed in federal district court and that is thus governed by a different set of procedural rules. To support this interpretation of § 145, the Director relies on background principles of administrative law and pre-existing practice under a patent statute that predated § 145. For the reasons discussed below, we find that neither of these factors justifies a new evidentiary rule or a heightened standard of review for factual findings in § 145 proceedings.

A

To address the Director's challenges, we begin with the text of § 145. See, *e. g.*, *Magwood* v. *Patterson*, 561 U. S. 320, 331 (2010). Section 145 grants a disappointed patent applicant a "remedy by civil action against the Director." The section further explains that the district court "may adjudge that such applicant is entitled to receive a patent for his invention, as specified in any of his claims involved in the decision of the [PTO], as the facts in the case may appear and such adjudication shall authorize the Director to issue such patent on compliance with the requirements of law." By its terms, § 145 neither imposes unique evidentiary limits in district court proceedings nor establishes a heightened standard of review for factual findings by the PTO.

B

In the absence of express support for his position in the text of § 145, the Director argues that the statute should be read in light of traditional principles of administrative law, which Congress codified in the APA. The Director notes that § 145 requires a district court to review the reasoned decisionmaking of the PTO, an executive agency with specific authority and expertise. Accordingly, the Director contends that a district court should defer to the PTO's factual findings. The Director further contends that, given the traditional rule that a party must exhaust his administrative remedies, a district court should consider new evidence only if the party did not have an opportunity to present it to the agency.

We reject the Director's contention that background principles of administrative law govern the admissibility of new evidence and require a deferential standard of review in a § 145 proceeding. Under the APA, judicial review of an agency decision is typically limited to the administrative record. See 5 U. S. C. § 706. But, as the Director concedes, § 145 proceedings are not so limited, for the district court may consider new evidence. When the district court does so, it must act as a factfinder. *Zurko*, 527 U. S., at 164. In that role, it makes little sense for the district court to apply a deferential standard of review to PTO factual findings that are contradicted by the new evidence. The PTO, no matter how great its authority or expertise, cannot account for evidence that it has never seen. Consequently, the district court must make its own findings *de novo* and does not act as the "reviewing court" envisioned by the APA. See 5 U. S. C. § 706.

We also conclude that the principles of administrative exhaustion do not apply in a § 145 proceeding. The Director argues that applicants must present all available evidence to the PTO to permit the PTO to develop the necessary facts and to give the PTO the opportunity to properly apply the

Patent Act in the first instance. Brief for Petitioner 21–22 (citing *McKart* v. *United States*, 395 U. S. 185, 193–194 (1969)). But as this Court held in *McKart*, a primary purpose of administrative exhaustion "is, of course, the avoidance of premature interruption of the administrative process." *Id.*, at 193. That rationale does not apply here because, by the time a § 145 proceeding occurs, the PTO's process is complete. Section 145, moreover, does not provide for remand to the PTO to consider new evidence, and there is no pressing need for such a procedure because a district court, unlike a court of appeals, has the ability and the competence to receive new evidence and to act as a fact-finder. In light of these aspects of § 145 proceedings—at least in those cases in which new evidence is presented to the district court on a disputed question of fact—we are not persuaded by the Director's suggestion that § 145 proceedings are governed by the deferential principles of agency review.

C

Having concluded that neither the statutory text nor background principles of administrative law support an evidentiary limit or a heightened standard of review for factual findings in § 145 proceedings, we turn to the evidentiary and procedural rules that were in effect when Congress enacted § 145 in 1952. Although § 145 is a relatively modern statute, the language in that provision originated in the Act of July 8, 1870 (1870 Act), ch. 230, 16 Stat. 198, and the history of § 145 proceedings can be traced back to the Act of July 4, 1836 (1836 Act), ch. 357, 5 Stat. 117. Thus, we begin our inquiry with the 1836 Act, which established the Patent Office, the PTO's predecessor, and first authorized judicial review of its decisions.

1

The 1836 Act provided that a patent applicant could bring a bill in equity in federal district court if his application was

denied on the ground that it would interfere with another patent. *Id.*, at 123–124; see also B. Shipman, Handbook of the Law of Equity Pleading §§ 101–103, pp. 168–171 (1897). Three years later, Congress expanded that provision, making judicial review available whenever a patent was refused on any ground. Act of Mar. 3, 1839, 5 Stat. 354. Pursuant to these statutes, any disappointed patent applicant could file a bill in equity to have the district court "adjudge" whether the applicant was "entitled, according to the principles and provisions of [the Patent Act], to have and receive a patent for his invention." 1836 Act, 5 Stat. 124.

In 1870, Congress amended the Patent Act again, adding intermediate layers of administrative review and introducing language describing the proceeding in the district court. 16 Stat. 198. Under the 1870 Act, an applicant denied a patent by the primary examiner could appeal first to a three-member board of examiners-in-chief, then to the Commissioner for Patents, and finally to an en banc sitting of the Supreme Court of the District of Columbia.[2] *Id.*, at 205. Notably, Congress described that court's review as an "appeal" based "on the evidence produced before the commissioner." *Ibid.* The 1870 Act preserved the prior remedy of a bill in equity in district court for the applicant whose appeal was denied either by the Commissioner or by the Supreme Court of the District of Columbia. *Ibid.* The district court, in a proceeding that was distinct from the appeal considered on the administrative record by the Supreme Court of the District of Columbia, would "adjudge" whether the applicant was "entitled, according to law, to receive a patent for his invention . . . as the facts in the case may appear." *Ibid.* In 1878, Congress codified this provision of

[2] The Supreme Court of the District of Columbia was a trial court created by Congress in 1863. Act of Mar. 3, 1863, ch. 91, 12 Stat. 762. Although the court was generally one of first instance, it also functioned as an appellate court when it sat en banc. Voorhees, The District of Columbia Courts: A Judicial Anomaly, 29 Cath. U. L. Rev. 917, 923 (1980).

the 1870 Act as Revised Statute § 4915 (R. S. 4915). That statute was the immediate predecessor to § 145, and its core language remains largely unchanged in § 145. Accordingly, both parties agree that R. S. 4915 and the judicial decisions interpreting that statute should inform our understanding of § 145.

2

This Court described the nature of R. S. 4915 proceedings in two different cases: *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50 (1884), and *Morgan* v. *Daniels*, 153 U. S. 120 (1894). In *Butterworth*, the Court held that the Secretary of the Interior, the head of the federal department in which the Patent Office was a bureau, had no authority to review a decision made by the Commissioner of Patents in an interference proceeding. In its discussion, the Court described the remedy provided by R. S. 4915 as

> "a proceeding in a court of the United States having original equity jurisdiction under the patent laws, according to the ordinary course of equity practice and procedure. It is not a technical appeal from the Patent Office, like that authorized [before the Supreme Court of the District of Columbia], confined to the case as made in the record of that office, but is prepared and heard upon all competent evidence adduced and upon the whole merits." 112 U. S., at 61.

The *Butterworth* Court also cited several lower court cases, which similarly described R. S. 4915 proceedings as "altogether independent" from the hearings before the Patent Office and made clear that the parties were "at liberty to introduce additional evidence" under "the rules and practice of a court of equity." *In re Squire*, 22 F. Cas. 1015, 1016 (No. 13,269) (CC ED Mo. 1877); see also *Whipple* v. *Miner*, 15 F. 117, 118 (CC Mass. 1883) (describing the federal court's jurisdiction in an R. S. 4915 proceeding as "an independent, original jurisdiction"); *Butler* v. *Shaw*, 21 F. 321, 327

(CC Mass. 1884) (holding that "the court may receive new evidence, and has the same powers as in other cases in equity").

Ten years later, in *Morgan*, this Court again confronted a case involving proceedings under R. S. 4915. 153 U. S. 120. There, a party challenged a factual finding by the Patent Office, but neither side presented additional evidence in the District Court. *Id.*, at 122–123. This Court described the parties' dispute as one over a question of fact that had already "been settled by a special tribunal [e]ntrusted with full power in the premises" and characterized the resulting District Court proceeding not as an independent civil action, but as "something in the nature of a suit to set aside a judgment." *Id.*, at 124. Consistent with that view, the Court held that the agency's findings should not be overturned by "a mere preponderance of evidence." *Ibid.*

Viewing *Butterworth* and *Morgan* together, one might perceive some tension between the two cases. *Butterworth* appears to describe an R. S. 4915 proceeding as an original civil action, seeking *de novo* adjudication of the merits of a patent application. *Morgan*, on the other hand, appears to describe an R. S. 4915 proceeding as a suit for judicial review of agency action, governed by a deferential standard of review. To resolve that apparent tension, the Director urges us to disregard the language in *Butterworth* as mere dicta and to follow *Morgan*. He argues that *Butterworth* "shed[s] no light on the extent to which new evidence was admissible in R. S. 4915 proceedings or on the standard of review that applied in such suits." Brief for Petitioner 33. The Director maintains that *Morgan*, in contrast, firmly established that a district court in such a proceeding performs a deferential form of review, governed by traditional principles of administrative law. We reject the Director's position.[3]

[3] Both parties cite additional cases from the lower courts that they claim support their view of the statute, but these cases are too diverse to support any firm inferences about Congress' likely intent in enacting § 145.

We think that the differences between *Butterworth* and *Morgan* are best explained by the fact that the two cases addressed different circumstances. *Butterworth* discussed the character of an R. S. 4915 proceeding in which a disappointed patent applicant challenged the Board's denial of his application. Although that discussion was not strictly necessary to *Butterworth*'s holding it was also not the kind of ill-considered dicta that we are inclined to ignore. The *Butterworth* Court carefully examined the various provisions providing relief from the final denial of a patent application by the Commissioner of Patents to determine that the Secretary of the Interior had no role to play in that process. 112 U. S., at 59–64. The Court further surveyed the decisions of the lower courts with regard to the nature of an R. S. 4915 proceeding and concluded that its view was "the uniform and correct practice in the Circuit Courts." *Id.*, at 61. We note that this Court reiterated *Butterworth*'s well-reasoned interpretation of R. S. 4915 in three later cases.[4]

Morgan, on the other hand, concerned a different situation from the one presented in this case. First, *Morgan* addressed an interference proceeding. See 153 U. S., at 125 (emphasizing that "the question decided in the Patent Office is one between contesting parties as to priority of invention"). Although interference proceedings were previously governed by R. S. 4915, they are now governed by a separate section of the Patent Act, 35 U. S. C. § 146, and therefore do not implicate § 145. In addition, *Morgan* did not involve a

[4] In *Gandy* v. *Marble*, 122 U. S. 432 (1887), the Court described an R. S. 4915 proceeding as "a suit according to the ordinary course of equity practice and procedure" rather than a "technical appeal from the Patent Office." *Id.*, at 439 (citing *Butterworth*, 112 U. S., at 61). Likewise, in *In re Hien*, 166 U. S. 432 (1897), the Court distinguished an R. S. 4915 proceeding from the "'technical appeal from the Patent Office'" authorized under R. S. 4911, the predecessor to current § 141. *Id.*, at 439 (quoting *Butterworth*, *supra*, at 61). And, finally, in *Hoover Co.* v. *Coe*, 325 U. S. 79 (1945), the Court cited *Butterworth* to support its description of an R. S. 4915 proceeding as a "formal trial." 325 U. S., at 83, and n. 4.

proceeding in which new evidence was presented to the District Court. See 153 U. S., at 122 (stating that the case "was submitted, without any additional testimony, to the Circuit Court").

3

Because in this case we are concerned only with § 145 proceedings in which new evidence has been presented to the District Court, *Butterworth* rather than *Morgan* guides our decision. In *Butterworth*, this Court observed that an R. S. 4915 proceeding should be conducted "according to the ordinary course of equity practice and procedure" and that it should be "prepared and heard upon all competent evidence adduced and upon the whole merits." 112 U. S., at 61. Likewise, we conclude that a district court conducting a § 145 proceeding may consider "all competent evidence adduced," *id.*, at 61, and is not limited to considering only new evidence that could not have been presented to the PTO. Thus, we agree with the Federal Circuit that "Congress intended that applicants would be free to introduce new evidence in § 145 proceedings subject only to the rules applicable to all civil actions, the Federal Rules of Evidence and the Federal Rules of Civil Procedure." 625 F. 3d, at 1331.

We also agree with the Federal Circuit's longstanding view that, "where new evidence is presented to the district court on a disputed fact question, a *de novo* finding will be necessary to take such evidence into account together with the evidence before the board." *Fregeau* v. *Mossinghoff*, 776 F. 2d 1034, 1038 (1985). As we noted in *Zurko*, the district court acts as a factfinder when new evidence is introduced in a § 145 proceeding. 527 U. S., at 164. The district court must assess the credibility of new witnesses and other evidence, determine how the new evidence comports with the existing administrative record, and decide what weight the new evidence deserves. As a logical matter, the district court can only make these determinations *de novo* because it is the first tribunal to hear the evidence in question. Furthermore, a *de novo* standard adheres to this Court's instruc-

tion in *Butterworth* that an R. S. 4915 proceeding be heard "upon the whole merits" and conducted "according to the ordinary course of equity practice and procedure." 112 U. S., at 61.

D

Although we reject the Director's proposal for a stricter evidentiary rule and an elevated standard of review in § 145 proceedings, we agree with the Federal Circuit that the district court may, in its discretion, "consider the proceedings before and findings of the Patent Office in deciding what weight to afford an applicant's newly-admitted evidence." 625 F. 3d, at 1335. Though the PTO has special expertise in evaluating patent applications, the district court cannot meaningfully defer to the PTO's factual findings if the PTO considered a different set of facts. Cf. *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 111 (2011) (noting that "if the PTO did not have all material facts before it, its considered judgment may lose significant force"). For this reason, we conclude that the proper means for the district court to accord respect to decisions of the PTO is through the court's broad discretion over the weight to be given to evidence newly adduced in the § 145 proceedings.

The Director warns that allowing the district court to consider all admissible evidence and to make *de novo* findings will encourage patent applicants to withhold evidence from the PTO intentionally with the goal of presenting that evidence for the first time to a nonexpert judge. Brief for Petitioner 23. We find that scenario unlikely. An applicant who pursues such a strategy would be intentionally undermining his claims before the PTO on the speculative chance that he will gain some advantage in the § 145 proceeding by presenting new evidence to a district court judge.

IV

For these reasons, we conclude that there are no limitations on a patent applicant's ability to introduce new evidence in a § 145 proceeding beyond those already present in

the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Moreover, if new evidence is presented on a disputed question of fact, the district court must make *de novo* factual findings that take account of both the new evidence and the administrative record before the PTO. In light of these conclusions, the Federal Circuit was correct to vacate the judgment of the District Court, which excluded newly presented evidence under the view that it "need not consider evidence negligently submitted after the end of administrative proceedings." Civ. Action No. 03–0901, at 15, App. to Pet. for Cert. 189a.

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

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring.

As the Court today recognizes, a litigant in a 35 U. S. C. § 145 proceeding is permitted to introduce evidence not presented to the Patent and Trademark Office (PTO) "'according to the ordinary course of equity practice and procedure.'" *Ante*, at 441 (quoting *Butterworth* v. *United States ex rel. Hoe*, 112 U. S. 50, 61 (1884)). Dating back to § 145's original predecessor, Congress contemplated that courts would manage such actions "according to the course and principles of courts of equity." Act of July 4, 1836, § 17, 5 Stat. 124. And this Court and other courts have acknowledged and applied that principle on numerous occasions. See, *e. g.*, *Gandy* v. *Marble*, 122 U. S. 432, 439 (1887) (describing Rev. Stat. § 4915 (R. S. 4915) proceeding as "a suit according to the ordinary course of equity practice and procedure"); *In re Hien*, 166 U. S. 432, 438 (1897) (same); *In re Squire*, 22 F. Cas. 1015, 1016 (No. 13,269) (CC ED Mo. 1877) (in an R. S. 4915 proceeding, the parties were "at liberty to introduce additional evidence" under "the rules and practice of a court of equity"); *ante*, at 441, 443, n. 4 (citing same cases).

Consistent with ordinary equity practice and procedure, there may be situations in which a litigant's conduct before the PTO calls into question the propriety of admitting evidence presented for the first time in a § 145 proceeding before a district court. The most well-known example was presented in *Barrett Co.* v. *Koppers Co.*, 22 F. 2d 395, 396 (CA3 1927), a case in which the Barrett Company, during proceedings before the Patent Office, "expressly refused to disclose and to allow their witnesses to answer questions" essential to establishing the priority of its invention. After the Patent Office ruled against it, the Barrett Company attempted to present in a subsequent R. S. 4915 proceeding "the very subject-matter concerning which . . . witnesses for the [patent] application were asked questions and the Barrett Company forbade them to answer." *Ibid.* The Third Circuit understandably found the Barrett Company estopped from introducing evidence that it had "purposely" withheld from prior factfinders, lest the company be allowed "to profit by [its] own . . . wrong doing." *Id.*, at 397. See also *Dowling* v. *Jones*, 67 F. 2d 537, 538 (CA2 1933) (L. Hand, J.) (describing *Barrett* as a case in which "the Third Circuit refused to consider evidence which the inventor had deliberately suppressed").

For the reasons the Court articulates, § 145 proceedings are not limited to the administrative record developed before the PTO and applicants are entitled to present new evidence to the district court. Accordingly, as Judge Hand suggested, a court's equitable authority to exclude evidence in such proceedings is limited, and must be exercised with caution. See *Dowling*, 67 F. 2d, at 538 (describing as "doubtful" the proposition that a court should exclude evidence that was "not suppressed, but merely neglected," before the Patent Office). Thus, when a patent applicant fails to present evidence to the PTO due to ordinary negligence, a lack of foresight, or simple attorney error, the applicant should not be estopped from presenting the evidence for the first time in a § 145 proceeding.

Because there is no suggestion here that the applicant's failure to present the evidence in question to the PTO was anything other than the product of negligence or a lack of foresight, I agree that the applicant was entitled to present his additional evidence to the District Court. But I do not understand today's decision to foreclose a district court's authority, consistent with "'the ordinary course of equity practice and procedure,'" *ante*, at 445 (quoting *Butterworth*, 112 U. S., at 61), to exclude evidence "deliberately suppressed" from the PTO or otherwise withheld in bad faith. For the reasons set out by the Court, see *ante*, at 445, an applicant has little to gain by such tactics; such cases will therefore be rare. In keeping with longstanding historical practice, however, I understand courts to retain their ordinary authority to exclude evidence from a § 145 proceeding when its admission would be inconsistent with regular equity practice and procedure.

With those observations, I join the Court's opinion in full.

Syllabus

MOHAMAD, INDIVIDUALLY AND FOR ESTATE OF RAHIM, DECEASED, ET AL. *v.* PALESTINIAN AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11–88. Argued February 28, 2012—Decided April 18, 2012

While visiting the West Bank, Azzam Rahim, a naturalized United States citizen, allegedly was arrested by Palestinian Authority intelligence officers, imprisoned, tortured, and ultimately killed. Rahim's relatives, petitioners here, sued the Palestinian Authority and the Palestine Liberation Organization under the Torture Victim Protection Act of 1991 (TVPA or Act), which authorizes a cause of action against "[a]n individual" for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation. 106 Stat. 73, note following 28 U. S. C. § 1350. The District Court dismissed the suit, concluding, as relevant here, that the TVPA's authorization of suit against "[a]n individual" extended liability only to natural persons. The United States Court of Appeals for the District of Columbia Circuit affirmed.

Held: As used in the TVPA, the term "individual" encompasses only natural persons. Consequently, the Act does not impose liability against organizations. Pp. 453–461.

(a) The ordinary, everyday meaning of "individual" refers to a human being, not an organization, and Congress in the normal course does not employ the word any differently. The Dictionary Act defines "person" to include certain artificial entities "as well as individuals," 1 U. S. C. § 1, thereby marking "individual" as distinct from artificial entities. Federal statutes routinely distinguish between an "individual" and an organizational entity. See, *e. g.*, 7 U. S. C. §§ 92(k), 511. And the very Congress that passed the TVPA defined "person" in a separate Act to include "any individual or entity." 18 U. S. C. § 2331(3). Pp. 453–455.

(b) Before a word will be assumed to have a meaning broader than or different from its ordinary meaning, Congress must give some indication that it intended such a result. There are no such indications in the TVPA. To the contrary, the statutory context confirms that Congress in the Act created a cause of action against natural persons alone. The Act's liability provision uses the word "individual" five times in the same sentence: once to refer to the perpetrator and four times to refer to the victim. See TVPA § 2(a). Since only a natural person can be a victim of torture or extrajudicial killing, it is difficult to conclude that Congress used "individual" four times in the same sentence to refer to

Syllabus

a natural person and once to refer to a natural person *and* any nonsovereign organization. In addition, the TVPA holds perpetrators liable for extrajudicial killing to "any person who may be a claimant in an action for wrongful death." See TVPA § 2(a)(2). "Persons" often has a broader meaning in the law than "individual," and frequently includes nonnatural persons. Construing "individual" in the Act to encompass solely natural persons credits Congress' use of disparate terms. Pp. 455–456.

(c) Petitioners' counterarguments are unpersuasive. Pp. 456–461.

(1) Petitioners dispute that the plain text of the TVPA requires this Court's result. First, they rely on definitions that frame "individual" in nonhuman terms, emphasizing the idea of "oneness," but these definitions make for an awkward fit in the context of the TVPA. Next they claim that federal tort statutes uniformly provide for liability against organizations, a convention they maintain is common to the legal systems of other nations. But while "Congress is understood to legislate against a background of common-law adjudicatory principles," *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108, Congress plainly evinced its intent in the TVPA not to subject organizations to liability. Petitioners next argue that the TVPA's scope of liability should be construed to conform with other federal statutes they claim provide civil remedies to victims of torture or extrajudicial killing. But none of the statutes petitioners cite employs the term "individual," as the TVPA, to describe the covered defendant. Finally, although petitioners rightly note that the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing, it does not follow that the Act embraces liability against nonsovereign organizations. Pp. 457–458.

(2) Petitioners also contend that legislative history supports their broad reading of "individual," but "reliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 236, n. 3. In any event, the history supports this Court's interpretation. Pp. 458–460.

(3) Finally, petitioners argue that precluding organizational liability may foreclose effective remedies for victims and their relatives. This purposive argument simply cannot overcome the force of the plain text. Moreover, Congress appeared well aware of the limited nature of the cause of action it established in the TVPA. Pp. 460–461.

634 F. 3d 604, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined, and in which SCALIA, J., joined except as to Part III–B. BREYER, J., filed a concurring opinion, *post*, p. 461.

Jeffrey L. Fisher argued the cause for petitioners. With him on the briefs were *Robert J. Tolchin*, *Thomas C. Goldstein*, *Kevin K. Russell*, *Pamela S. Karlan*, and *Nathaniel A. Tarnor*.

Laura G. Ferguson argued the cause for respondents. With her on the brief were *Richard A. Hibey*, *Mark J. Rochon*, *Dawn E. Murphy-Johnson*, *Jeffrey A. Lamken*, *Robert K. Kry*, and *Martin V. Totaro*.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* supporting affirmance. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Douglas N. Letter*, *Robert M. Loeb*, *Lewis S. Yelin*, *Harold Hongju Koh*, and *Cameron F. Kerry*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.†

The Torture Victim Protection Act of 1991 (TVPA or Act), 106 Stat. 73, note following 28 U. S. C. § 1350, authorizes a cause of action against "[a]n individual" for acts of torture and extrajudicial killing committed under authority or color of law of any foreign nation. We hold that the term "individual" as used in the Act encompasses only natural per-

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*Briefs of *amici curiae* urging reversal were filed for Law Professors of Civil Liberties and 42 U. S. C. § 1983 by *Penny M. Venetis;* for the Yale Law School Center for Global Legal Challenges by *Oona A. Hathaway* and *Jeffrey A. Meyer;* for Juan Méndez by *Deena R. Hurwitz;* for Former U. S. Senator Arlen Specter et al. by *William J. Aceves* and *Anthony DiCaprio;* and for Joseph E. Stiglitz by *Michael D. Hausfeld*.

Briefs of *amici curiae* were filed for the American Petroleum Institute et al. by *Peter B. Rutledge;* for KBR, Inc., by *David B. Rivkin, Jr.*, and *Lee A. Casey;* for Omer Bartov et al. by *Jennifer Green*, *Judith Brown Chomsky*, and *Beth Stephens;* for Juan Romagoza Arce et al. by *Andrea C. Evans*, *Pamela M. Merchant*, *Natasha E. Fain*, and *L. Kathleen Roberts;* and for Larry Bowoto et al. by *Marco Simons*, *Richard Herz*, *Theresa Traber*, *Bert Voorhees*, *Lauren Teukolsky*, *Dan Stormer*, *Cindy A. Cohn*, *Mr. DiCaprio*, *Michael S. Sorgen*, *Ms. Chomsky*, and *Richard R. Wiebe*.

†JUSTICE SCALIA joins this opinion except as to Part III–B.

sons. Consequently, the Act does not impose liability against organizations.

I

Because this case arises from a motion to dismiss, we accept as true the allegations of the complaint. *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 734 (2011). Petitioners are the relatives of Azzam Rahim, who immigrated to the United States in the 1970's and became a naturalized citizen. In 1995, while on a visit to the West Bank, Rahim was arrested by Palestinian Authority intelligence officers. He was taken to a prison in Jericho, where he was imprisoned, tortured, and ultimately killed. The following year, the U. S. Department of State issued a report concluding that Rahim "died in the custody of [Palestinian Authority] intelligence officers in Jericho." Dept. of State, Country Reports on Human Rights Practices for 1995, Submitted to the House Committee on International Relations and the Senate Committee on Foreign Relations, 104th Cong., 2d Sess., 1183 (Joint Committee Print 1996).

In 2005, petitioners filed this action against respondents, the Palestinian Authority and the Palestine Liberation Organization, asserting, *inter alia*, claims of torture and extrajudicial killing under the TVPA. The District Court granted respondents' motion to dismiss, concluding, as relevant, that the Act's authorization of suit against "[a]n individual" extended liability only to natural persons. *Mohamad* v. *Rajoub*, 664 F. Supp. 2d 20, 22 (DC 2009). The United States Court of Appeals for the District of Columbia Circuit affirmed on the same ground. See *Mohamad* v. *Rajoub*, 634 F. 3d 604, 608 (2011) ("Congress used the word 'individual' to denote only natural persons").[1] We granted certiorari, 565 U. S. 962 (2011), to resolve a split among the Circuits

[1] Respondents also argued before the District Court that the TVPA's requirement that acts be committed under authority or color of law of a foreign nation was not met. Neither the District Court nor Court of Appeals addressed the argument, and we offer no opinion on its merits.

with respect to whether the TVPA authorizes actions against defendants that are not natural persons,[2] and now affirm.

II

The TVPA imposes liability on individuals for certain acts of torture and extrajudicial killing. The Act provides:

> "An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> "(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." § 2(a).

The Act defines "torture" and "extrajudicial killing," § 3, and imposes a statute of limitations and an exhaustion requirement, §§ 2(b), (c). It does not define "individual."

Petitioners concede that foreign states may not be sued under the Act—namely, that the Act does not create an exception to the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1602 *et seq.*, which renders foreign sovereigns largely immune from suits in U. S. courts. They argue, however, that the TVPA does not similarly restrict liability against other juridical entities. In petitioners' view, by permitting suit against "[a]n individual," the TVPA contemplates liability against natural persons *and* nonsovereign organizations (a category that, petitioners assert, includes respondents). We decline to read "individual" so unnaturally. The ordinary meaning of the word, fortified by its

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[2] Compare *Aziz* v. *Alcolac, Inc.*, 658 F. 3d 388 (CA4 2011) (TVPA excludes corporate defendants from liability); *Mohamad* v. *Rajoub*, 634 F. 3d 604 (CADC 2011) (TVPA liability limited to natural persons); *Bowoto* v. *Chevron Corp.*, 621 F. 3d 1116 (CA9 2010) (same as *Aziz*), with *Sinaltrainal* v. *Coca-Cola Co.*, 578 F. 3d 1252, 1264, n. 13 (CA11 2009) (TVPA liability extends to corporate defendants).

statutory context, persuades us that the Act authorizes suit against natural persons alone.

A

Because the TVPA does not define the term "individual," we look first to the word's ordinary meaning. See *FCC* v. *AT&T Inc.*, 562 U. S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning" (internal quotation marks omitted)). As a noun, "individual" ordinarily means "[a] human being, a person." 7 Oxford English Dictionary 880 (2d ed. 1989); see also, *e. g.*, Random House Dictionary of the English Language 974 (2d ed. 1987) ("a person"); Webster's Third New International Dictionary 1152 (1986) (hereinafter Webster's) ("a particular person"). After all, that is how we use the word in everyday parlance. We say "the individual went to the store," "the individual left the room," and "the individual took the car," each time referring unmistakably to a natural person. And no one, we hazard to guess, refers in normal parlance to an organization as an "individual." Evidencing that common usage, this Court routinely uses "individual" to denote a natural person, and in particular to distinguish between a natural person and a corporation. See, *e. g.*, *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915, 924 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home").

Congress does not, in the ordinary course, employ the word any differently. The Dictionary Act instructs that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, *and* joint stock companies, *as well as* individuals." 1 U. S. C. § 1 (emphasis added). With the phrase "as well as," the definition marks "individual" as distinct from the list of artificial entities that precedes it.

In a like manner, federal statutes routinely distinguish between an "individual" and an organizational entity of some kind. See, *e. g.*, 7 U. S. C. § 92(k) ("'Person' includes partnerships, associations, and corporations, as well as individuals"); § 511 (same); 15 U. S. C. § 717a ("'Person' includes an individual or a corporation"); 16 U. S. C. § 796(4) ("'[P]erson' means an individual or a corporation"); 8 U. S. C. § 1101(b)(3) ("'[P]erson' means an individual or an organization"). Indeed, the very same Congress that enacted the TVPA also established a cause of action for U. S. nationals injured "by reason of an act of international terrorism" and defined "person" as it appears in the statute to include "any individual *or entity* capable of holding a legal or beneficial interest in property." Federal Courts Administration Act of 1992, 18 U. S. C. §§ 2333(a), 2331(3) (emphasis added).

B

This is not to say that the word "individual" invariably means "natural person" when used in a statute. Congress remains free, as always, to give the word a broader or different meaning. But before we will assume it has done so, there must be *some* indication Congress intended such a result. Perhaps it is the rare statute (petitioners point to only one such example, located in the Internal Revenue Code) in which Congress expressly defines "individual" to include corporate entities. See 26 U. S. C. § 542(a)(2). Or perhaps, as was the case in *Clinton* v. *City of New York*, 524 U. S. 417, 429 (1998), the statutory context makes that intention clear, because any other reading of "individual" would lead to an "'absurd'" result Congress could not plausibly have intended.

There are no such indications in the TVPA. As noted, the Act does not define "individual," much less do so in a manner that extends the term beyond its ordinary usage. And the statutory context strengthens—not undermines—the conclusion that Congress intended to create a cause of action against natural persons alone. The Act's liability provision

uses the word "individual" five times in the same sentence: once to refer to the perpetrator (*i. e.*, the defendant) and four times to refer to the victim. See § 2(a). Only a natural person can be a victim of torture or extrajudicial killing. "Since there is a presumption that a given term is used to mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence," *Brown* v. *Gardner*, 513 U. S. 115, 118 (1994) (citation omitted), it is difficult indeed to conclude that Congress employed the term "individual" four times in one sentence to refer to a natural person and once to refer to a natural person *and* any nonsovereign organization. See also § 3(b)(1) (using term "individual" six times in referring to victims of torture).

It is also revealing that the Act holds perpetrators liable for extrajudicial killing to "any *person* who may be a claimant in an action for wrongful death." § 2(a)(2) (emphasis added). "Person," we have recognized, often has a broader meaning in the law than "individual," see *Clinton*, 524 U. S., at 428, n. 13, and frequently includes nonnatural persons, see, *e. g.*, 1 U. S. C. § 1. We generally seek to respect Congress' decision to use different terms to describe different categories of people or things. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 711, n. 9 (2004). Our construction of "individual" to encompass solely natural persons credits Congress' use of the disparate terms; petitioners' construction does not.[3]

In sum, the text of the statute persuades us that the Act authorizes liability solely against natural persons.

III

Petitioners' counterarguments are unpersuasive.

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[3] The parties debate whether estates, or other nonnatural persons, in fact may be claimants in a wrongful-death action. We think the debate largely immaterial. Regardless of whether jurisdictions today allow for such actions, Congress' use of the broader term evidences an intent to accommodate that possibility.

A

Petitioners first dispute that the plain text of the TVPA requires today's result. Although they concede that an ordinary meaning of "individual" is "human being," petitioners point to definitions of "individual" that "frame the term . . . in distinctly non-human terms, instead placing their emphases on the *oneness* of something." Brief for Petitioners 18 (citing, *e. g.*, Webster's 1152 (defining "individual" as "a single or particular being or thing or group of being or things")). Those definitions, however, do not account even for petitioners' preferred interpretation of "individual" in the Act, for foreign states—which petitioners concede are not liable under the Act—do not differ from nonsovereign organizations in their degree of "oneness." Moreover, "[w]ords that can have more than one meaning are given content . . . by their surroundings," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 466 (2001), and for the reasons explained *supra*, petitioners' definition makes for an awkward fit in the context of the TVPA.

Petitioners next claim that federal tort statutes uniformly provide for liability against organizations, a convention they maintain is common to the legal systems of other nations. We are not convinced, however, that any such "domestic and international presumption of organizational liability" in tort actions overcomes the ordinary meaning of "individual." Brief for Petitioners 16. It is true that "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). But Congress plainly can override those principles, see, *e. g.*, *id.*, at 108–109, and, as explained *supra*, the TVPA's text evinces a clear intent not to subject nonsovereign organizations to liability.[4]

[4] Petitioners' separate contention that the TVPA must be construed in light of international agreements prohibiting torture and extrajudicial killing fails for similar reasons. Whatever the scope of those agreements, the TVPA does not define "individual" by reference to them, and principles

We also decline petitioners' suggestion to construe the TVPA's scope of liability to conform with other federal statutes that petitioners contend provide civil remedies to victims of torture or extrajudicial killing. None of the three statutes petitioners identify employs the term "individual" to describe the covered defendant, and so none assists in the interpretive task we face today. See 42 U. S. C. § 1983; 28 U. S. C. § 1603(a) (2006 ed.), § 1605A(c) (2006 ed., Supp. IV); 18 U. S. C. §§ 2333, 2334(a)–(b), 2337. The same is true of the Alien Tort Statute, 28 U. S. C. § 1350, so it offers no comparative value here regardless of whether corporate entities can be held liable in a federal common-law action brought under that statute. Compare *Doe* v. *Exxon Mobil Corp.*, 654 F. 3d 11 (CADC 2011), with *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F. 3d 111 (CA2 2010), cert. granted, 565 U. S. 961 (2011). Finally, although petitioners rightly note that the TVPA contemplates liability against officers who do not personally execute the torture or extrajudicial killing, see, *e. g.*, *Chavez* v. *Carranza*, 559 F. 3d 486 (CA6 2009), it does not follow (as petitioners argue) that the Act embraces liability against nonsovereign organizations. An officer who gives an order to torture or kill is an "individual" in that word's ordinary usage; an organization is not.

B

Petitioners also contend that legislative history supports their broad reading of "individual." But "reliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz, Gallop & Milavetz, P. A.* v.

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they elucidate cannot overcome the statute's text. The same is true of petitioners' suggestion that Congress in the TVPA imported a "specialized usage" of the word "individual" in international law. See Brief for Petitioners 6. There is no indication in the text of the statute or legislative history that Congress knew of any such specialized usage of the term, much less intended to import it into the Act.

United States, 559 U. S. 229, 236, n. 3 (2010). In any event, the excerpts petitioners cite do not help their cause. Petitioners note that the Senate Report states that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances." S. Rep. No. 102–249, p. 7 (1991) (S. Rep.); see also H. R. Rep. No. 102–367, pt. 1, p. 4 (1991) ("Only 'individuals,' not foreign states, can be sued"). Yet that statement, while clarifying that the Act does not encompass liability against foreign states, says nothing about liability against nonsovereign organizations. The other excerpts petitioners cite likewise are not probative of the meaning of "individual," for they signal only that the Act does not impose liability on perpetrators who act without authority or color of law of a foreign state. See, *e. g.*, *id.*, at 5 ("The bill does not attempt to deal with torture or killing by purely private groups"); S. Rep., at 8 (The bill "does not cover purely private criminal acts by individuals or nongovernmental organizations").

Indeed, although we need not rely on legislative history given the text's clarity, we note that the history only supports our interpretation of "individual." The version of the TVPA that was introduced in the 100th Congress established liability against a "person." Hearing and Markup on H. R. 1417 before the House Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations, 100th Cong., 2d Sess., 82 (1988). During the markup session of the House Foreign Affairs Committee, one of the bill's sponsors proposed an amendment "to make it clear we are applying it to individuals and not to corporations." *Id.*, at 81, 87. Counsel explained that it was a "fairly simple" matter "of changing the word, 'person' to 'individuals' in several places in the bill." *Id.*, at 87–88. The amendment was unanimously adopted, and the version of the bill reported out of Committee reflected the change. *Id.*, at 88; H. R. Rep.

No. 100–693, pt. 1, p. 1 (1988). A materially identical version of the bill was enacted as the TVPA by the 102d Congress. Although we are cognizant of the limitations of this drafting history, cf. *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 568 (2005), we nevertheless find it telling that the sole explanation for substituting "individual" for "person" confirms what we have concluded from the text alone.

C

Petitioners' final argument is that the Act would be rendered toothless by a construction of "individual" that limits liability to natural persons. They contend that precluding organizational liability may foreclose effective remedies for victims and their relatives for any number of reasons. Victims may be unable to identify the men and women who subjected them to torture, all the while knowing the organization for whom they work. Personal jurisdiction may be more easily established over corporate than human beings. And natural persons may be more likely than organizations to be judgment proof. Indeed, we are told that only two TVPA plaintiffs have been able to recover successfully against a natural person—one only after the defendant won the state lottery. See *Jean* v. *Dorélien*, 431 F. 3d 776, 778 (CA11 2005).

We acknowledge petitioners' concerns about the limitations on recovery. But they are ones that Congress imposed and that we must respect. "[N]o legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)*, and petitioners' purposive argument simply cannot overcome the force of the plain text. We add only that Congress appeared well aware of the limited nature of the cause of action it established in the Act. See, *e. g.*, 138 Cong. Rec. 4177 (1992) (remarks of Sen. Simpson) (noting that "as a practical matter, this legislation will result in a very small number of cases"); 137 Cong. Rec. 2671 (1991) (remarks of Sen. Specter) ("Let me emphasize that

the bill is a limited measure. It is estimated that only a few of these lawsuits will ever be brought").

* * *

The text of the TVPA convinces us that Congress did not extend liability to organizations, sovereign or not. There are no doubt valid arguments for such an extension. But Congress has seen fit to proceed in more modest steps in the Act, and it is not the province of this branch to do otherwise. The judgment of the United States Court of Appeals for the District of Columbia Circuit is affirmed.

It is so ordered.

JUSTICE BREYER, concurring.

I join the Court's opinion with one qualification. The word "individual" is open to multiple interpretations, permitting it, linguistically speaking, to include natural persons, corporations, and other entities. Thus, I do not believe that word alone is sufficient to decide this case.

The legislative history of the statute, however, makes up for whatever interpretive inadequacies remain after considering language alone. See, *e. g.*, *ante*, at 459 (describing markup session in which one of the bill's sponsors proposed an amendment containing the word "individual" to "'make it clear'" that the statute applied to "'individuals and not to corporations'"); Hearing on S. 1629 et al. before the Subcommittee on Immigration and Refugee Affairs of the Senate Committee on the Judiciary, 101st Cong., 2d Sess., 65 (1990) (witness explaining to Committee that there would be a "problem" with suing an "independent entity or a series of entities that are not governments," such as the Palestine Liberation Organization); *id.*, at 75 (allaying concerns that there will be a flood of lawsuits "because of the requirement [in the statute] that an individual has to identify his or her precise torture[r] and they have to be both in the United States"); see also *ante*, at 458–459 (making clear that peti-

tioners' citations to the legislative history "do not help their cause"). After examining the history in detail, and considering it along with the reasons that the Court provides, I join the Court's judgment and opinion.

Syllabus

WOOD *v.* MILYARD, WARDEN, ET AL.

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

No. 10–9995. Argued February 27, 2012—Decided April 24, 2012

In 1987, petitioner Patrick Wood was convicted of murder and other crimes by a Colorado court and sentenced to life imprisonment. Wood filed a federal habeas petition in 2008. After receiving Wood's petition, the U. S. District Court asked the State if it planned to argue that the petition was untimely. In response, the State twice informed the District Court that it would "not challenge, but [was] not conceding," the timeliness of Wood's petition. Thereafter, the District Court rejected Wood's claims on the merits. On appeal, the Tenth Circuit ordered the parties to brief both the merits and the timeliness of Wood's petition. After briefing, the court held the petition time barred, concluding that the court had authority to raise timeliness on its own motion, and that the State had not taken the issue off the table by declining to raise a statute of limitations defense in the District Court.

Held:

1. Courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative in exceptional cases. Pp. 468–473.

(a) "Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day* v. *McDonough*, 547 U. S. 198, 202. An affirmative defense, once forfeited, is excluded from the case and, as a rule, cannot be asserted on appeal.

In *Granberry* v. *Greer*, 481 U. S. 129, 133, this Court recognized a modest exception to the rule that a federal court will not consider a forfeited defense. There, the Seventh Circuit addressed a nonexhaustion defense the State raised for the first time on appeal. The exhaustion doctrine, this Court noted, is founded on concerns broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries. *Id.*, at 133–135. With that comity interest in mind, the Court held that federal appellate courts have discretion to consider a nonexhaustion argument inadvertently overlooked by the State in the district court. *Id.*, at 132, 134.

In *Day*, the Court affirmed a federal district court's authority to consider a forfeited habeas defense when extraordinary circumstances so

warrant. 547 U. S., at 201. The State in *Day*, having miscalculated a timespan, erroneously informed the District Court that Day's habeas petition was timely. Apprised of the error by a Magistrate Judge, the District Court, *sua sponte*, dismissed the petition as untimely. This Court affirmed, holding that "district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.*, at 209. Such leeway was appropriate, the Court again reasoned, because the statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), like the exhaustion doctrine, "implicat[es] values beyond the concerns of the parties." *Id.*, at 205.

The Court clarified, however, that a federal court does not have *carte blanche* to depart from the principle of party presentation. See *Greenlaw* v. *United States*, 554 U. S. 237, 243–244. It would be "an abuse of discretion" for a court "to override a State's deliberate waiver of a limitations defense." *Day*, 547 U. S., at 202. In *Day* itself, the State's timeliness concession resulted from "inadvertent error," *id.*, at 211, not a deliberate decision to proceed to the merits. Pp. 470–473.

(b) Consistent with *Granberry* and *Day*, the Court declines to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense. The institutional interests served by AEDPA's statute of limitations are also present when a habeas case moves to the court of appeals, a point *Granberry* recognized with respect to a nonexhaustion defense. P. 473.

2. The Tenth Circuit abused its discretion when it dismissed Wood's petition as untimely. In the District Court, the State was well aware of the statute of limitations defense available to it, and of the arguments that could be made in support of that defense. Yet, the State twice informed the District Court that it would not "challenge" the timeliness of Wood's petition. In so doing, the State deliberately waived the statute of limitations defense. In light of that waiver, the Tenth Circuit should have followed the District Court's lead and decided the merits of Wood's petition. Pp. 473–475.

403 Fed. Appx. 335, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed an opinion concurring in the judgment, in which SCALIA, J., joined, *post*, p. 475.

Kathleen A. Lord argued the cause and filed briefs for petitioner.

Daniel D. Domenico, Solicitor General of Colorado, argued the cause for respondents. With him on the brief were *John W. Suthers*, Attorney General, *John D. Seidel* and *John J. Fuerst III*, Senior Assistant Attorneys General, *William S. Consovoy*, and *Thomas R. McCarthy*.

Melissa Arbus Sherry argued the cause for the United States as *amicus curiae* supporting affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, and *Deputy Solicitor General Dreeben*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of a federal court to raise, on its own motion, a statute of limitations defense to a habeas corpus petition. After state prisoner Patrick Wood filed a federal habeas corpus petition, the State twice informed the U. S. District Court that it "[would] not challenge, but [is] not conceding, the timeliness of Wood's habeas petition." App. 70a; see *id.*, at 87a. Thereafter, the District Court rejected Wood's claims on the merits. On appeal, the Tenth Circuit directed the parties to brief the question whether Wood's federal petition was timely. Postbriefing, the Court of Appeals affirmed the denial of Wood's petition, but solely on the ground that it was untimely.

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*A brief of *amici curiae* urging affirmance was filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Daniel T. Hodge*, First Assistant Attorney General, *Don Clemmer*, Deputy Attorney General, *Jonathan F. Mitchell*, Solicitor General, and *James P. Sullivan*, Assistant Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *Pamela Jo Bondi* of Florida, *Leonardo M. Rapadas* of Guam, *Lisa Madigan* of Illinois, *Derek Schmidt* of Kansas, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Jeffrey S. Chiesa* of New Jersey, *Wayne Stenehjem* of North Dakota, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Mark L. Shurtleff* of Utah, *Robert M. McKenna* of Washington, and *Gregory A. Phillips* of Wyoming.

Our precedent establishes that a court may consider a statute of limitations or other threshold bar the State failed to raise in answering a habeas petition. *Granberry* v. *Greer*, 481 U. S. 129, 134 (1987) (exhaustion defense); *Day* v. *McDonough*, 547 U. S. 198, 202 (2006) (statute of limitations defense). Does court discretion to take up timeliness hold when a State is aware of a limitations defense, and intelligently chooses not to rely on it in the court of first instance? The answer *Day* instructs is "no": A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense. *Id.*, at 202, 210, n. 11. The Tenth Circuit, we accordingly hold, abused its discretion by resurrecting the limitations issue instead of reviewing the District Court's disposition on the merits of Wood's claims.

I

In the course of a 1986 robbery at a pizza shop in a Colorado town, the shop's assistant manager was shot and killed. Petitioner Patrick Wood was identified as the perpetrator. At a bench trial in January 1987, Wood was convicted of murder, robbery, and menacing, and sentenced to life imprisonment. The Colorado Court of Appeals affirmed Wood's convictions and sentence on direct appeal in May 1989, and the Colorado Supreme Court denied Wood's petition for certiorari five months later. Wood did not ask this Court to review his conviction in the 90 days he had to do so.

Wood then pursued postconviction relief, asserting constitutional infirmities in his trial, conviction, and sentence. Prior to the federal petition at issue here, which was filed in 2008, Wood, proceeding *pro se*, twice sought relief in state court. First, in 1995, he filed a motion to vacate his conviction and sentence pursuant to Colorado Rule of Criminal Procedure 35(c) (1984).[1] He also asked the Colorado trial

[1] Colorado Rule of Criminal Procedure 35(c) (1984) provides, in relevant part: "[E]very person convicted of a crime is entitled as a matter of right to make application for postconviction review upon the groun[d] . . . [t]hat

court to appoint counsel to aid him in pursuit of the motion. When some months passed with no responsive action, Wood filed a request for a ruling on his motion and accompanying request for counsel. The state court then granted Wood's plea for the appointment of counsel, but the record is completely blank on any further action regarding the 1995 motion. Second, Wood filed a new *pro se* motion for post-conviction relief in Colorado court in 2004. On the first page of his second motion, he indicated that "[n]o other postconviction proceedings [had been] filed." Record in No. 08–cv–00247 (D Colo.), Doc. 15–5 (Exh. E), p. 1. The state court denied Wood's motion four days after receiving it.

Wood filed a federal habeas petition in 2008, which the District Court initially dismissed as untimely. App. 41a–46a. On reconsideration, the District Court vacated the dismissal and instructed the State to file a preanswer response "limited to addressing the affirmative defenses of timeliness . . . and/or exhaustion of state court remedies." *Id.*, at 64a–65a. On timeliness, the State represented in its preanswer response: "Respondents will not challenge, but are not conceding, the timeliness of Wood's [federal] habeas petition." *Id.*, at 70a. Consistently, in its full answer to Wood's federal petition, the State repeated: "Respondents are not challenging, but do not concede, the timeliness of the petition." *Id.*, at 87a.

Disposing of Wood's petition, the District Court dismissed certain claims for failure to exhaust state remedies, and denied on the merits Wood's two remaining claims—one alleging a double jeopardy violation and one challenging the validity of Wood's waiver of his Sixth Amendment right to a jury trial. *Id.*, at 96a–111a. On appeal, the Tenth Circuit ordered the parties to brief, along with the merits of Wood's double jeopardy and Sixth Amendment claims, "the timeli-

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the conviction was obtained or sentence imposed in violation of the Constitution or laws of the United States or the constitution or laws of this state."

ness of Wood's application for [federal habeas relief]." *Id.*, at 129a. After briefing, the Court of Appeals affirmed the denial of Wood's petition without addressing the merits; instead, the Tenth Circuit held the petition time barred. 403 Fed. Appx. 335 (2010). In so ruling, the Court of Appeals concluded it had authority to raise timeliness on its own motion. *Id.*, at 337, n. 2. It further ruled that the State had not taken that issue off the table by declining to interpose a statute of limitations defense in the District Court. *Ibid.*

We granted review, 564 U. S. 1066 (2011), to resolve two issues: first, whether a court of appeals has the authority to address the timeliness of a habeas petition on the court's own initiative;[2] second, assuming a court of appeals has such authority, whether the State's representations to the District Court in this case nonetheless precluded the Tenth Circuit from considering the timeliness of Wood's petition.

II

A

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a state prisoner has one year to file a federal petition for habeas corpus relief, starting from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U. S. C. §2244(d)(1)(A). For a prisoner whose judgment became final before AEDPA was enacted, the one-year limitations period runs from AEDPA's effective date: April 24, 1996. See *Serrano* v. *Williams*, 383 F. 3d 1181, 1183 (CA10 2004). "The one-year clock is stopped, however, during the time the petitioner's

[2] The Tenth Circuit's conclusion that it had authority to raise an AEDPA statute of limitations defense *sua sponte* conflicts with the view of the Eighth Circuit. Compare 403 Fed. Appx. 335, 337, n. 2 (CA10 2010) (case below), with *Sasser* v. *Norris*, 553 F. 3d 1121, 1128 (CA8 2009) ("The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level.").

'properly filed' application for state postconviction relief 'is pending.'" *Day*, 547 U. S., at 201 (quoting 28 U. S. C. § 2244(d)(2)).[3]

The state judgment against Wood became final on direct review in early 1990. See *supra*, at 466. Wood's time for filing a federal petition therefore began to run on the date of AEDPA's enactment, April 24, 1996, and expired on April 24, 1997, unless Wood had a "properly filed" application for state postconviction relief "pending" in Colorado state court during that period. Wood maintains he had such an application pending on April 24, 1996: the Rule 35(c) motion he filed in 1995. That motion, Wood asserts, remained pending (thus continuing to suspend the one-year clock) until at least August 2004, when he filed his second motion for postconviction relief in state court. The 2004 motion, the State does not contest, was "properly filed." Wood argues that this second motion further tolled the limitations period until February 5, 2007, exactly one year before he filed the federal petition at issue here. If Wood is correct that his 1995 motion remained "pending" in state court from April 1996 until August 2004, his federal petition would be timely.

In its preanswer response to Wood's petition, the State set forth its comprehension of the statute of limitations issue. It noted that Wood's "time for filing a [habeas] petition began to run on April 24, 1996, when the AEDPA became effective," and that Wood "had until April 24, 1997, plus any tolling periods, to timely file his habeas petition." App. 69a–70a. The State next identified the crucial question: Did Wood's 1995 state petition arrest the one-year statute of limitations period from 1996 until 2004? *Id.*, at 70a. "[I]t is certainly arguable," the State then asserted, "that the 1995

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[3] The one-year clock may also be stopped—or "tolled"—for equitable reasons, notably when an "extraordinary circumstance" prevents a prisoner from filing his federal petition on time. See *Holland* v. *Florida*, 560 U. S. 631 (2010). Wood does not contend that the equitable tolling doctrine applies to his case. App. 144a, n. 5.

postconviction motion was abandoned before 1997 and thus did not toll the AEDPA statute of limitations at all." *Ibid.* But rather than inviting a decision on the statute of limitations question, the State informed the District Court it would "not challenge" Wood's petition on timeliness grounds; instead, the State simply defended against Wood's double jeopardy and Sixth Amendment claims on the merits.

B

"Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto." *Day*, 547 U. S., at 202 (citing Fed. Rules Civ. Proc. 8(c), 12(b), and 15(a)). See also Habeas Corpus Rule 5(b) (requiring the State to plead a statute of limitations defense in its answer).[4] An affirmative defense, once forfeited, is "exclu[ded] from the case," 5 C. Wright & A. Miller, Federal Practice and Procedure § 1278, pp. 644–645 (3d ed. 2004), and, as a rule, cannot be asserted on appeal. See *Day*, 547 U. S., at 217 (SCALIA, J., dissenting); *Weinberger* v. *Salfi*, 422 U. S. 749, 764 (1975); *McCoy* v. *Massachusetts Inst. of Technology*, 950 F. 2d 13, 22 (CA1 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.").

In *Granberry* v. *Greer*, we recognized a modest exception to the rule that a federal court will not consider a forfeited affirmative defense. 481 U. S., at 134. The District Court in *Granberry* denied a federal habeas petition on the merits. *Id.*, at 130. On appeal, the State argued for the first time that the petition should be dismissed because the petitioner had failed to exhaust relief available in state court. *Ibid.*

[4] We note here the distinction between defenses that are "waived" and those that are "forfeited." A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve. *Kontrick* v. *Ryan*, 540 U. S. 443, 458, n. 13 (2004); *United States* v. *Olano*, 507 U. S. 725, 733 (1993). That distinction is key to our decision in Wood's case.

See Habeas Corpus Rule 5(b) (listing "failure to exhaust state remedies" as a threshold bar to federal habeas relief). Despite the State's failure to raise the nonexhaustion argument in the District Court, the Seventh Circuit accepted the argument and ruled for the State on that ground. We granted certiorari to decide whether a court of appeals has discretion to address a nonexhaustion defense that the State failed to raise in the district court. *Id.*, at 130.

Although "express[ing] our reluctance to adopt rules that allow a party to withhold raising a defense until after the 'main event' . . . is over," *id.*, at 132, we nonetheless concluded that the bar to court of appeals' consideration of a forfeited habeas defense is not absolute, *id.*, at 133. The exhaustion doctrine, we noted, is founded on concerns broader than those of the parties; in particular, the doctrine fosters respectful, harmonious relations between the state and federal judiciaries. *Id.*, at 133–135. With that comity interest in mind, we held that federal appellate courts have discretion, in "exceptional cases," to consider a nonexhaustion argument "inadverten[tly]" overlooked by the State in the District Court. *Id.*, at 132, 134.[5]

In *Day*, we affirmed a federal district court's authority to consider a forfeited habeas defense when extraordinary circumstances so warrant. 547 U. S., at 201. There, the State miscalculated a timespan, specifically, the number of days running between the finality of Day's state-court conviction and the filing of his federal habeas petition. *Id.*, at 203. As a result, the State erroneously informed the District Court that Day's petition was timely. *Ibid.* A Magistrate Judge caught the State's computation error and recommended that the petition be dismissed as untimely, notwithstanding the State's timeliness concession. *Id.*, at 204. The District

[5] Although our decision in *Granberry* v. *Greer*, 481 U. S. 129 (1987), did not expressly distinguish between forfeited and waived defenses, we made clear in *Day* v. *McDonough*, 547 U. S. 198 (2006), that a federal court has the authority to resurrect only forfeited defenses. See *infra*, at 472–473.

Court adopted the recommendation, and the Court of Appeals upheld the trial court's *sua sponte* dismissal of the petition as untimely. *Ibid.*

Concluding that it would make "scant sense" to treat AEDPA's statute of limitations differently from other threshold constraints on federal habeas petitioners, we held "that district courts are permitted, but not obliged, to consider, *sua sponte*, the timeliness of a state prisoner's habeas petition." *Id.*, at 209; *ibid.* (noting that Habeas Corpus Rule 5(b) places " 'a statute of limitations' defense on a par with 'failure to exhaust state remedies, a procedural bar, [and] non-retroactivity' "). Affording federal courts leeway to consider a forfeited timeliness defense was appropriate, we again reasoned, because AEDPA's statute of limitations, like the exhaustion doctrine, "implicat[es] values beyond the concerns of the parties." *Day*, 547 U. S., at 205 (quoting *Acosta* v. *Artuz*, 221 F. 3d 117, 123 (CA2 2000)); 547 U. S., at 205–206 ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." (internal quotation marks omitted)).

We clarified, however, that a federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system. See *Greenlaw* v. *United States*, 554 U. S. 237, 243–244 (2008). Only where the State does not "strategically withh[o]ld the [limitations] defense or cho[o]se to relinquish it," and where the petitioner is accorded a fair opportunity to present his position, may a district court consider the defense on its own initiative and " 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U. S., at 210–211 (quoting *Granberry*, 481 U. S., at 136; internal quotation marks omitted). It would be "an abuse of discretion," we observed, for

a court "to override a State's deliberate waiver of a limitations defense." 547 U. S., at 202. In Day's case itself, we emphasized, the State's concession of timeliness resulted from "inadvertent error," *id.*, at 211, not from any deliberate decision to proceed straightaway to the merits.

Consistent with *Granberry* and *Day*, we decline to adopt an absolute rule barring a court of appeals from raising, on its own motion, a forfeited timeliness defense. The institutional interests served by AEDPA's statute of limitations are also present when a habeas case moves to the court of appeals, a point *Granberry* recognized with respect to a nonexhaustion defense. We accordingly hold, in response to the first question presented, see *supra*, at 468, that courts of appeals, like district courts, have the authority—though not the obligation—to raise a forfeited timeliness defense on their own initiative.

C

We turn now to the second, case-specific, inquiry. See *ibid.* Although a court of appeals has discretion to address, *sua sponte*, the timeliness of a habeas petition, appellate courts should reserve that authority for use in exceptional cases. For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance. See *supra*, at 470. That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal.

Due regard for the trial court's processes and time investment is also a consideration appellate courts should not overlook. It typically takes a district court more time to decide a habeas case on the merits than it does to resolve a petition on threshold procedural grounds. See Dept. of Justice, Bureau of Justice Statistics, R. Hanson & H. Daley, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions 23 (NCJ–155504, 1995) (district courts spent an

average of 477 days to decide a habeas petition on the merits, and 268 days to resolve a petition on procedural grounds). When a court of appeals raises a procedural impediment to disposition on the merits, and disposes of the case on that ground, the district court's labor is discounted and the appellate court acts not as a court of review but as one of first view.

In light of the foregoing discussion of the relevant considerations, we hold that the Tenth Circuit abused its discretion when it dismissed Wood's petition as untimely. In the District Court, the State was well aware of the statute of limitations defense available to it and of the arguments that could be made in support of the defense. See *supra*, at 467. Yet the State twice informed the District Court that it "will not challenge, but [is] not conceding" the timeliness of Wood's petition. *Ibid.* Essentially, the District Court asked the State: Will you oppose the petition on statute of limitations grounds? The State answered: Such a challenge would be supportable, but we won't make the challenge here.

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *Kontrick* v. *Ryan*, 540 U. S. 443, 458, n. 13 (2004) (quoting *United States* v. *Olano*, 507 U. S. 725, 733 (1993)). The State's conduct in this case fits that description. Its decision not to contest the timeliness of Wood's petition did not stem from an "inadvertent error," as did the State's concession in *Day*. See 547 U. S., at 211. Rather, the State, after expressing its clear and accurate understanding of the timeliness issue, see *supra*, at 469–470, deliberately steered the District Court away from the question and toward the merits of Wood's petition. In short, the State knew it had an "arguable" statute of limitations defense, see *ibid.*, yet it chose, in no uncertain terms, to refrain from interposing a timeliness "challenge" to Wood's petition. The District Court therefore reached and decided the merits of the petition. The Tenth Circuit should have done so as well.

* * *

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

It is so ordered.

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

In *Day* v. *McDonough*, 547 U. S. 198 (2006), the Court held that a federal district court may raise *sua sponte* a forfeited statute of limitations defense to a habeas corpus petition. Relying on *Day* and *Granberry* v. *Greer*, 481 U. S. 129 (1987), the Court now holds that a court of appeals may do the same. Because I continue to think that *Day* was wrongly decided and that *Granberry* is inapposite, I cannot join the Court's opinion. See *Day*, 547 U. S., at 212–219 (SCALIA, J., joined by THOMAS and BREYER, JJ., dissenting).

As the dissent in *Day* explained, the Federal Rules of Civil Procedure apply in habeas corpus cases to the extent that they are consistent with the Habeas Corpus Rules, the habeas corpus statute, and the historical practice of habeas proceedings. *Id.*, at 212 (citing *Gonzalez* v. *Crosby*, 545 U. S. 524, 529–530 (2005), and *Woodford* v. *Garceau*, 538 U. S. 202, 208 (2003)). As relevant here, the Rules of Civil Procedure provide that a defendant forfeits his statute of limitations defense if he fails to raise it in his answer or in an amendment thereto. 547 U. S., at 212 (citing Rules 8(c), 12(b), 15(a)). That forfeiture rule is fully consistent with habeas corpus procedure. As an initial matter, the rule comports with the Habeas Rules' instruction that a State "must" plead any limitations defense in its answer. *Id.*, at 212–213 (quoting Rule 5(b) (emphasis deleted)). Moreover, the rule does not conflict with the habeas statute, which imposes a 1-year period of limitations without any indication that typical forfeiture rules do not apply. *Id.*, at 213 (citing 28 U. S. C.

§ 2244(d)(1)). Finally, the rule does not interfere with historical practice. Prior to the enactment of a habeas statute of limitations in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas practice included no limitations period at all, much less one immune to forfeiture. 547 U. S., at 212.

As the dissent in *Day* further explained, *id.*, at 214, AEDPA's statute of limitations is distinguishable from the equitable defenses that we have traditionally permitted federal habeas courts to raise *sua sponte*. See, *e. g.*, *Granberry*, *supra*, at 133 (holding that appellate courts may consider a habeas petitioner's failure to exhaust state remedies despite a State's forfeiture of the defense). Those judicially created defenses were rooted in concerns of comity and finality that arise when federal courts collaterally review state criminal convictions. *Day*, 547 U. S., at 214. But those same concerns did not lead this Court to recognize any equitable time bar against habeas petitions. *Id.*, at 214–215. Thus, nothing in this Court's pre-existing doctrine of equitable defenses supported the *Day* Court's "decision to beef up the presumptively forfeitable 'limitations period' of § 2244(d) by making it the subject of *sua sponte* dismissal." *Id.*, at 215–216.

For these reasons, I believe that the *Day* Court was wrong to hold that district courts may raise *sua sponte* forfeited statute of limitations defenses in habeas cases. I therefore would not extend *Day*'s reasoning to proceedings in the courts of appeals. Appellate courts, moreover, are particularly ill suited to consider issues forfeited below. Unlike district courts, courts of appeals cannot permit a State to amend its answer to add a defense, nor can they develop the facts that are often necessary to resolve questions of timeliness. Cf. *id.*, at 209 (majority opinion) (finding no difference between a district court's ability to raise a forfeited limitations defense *sua sponte* and its ability to notice the State's

forfeiture and permit an amended pleading under Rule of Civil Procedure 15).

In light of these considerations, I cannot join the Court's holding that a court of appeals has discretion to consider *sua sponte* a forfeited limitations defense. Nor can I join the Court's separate holding that the Court of Appeals abused its discretion by raising a defense that had been deliberately waived by the State. As the dissent in *Day* noted, there is no principled reason to distinguish between forfeited and waived limitations defenses when determining whether courts may raise such defenses *sua sponte*. See 547 U. S., at 218, n. 3 (explaining that, if "'"values beyond the concerns of the parties"'" justify *sua sponte* consideration of forfeited defenses, such values equally support *sua sponte* consideration of waived defenses). Therefore, I concur only in the judgment.

Syllabus

UNITED STATES *v.* HOME CONCRETE & SUPPLY, LLC, ET AL.

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

No. 11–139. Argued January 17, 2012—Decided April 25, 2012

Ordinarily, the Government must assess a deficiency against a taxpayer within "3 years after the return was filed," 26 U. S. C. § 6501(a), but that period is extended to 6 years when a taxpayer "omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return," § 6501(e)(1)(A). Respondent taxpayers overstated the basis of certain property that they had sold. As a result, their returns understated the gross income they received from the sale by an amount in excess of 25%. The Commissioner asserted the deficiency outside the 3-year limitations period but within the 6-year period. The Fourth Circuit concluded that the taxpayers' overstatements of basis, and resulting understatements of gross income, did not trigger the extended limitations period.

Held: The judgment is affirmed.

634 F. 3d 249, affirmed.

JUSTICE BREYER delivered the opinion of the Court, except as to Part IV–C, concluding that § 6501(e)(1)(A) does not apply to an overstatement of basis. Pp. 481–487.

(a) In *Colony, Inc.* v. *Commissioner*, 357 U. S. 28, the Court interpreted a provision of the Internal Revenue Code of 1939 containing language materially indistinguishable from the language at issue here, holding that taxpayer misstatements that overstate the basis in property do not fall within the statute's scope. The Court recognized that such an overstatement wrongly understates a taxpayer's income, but concluded that the phrase "omits . . . an amount" limited the statute's scope to situations in which specific receipts are *left out* of the computation of gross income. The Court also noted that while the statute's language was not "unambiguous," *id.*, at 33, the statutory history showed that Congress intended to restrict the extended limitations period to situations that did not include overstatements of basis. Finally, the Court found its conclusion "in harmony with the unambiguous language of § 6501(e)(1)(A)," *id.*, at 37, the provision enacted as part of the Internal Revenue Code of 1954 and applicable here. Pp. 481–483.

(b) *Colony* determines the outcome of this case. The operative language of the 1939 provision and the provision at issue is identical. It

Syllabus

would be difficult to give the same language here a different interpretation without overruling *Colony*, a course of action *stare decisis* counsels against. *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139. The Government suggests that differences in other nearby parts of the 1954 Code favor a different interpretation than the one adopted in *Colony*. However, its arguments are too fragile to bear the significant weight it seeks to place upon them. Pp. 483–486.

(c) The Court also rejects the Government's argument that a recently promulgated Treasury Regulation interpreting the statute's operative language in its favor should be granted deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. See *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982. *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency. Pp. 486–487.

BREYER, J., delivered the opinion of the Court, except as to Part IV–C. ROBERTS, C. J., and THOMAS and ALITO, JJ., joined that opinion in full, and SCALIA, J., joined except as to Part IV–C. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 492. KENNEDY, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 497.

Deputy Solicitor General Stewart argued the cause for the United States. With him on the briefs were *Solicitor General Verrilli*, *Deputy Assistant Attorney General Ashford*, *Jeffrey B. Wall*, *Gilbert S. Rothenberg*, *Michael J. Haungs*, and *Joan I. Oppenheimer*.

Gregory G. Garre argued the cause for respondents. With him on the brief were *Richard T. Rice*, *C. Mark Wiley*, *Robert T. Numbers II*, *J. Scott Ballenger*, *Lori Alvino McGill*, and *Roger J. Jones*.*

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*Briefs of *amici curiae* urging affirmance were filed for the Government of the United States Virgin Islands by *Vincent F. Frazer*, Attorney General, *Carol Thomas-Jacobs* and *Tamika M. Archer*, Assistant Attorneys General, *Gene C. Schaerr*, *Linda T. Coberly*, and *Barry J. Hart;* for Bausch & Lomb Inc. by *Lisa S. Blatt* and *Anthony J. Franze;* for Grapevine Imports, Ltd., by *Howard R. Rubin* and *Robert T. Smith;* for the National Association of Home Builders by *Christopher M. Whitcomb;* and for the National Federation of Independent Business Small Business

JUSTICE BREYER delivered the opinion of the Court, except as to Part IV–C.

Ordinarily, the Government must assess a deficiency against a taxpayer within "3 years after the return was filed." 26 U. S. C. § 6501(a) (2000 ed.). The 3-year period is extended to 6 years, however, when a taxpayer "*omits from gross income an amount properly includible therein* which is in excess of 25 percent of the amount of gross income stated in the return." § 6501(e)(1)(A) (emphasis added). The question before us is whether this latter provision applies (and extends the ordinary 3-year limitations period) when the taxpayer *overstates his basis* in property that he has sold, thereby *understating the gain* that he received from its sale. Following *Colony, Inc.* v. *Commissioner*, 357 U. S. 28 (1958), we hold that the provision does not apply to an overstatement of basis. Hence the 6-year period does not apply.

I

For present purposes the relevant underlying circumstances are not in dispute. We consequently assume that (1) the respondent taxpayers filed their relevant tax returns in April 2000; (2) the returns overstated the basis of certain property that the taxpayers had sold; (3) as a result the returns understated the gross income that the taxpayers received from the sale of the property; and (4) the understatement exceeded the statute's 25% threshold. We also take as undisputed that the Commissioner asserted the relevant deficiency within the extended 6-year limitations period, but

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Legal Center et al. by *Elizabeth Milito, Karen R. Harned,* and *Ilya Shapiro.*

Briefs of *amici curiae* were filed for the American College of Tax Counsel by *Clifford M. Sloan, Pamela F. Olson, Julia M. Kazaks, David W. Foster, Richard M. Lipton,* and *Russell Young;* for UTAM, Ltd., et al. by *James F. Martens;* for Daniel S. Burks et al. by *Joel N. Crouch, David E. Colmenero,* and *Anthony P. Daddino;* and for Kristin E. Hickman by *Ms. Hickman, pro se.*

outside the default 3-year period. Thus, unless the 6-year statute of limitations applies, the Government's efforts to assert a tax deficiency came too late. Our conclusion—that the extended limitations period does not apply—follows directly from this Court's earlier decision in *Colony*.

II

In *Colony* this Court interpreted a provision of the Internal Revenue Code of 1939, the operative language of which is identical to the language now before us. The Commissioner there had determined

> "that the taxpayer had understated the gross profits on the sales of certain lots of land for residential purposes as a result of having overstated the 'basis' of such lots by erroneously including in their cost certain unallowable items of development expense." *Id.*, at 30.

The Commissioner's assessment came after the ordinary 3-year limitations period had run. And, it was consequently timely only if the taxpayer, in the words of the 1939 Code, had "omit[ted] from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return . . . ." 26 U. S. C. § 275(c) (1940 ed.). The Code provision applicable to this case, adopted in 1954, contains materially indistinguishable language. See § 6501(e)(1)(A) (2000 ed.) (same, but replacing "per centum" with "percent"). See also Appendix, *infra*.

In *Colony* this Court held that taxpayer misstatements, overstating the basis in property, do not fall within the scope of the statute. But the Court recognized the Commissioner's contrary argument for inclusion. 357 U. S., at 32. Then as now, the Code itself defined "gross income" in this context as the difference between gross revenue (often the amount the taxpayer received upon selling the property) and basis (often the amount the taxpayer paid for the property). Compare 26 U. S. C. §§ 22, 111 (1940 ed.) with §§ 61(a)(3),

1001(a) (2000 ed.). And, the Commissioner pointed out, an overstatement of basis can diminish the "amount" of the gain just as leaving the item entirely off the return might do. 357 U. S., at 32. Either way, the error wrongly understates the taxpayer's income.

But, the Court added, the Commissioner's argument did not fully account for the provision's language, in particular the word "omit." The key phrase says "*omits* . . . an amount." The word "omits" (unlike, say, "reduces" or "understates") means "'[t]o leave out or unmentioned; not to insert, include, or name.'" *Ibid.* (quoting Webster's New International Dictionary (2d ed. 1939)). Thus, taken literally, "omit" limits the statute's scope to situations in which specific receipts or accruals of income are *left out* of the computation of gross income; to inflate the basis, however, is not to "omit" a specific item, not even of profit.

While finding this latter interpretation of the language the "more plausibl[e]," the Court also noted that the language was not "unambiguous." *Colony*, 357 U. S., at 33. It then examined various congressional Reports discussing the relevant statutory language. It found in those Reports

> "persuasive indications that Congress merely had in mind failures to report particular income receipts and accruals, and did not intend the [extended] limitation to apply whenever gross income was understated . . . ." *Id.*, at 35.

This "history," the Court said, "shows . . . that the Congress intended an exception to the usual three-year statute of limitations only in the restricted type of situation already described," a situation that did not include overstatements of basis. *Id.*, at 36.

The Court wrote that Congress, in enacting the provision,

> "manifested no broader purpose than to give the Commissioner an additional two [now three] years to investigate tax returns in cases where, because of a taxpayer's

> omission to report some taxable item, the Commissioner is at a special disadvantage . . . [because] the return on its face provides no clue to the existence of the omitted item. . . . [W]hen, *as here* [*i. e.*, where the overstatement of basis is at issue], the understatement of a tax arises from an error in reporting an item disclosed on the face of the return the Commissioner is at no such disadvantage . . . whether the error be one affecting 'gross income' or one, such as overstated deductions, affecting other parts of the return." *Ibid.* (emphasis added).

Finally, the Court noted that Congress had recently enacted the Internal Revenue Code of 1954. And the Court observed that "the conclusion we reach is in harmony with the unambiguous language of § 6501(e)(1)(A)," *id.*, at 37, *i. e.*, the provision relevant in this present case.

III

In our view, *Colony* determines the outcome in this case. The provision before us is a 1954 reenactment of the 1939 provision that *Colony* interpreted. The operative language is identical. It would be difficult, perhaps impossible, to give the same language here a different interpretation without effectively overruling *Colony*, a course of action that basic principles of *stare decisis* wisely counsel us not to take. *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 139 (2008) ("*[S]tare decisis* in respect to statutory interpretation has special force, for Congress remains free to alter what we have done" (internal quotation marks omitted)); *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989).

The Government, in an effort to convince us to interpret the operative language before us differently, points to differences in other nearby parts of the 1954 Code. It suggests that these differences counsel in favor of a different interpretation than the one adopted in *Colony*. For example, the

Government points to a new provision, § 6501(e)(1)(A)(i), which says:

> "In the case of a trade or business, the term 'gross income' means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to the diminution by the cost of such sales or services."

If the section's basic phrase "omi[ssion] from gross income" does not apply to overstatements of basis (which is what *Colony* held), then what need would there be for clause (i), which leads to the same result in a specific subset of cases?

And why, the Government adds, does a later paragraph, referring to gifts and estates, speak of a taxpayer who "omits . . . *items* includible in [the] gross estate"? See § 6501(e)(2) (emphasis added). By speaking of "items" there does it not imply that omission of an "amount" covers more than omission of individual items—indeed that it includes overstatements of basis, which, after all, diminish the *amount* of the profit that should have been reported as gross income?

In our view, these points are too fragile to bear the significant argumentative weight the Government seeks to place upon them. For example, at least one plausible reason why Congress might have added clause (i) has nothing to do with any desire to change the meaning of the general rule. Rather when Congress wrote the 1954 Code (prior to *Colony*), it did not yet know how the Court would interpret the provision's operative language. At least one lower court had decided that the provision did *not* apply to overstatements about the cost of goods that a business later sold. See *Uptegrove Lumber Co.* v. *Commissioner*, 204 F. 2d 570 (CA3 1953). But see *Reis* v. *Commissioner*, 142 F. 2d 900, 902–903 (CA6 1944). And Congress could well have wanted to ensure that, come what may in the Supreme Court, *Uptegrove*'s interpretation would remain the law where a "trade or business" was at issue.

Nor does our interpretation leave clause (i) without work to do. *TRW Inc.* v. *Andrews*, 534 U. S. 19, 31 (2001) (noting canon that statutes should be read to avoid making any provision "superfluous, void, or insignificant" (internal quotation marks omitted)). That provision also explains how to calculate the denominator for purposes of determining whether a conceded omission amounts to 25% of "gross income." For example, it tells us that a merchant who fails to include $10,000 of revenue from sold goods has not met the 25% test if total revenue is more than $40,000, regardless of the cost paid by the merchant to acquire those goods. But without clause (i), the general statutory definition of "gross income" requires subtracting the cost from the sales price. See 26 U. S. C. §§ 61(a)(3), 1012. Under such a definition of "gross income," the calculation would take (1) *total revenue from sales*, $40,000, minus (2) "*the cost of such sales*," say, $25,000. The $10,000 of revenue would thus amount to 67% of the "gross income" of $15,000. And the clause does this work in respect to omissions from gross income irrespective of our interpretation regarding overstatements of basis.

The Government's argument about subsection (e)(2)'s use of the word "item" instead of "amount" is yet weaker. The Court in *Colony* addressed a similar argument about the word "amount." It wrote:

> "The Commissioner states that the draftsman's use of the word 'amount' (instead of, for example, 'item') suggests a concentration on the quantitative aspect of the error—that is whether or not gross income was understated by as much as 25%." 357 U. S., at 32.

But the Court, while recognizing the Commissioner's logic, rejected the argument (and the significance of the word "amount") as insufficient to prove the Commissioner's conclusion. And the addition of the word "item" in a different subsection similarly fails to exert an interpretive force sufficiently strong to affect our conclusion. The word's appear-

ance in subsection (e)(2), we concede, is new. But to rely in the case before us on this solitary word change in a different subsection is like hoping that a new batboy will change the outcome of the World Series.

IV

A

Finally, the Government points to Treasury Regulation § 301.6501(e)–1, which was promulgated in final form in December 2010. See 26 CFR § 301.6501(e)–1 (2011). The regulation, as relevant here, departs from *Colony* and interprets the operative language of the statute in the Government's favor. The regulation says that "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income." § 301.6501(e)–1(a)(1)(iii). In the Government's view this new regulation in effect overturns *Colony*'s interpretation of this statute.

The Government points out that the Treasury Regulation constitutes "an agency's construction of a statute which it administers." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). See also *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44 (2011) (applying *Chevron* in the tax context). The Court has written that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the *unambiguous* terms of the statute . . . ." *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982 (2005) (emphasis added). And, as the Government notes, in *Colony* itself the Court wrote that "it cannot be said that the language is unambiguous." 357 U. S., at 33. Hence, the Government concludes, *Colony* cannot govern the outcome in this case. The question, rather, is whether the agency's construction is a "permissible construction of the

statute." *Chevron*, *supra*, at 843. And, since the Government argues that the regulation embodies a reasonable, hence permissible, construction of the statute, the Government believes it must win.

B

We do not accept this argument. In our view, *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency.

C

The fatal flaw in the Government's contrary argument is that it overlooks the *reason why Brand X* held that a "prior judicial construction," unless reflecting an "unambiguous" statute, does not trump a different agency construction of that statute. 545 U. S., at 982. The Court reveals that reason when it points out that "it is for agencies, not courts, to fill statutory gaps." *Ibid.* The fact that a statute is unambiguous means that there is "no gap for the agency to fill" and thus "no room for agency discretion." *Id.*, at 982–983.

In so stating, the Court sought to encapsulate what earlier opinions, including *Chevron*, made clear. Those opinions identify the underlying interpretive problem as that of deciding whether, or when, a particular statute in effect delegates to an agency the power to fill a gap, thereby implicitly taking from a court the power to void a reasonable gap-filling interpretation. Thus, in *Chevron* the Court said that, when

> "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. [But in either instance], a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467 U. S., at 843–844.

See also *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741 (1996); *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 448 (1987); *Morton* v. *Ruiz*, 415 U. S. 199, 231 (1974).

Chevron and later cases find in unambiguous language a clear sign that Congress did *not* delegate gap-filling authority to an agency; and they find in ambiguous language at least a presumptive indication that Congress did delegate that gap-filling authority. Thus, in *Chevron* the Court wrote that a statute's silence or ambiguity as to a particular issue means that Congress has not "directly addressed the precise question at issue" (thus likely delegating gap-filling power to the agency). 467 U. S., at 843. In *Mead* the Court, describing *Chevron*, explained:

> "Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which Congress did not actually have an intent as to a particular result." 533 U. S., at 229 (internal quotation marks omitted).

Chevron added that "[i]f 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." 467 U. S., at 843, n. 9 (emphasis added).

As the Government points out, the Court in *Colony* stated that the statutory language at issue is not "unambiguous." 357 U. S., at 33. But the Court decided that case nearly 30 years before it decided *Chevron*. There is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-

filling power to the agency. At the same time, there is every reason to believe that the Court thought that Congress had "directly spoken to the precise question at issue," and thus left "[no] gap for the agency to fill." *Chevron*, *supra*, at 842–843.

For one thing, the Court said that the taxpayer had the better side of the textual argument. *Colony*, 357 U. S., at 33. For another, its examination of legislative history led it to believe that Congress had decided the question definitively, leaving no room for the agency to reach a contrary result. It found in that history "persuasive indications" that Congress intended overstatements of basis to fall outside the statute's scope, and it said that it was satisfied that Congress "intended an exception . . . only in the restricted type of situation" it had already described. *Id.*, at 35–36. Further, it thought that the Commissioner's interpretation (the interpretation once again advanced here) would "create a patent incongruity in the tax law." *Id.*, at 36–37. And it reached this conclusion despite the fact that, in the years leading up to *Colony*, the Commissioner had consistently advocated the opposite in the circuit courts. See, *e. g.*, *Uptegrove*, 204 F. 2d 570; *Reis*, 142 F. 2d 900; *Goodenow* v. *Commissioner*, 238 F. 2d 20 (CA8 1956); *American Liberty Oil Co.* v. *Commissioner*, 1 T. C. 386 (1942). Cf. *Slaff* v. *Commissioner*, 220 F. 2d 65 (CA9 1955); *Davis* v. *Hightower*, 230 F. 2d 549 (CA5 1956). Thus, the Court was aware it was rejecting the expert opinion of the Commissioner of Internal Revenue. And finally, after completing its analysis, *Colony* found its interpretation of the 1939 Code "in harmony with the [now] unambiguous language" of the 1954 Code, which at a minimum suggests that the Court saw nothing in the 1954 Code as inconsistent with its conclusion. 357 U. S., at 37.

It may be that judges today would use other methods to determine whether Congress left a gap to fill. But that is beside the point. The question is whether the Court in *Colony* concluded that the statute left such a gap. And, in our

view, the opinion (written by Justice Harlan for the Court) makes clear that it did not.

Given principles of *stare decisis*, we must follow that interpretation. And there being no gap to fill, the Government's gap-filling regulation cannot change *Colony*'s interpretation of the statute. We agree with the taxpayers that overstatements of basis, and the resulting understatements of gross income, do not trigger the extended limitations period of § 6501(e)(1)(A). The Court of Appeals reached the same conclusion. See 634 F. 3d 249 (CA4 2011). And its judgment is affirmed.

It is so ordered.

APPENDIX

We reproduce the applicable sections of the two relevant versions of the U. S. Code below. Section 6501 was amended and reorganized in 2010. See Hiring Incentives to Restore Employment Act, § 513, 124 Stat. 111. But the parties agree that the amendments do not affect this case. We therefore have referred to, and reproduce here, the section as it appears in the 2000 edition of the U. S. Code.

Title 26 U. S. C. § 275 (1940 ed.)

"**Period of limitation upon assessment and collection.**

. . . . .

"**(a) General rule.**

"The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

. . . . .

"**(c) Omission from gross income.**

"If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 per centum of the amount of gross income stated in the return, the tax may

be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 5 years after the return was filed."

Title 26 U. S. C. § 6501 (2000 ed.)

"Limitations on assessment and collection.

"(a) General rule

"Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. . . .

. . . . . .

"(e) Substantial omission of items

"Except as otherwise provided in subsection (c)—

"(1) Income taxes

"In the case of any tax imposed by subtitle A—

"(A) General rule

"If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. For purposes of this subparagraph—

"(i) In the case of a trade or business, the term 'gross income' means the total of the amounts received or accrued from the sale of goods or services (if such amounts are required to be shown on the return) prior to diminution by the cost of such sales or services; and

> "(ii) In determining the amount omitted from gross income, there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item.
>
> . . . . .
>
> **"(2) Estate and gift taxes**
>
> "In the case of a return of estate tax under chapter 11 or a return of gift tax under chapter 12, if the taxpayer omits from the gross estate or from the total amount of the gifts made during the period for which the return was filed items includible in such gross estate or such total gifts, as the case may be, as exceed in amount 25 percent of the gross estate stated in the return or the total amount of gifts stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed. . . . "

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

It would be reasonable, I think, to deny all precedential effect to *Colony, Inc.* v. *Commissioner*, 357 U. S. 28 (1958)—to overrule its holding as obviously contrary to our later law that agency resolutions of ambiguities are to be accorded deference. Because of justifiable taxpayer reliance I would not take that course—and neither does the Court's opinion, which says that "*Colony* determines the outcome in this case." *Ante*, at 483. That should be the end of the matter.

The plurality, however, goes on to address the Government's argument that Treasury Regulation §301.6501(e)–1 effectively overturned *Colony*. See 26 CFR §301.6501(e)–1 (2011). In my view, that cannot be: "Once a court has de-

cided upon its *de novo* construction of the statute, there no longer is a different construction that is consistent with the court's holding and available for adoption by the agency." *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 1018, n. 12 (2005) (SCALIA, J., dissenting) (citation and internal quotation marks omitted). That view, of course, did not carry the day in *Brand X*, and the Government quite reasonably relies on the *Brand X* majority's innovative pronouncement that a "court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute." *Id.*, at 982.

In cases decided pre-*Brand X*, the Court had no inkling that it *must* utter the magic words "ambiguous" or "unambiguous" in order to (poof!) expand or abridge executive power, and (poof!) enable or disable administrative contradiction of the Supreme Court. Indeed, the Court was unaware of even the utility (much less the necessity) of making the ambiguous/nonambiguous determination in cases decided pre-*Chevron*, before that opinion made the so-called "Step 1" determination of ambiguity *vel non* a customary (though hardly mandatory[1]) part of judicial-review analysis, see *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). For many of those earlier cases, therefore, it will be incredibly difficult to determine

[1] "Step 1" has never been an essential part of *Chevron* analysis. Whether a particular statute is ambiguous makes no difference if the interpretation adopted by the agency is clearly reasonable—and it would be a waste of time to conduct that inquiry. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218, and n. 4 (2009). The same would be true if the agency interpretation is clearly beyond the scope of any conceivable ambiguity. It does not matter whether the word "yellow" is ambiguous when the agency has interpreted it to mean "purple." See Stephenson & Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 599 (2009).

whether the decision purported to be giving meaning to an ambiguous, or rather an unambiguous, statute.

Thus, one would have thought that the *Brand X* majority would breathe a sigh of relief in the present case, involving a pre-*Chevron* opinion that *(mirabile dictu)* makes it *inescapably clear* that the Court thought the statute ambiguous: "[I]t *cannot* be said that the language is *unambiguous*." *Colony*, *supra*, at 33 (emphasis added). As today's plurality opinion explains, *Colony* "said that the taxpayer had the *better* side of the textual argument," *ante*, at 489 (emphasis added)—not what *Brand X* requires to foreclose administrative revision of our decisions: "the *only permissible* reading of the statute," 545 U. S., at 984. Thus, having decided to stand by *Colony* and to stand by *Brand X* as well, the plurality should have found—in order to reach the decision it did—that the Treasury Department's current interpretation was unreasonable.

Instead of doing what *Brand X* would require, however, the plurality manages to sustain the justifiable reliance of taxpayers by revising *yet again* the meaning of *Chevron*—and revising it *yet again* in a direction that will create confusion and uncertainty. See *United States* v. *Mead Corp.*, 533 U. S. 218, 245–246 (2001) (SCALIA, J., dissenting); Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1457–1475 (2005). Of course there is no doubt that, with regard to the Internal Revenue Code, the Treasury Department satisfies the *Mead* requirement of some indication "that Congress delegated authority to the agency generally to make rules carrying the force of law." 533 U. S., at 226–227. We have given *Chevron* deference to a Treasury Regulation before. See *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44, 58 (2011). But in order to evade *Brand X* and yet reaffirm *Colony*, the plurality would add yet another lop-sided story to the ugly and improbable structure that our law of administrative review has become: To trigger the *Brand X* power

of an authorized "gap-filling" agency to give content to an ambiguous text, a pre-*Chevron* determination that language is ambiguous does not alone suffice; the pre-*Chevron* Court must in addition have found that Congress wanted *the particular ambiguity in question* to be resolved by the agency. And here, today's plurality opinion finds, "[t]here is no reason to believe that the linguistic ambiguity noted by *Colony* reflects a post-*Chevron* conclusion that Congress had delegated gap-filling power to the agency." *Ante,* at 488–489. The notion, seemingly, is that post-*Chevron* a finding of ambiguity is accompanied by a finding of agency authority to resolve the ambiguity, but pre-*Chevron* that was not so. The premise is false. Post-*Chevron* cases do not "conclude" that Congress wanted the particular ambiguity resolved by the agency; that is simply the *legal effect* of ambiguity—a legal effect that should obtain whenever the language is in fact (as *Colony* found) ambiguous.

Does the plurality feel that it ought not give effect to *Colony*'s determination of ambiguity because the Court did not know, in that era, the importance of that determination—that it would empower the agency to (in effect) revise the Court's determination of statutory meaning? But as I suggested earlier, that was an ignorance which all of our cases shared not just pre-*Chevron*, but pre-*Brand X*. Before then it did not really matter whether the Court was resolving an ambiguity or setting forth the statute's clear meaning. The opinion might (or might not) advert to that point in the course of its analysis, but either way the Court's interpretation of the statute would be the law. So it is no small number of still-authoritative cases that today's plurality opinion would exile to the Land of Uncertainty.

Perhaps sensing the fragility of its new approach, the plurality opinion then pivots (as the a la mode vernacular has it)—from focusing on whether *Colony* concluded that there was gap-filling authority to focusing on whether *Colony* concluded that there was any gap to be filled: "The question is

whether the Court in *Colony* concluded that the statute left such a gap. And, in our view, the opinion . . . makes clear that it did not." *Ante*, at 489–490. How does the plurality know this? Because Justice Harlan's opinion "said that the taxpayer had the better side of the textual argument"; because it found that legislative history indicated "that Congress intended overstatements of basis to fall outside the statute's scope"; because it concluded that the Commissioner's interpretation would "create a patent incongruity in the tax law"; and because it found its interpretation "in harmony with the [now] unambiguous language" of the 1954 Code. *Ante*, at 489 (internal quotation marks omitted). But these are the sorts of arguments that courts *always* use in *resolving* ambiguities. They do not prove that no ambiguity existed, unless one believes that an ambiguity resolved is an ambiguity that never existed in the first place. *Colony* said unambiguously that the text was ambiguous, and that should be an end of the matter—unless one wants simply to deny *stare decisis* effect to *Colony* as a pre-*Chevron* decision.

Rather than making our judicial-review jurisprudence curiouser and curiouser, the Court should abandon the opinion that produces these contortions, *Brand X*. I join the judgment announced by the Court because it is indisputable that *Colony* resolved the construction of the statutory language at issue here, and that construction must therefore control. And I join the Court's opinion except for Part IV–C.

* * *

I must add a word about the peroration of the dissent, which asserts that "[o]ur legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application," and that the "'constructive discourse,'" "'convers[ations],'" and "instructive exchanges" would be "foreclosed by an insistence on adhering to earlier interpretations of a statute even in light of new, relevant statutory amend-

ments." *Post*, at 503–504 (opinion of KENNEDY, J.). This passage is reminiscent of Professor K. C. Davis's vision that administrative procedure is developed by "a partnership between legislators and judges," who "working [as] partners produce better law than legislators alone could possibly produce."[2] That romantic, judge-empowering image was obliterated by this Court in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519 (1978), which held that Congress prescribes and we obey, with no discretion to add to the administrative procedures that Congress has created. It seems to me that the dissent's vision of a troika partnership (legislative-executive-judicial) is a similar mirage. The discourse, conversation, and exchange that the dissent perceives is peculiarly one-sided. Congress prescribes; and where Congress's prescription is ambiguous the Executive can (within the scope of the ambiguity) clarify that prescription; and if the product is constitutional the courts obey. I hardly think it amounts to a "discourse" that Congress or (as this Court would allow in its *Brand X* decision) the Executive can change its prescription so as to render our prior holding irrelevant. What is needed for the system to work is that Congress, the Executive, and the private parties subject to their dispositions, be able to predict the meaning that the courts will give to their instructions. That goal would be obstructed if the judicially established meaning of a technical legal term used in a very specific context could be overturned on the basis of statutory indications as feeble as those asserted here.

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

This case involves a provision of the Internal Revenue Code establishing an extended statute of limitations for tax assessment in cases where substantial income has been omit-

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[2] 1 K. Davis, Administrative Law Treatise § 2.17, p. 138 (2d ed. 1978).

ted from a tax return. See 26 U. S. C. § 6501(e)(1)(A) (2006 ed., Supp. IV). The Treasury Department has determined that taxpayers omit income under this section not only when they fail to report a sale of property but also when they overstate their basis in the property sold. See Treas. Reg. § 301.6501(e)–1, 26 CFR § 301.6501(e)–1 (2011). The question is whether this otherwise reasonable interpretation is foreclosed by the Court's contrary reading of an earlier version of the statute in *Colony, Inc.* v. *Commissioner*, 357 U. S. 28 (1958).

In *Colony* there was no need to decide whether the meaning of the provision changed when Congress reenacted it as part of the 1954 revision of the Tax Code. Although the main text of the statute remained the same, Congress added new provisions leading to the permissible conclusion that it would have a different meaning going forward. The *Colony* decision reserved judgment on this issue. In my view, the amended statute leaves room for the Department's reading. A summary of the reasons for concluding the Department's interpretation is permissible, and for this respectful dissent, now follows.

I

The statute at issue in *Colony*, 26 U. S. C. § 275(c) (1940 ed.), was enacted as part of the Internal Revenue Code of 1939. It provided for a longer period of limitations if the Government assessed income taxes against a taxpayer who had "omit[ted] from gross income an amount . . . in excess of 25 per centum of the amount of gross income stated in the return."

There was disagreement in the courts about the meaning of this provision in the statute as first enacted. The Tax Court of the United States, and the United States Court of Appeals for the Sixth Circuit, held that an overstatement of basis constituted an omission from gross income and could trigger the extended limitations period. See, *e. g.*, *Reis* v. *Commissioner*, 142 F. 2d 900, 902–903 (1944); *American Lib-*

erty Oil Co. v. *Commissioner*, 1 T. C. 386 (1942). The United States Court of Appeals for the Third Circuit came to the opposite conclusion in a case where a corporation misreported its income after inflating the cost of goods it sold from inventory. See *Uptegrove Lumber Co.* v. *Commissioner*, 204 F. 2d 570, 571–573 (1953). In the Third Circuit's view there could be an omission only where the taxpayer had left an entire "item of gain out of his computation of gross income." *Id.*, at 571. In the *Colony* decision, issued in 1958, this Court resolved that dispute against the Government. Acknowledging that "it cannot be said that the language is unambiguous," 357 U. S., at 33, and relying in large part on the legislative history of the 1939 Code, the Court concluded that the mere overstatement of basis did not constitute an omission from gross income under §275(c).

If the Government is to prevail in the instant case the regulation in question must be a proper implementation of the same language the Court considered in *Colony;* but the statutory interpretation issue here cannot be resolved, and the *Colony* decision cannot be deemed controlling, without first considering the inferences that should be drawn from added statutory text. The additional language was not part of the statute that governed the taxpayer's liability in *Colony*, and the Court did not consider it in that case. Congress revised the Internal Revenue Code in 1954, several years before *Colony* was decided but after the tax years in question in that case. Although the interpretation adopted by the Court in *Colony* can be a proper beginning point for the interpretation of the revised statute, it ought not to be the end.

The central language of the new provision remained the same as the old, with the longer period of limitations still applicable where a taxpayer had "omit[ted] from gross income an amount . . . in excess of 25 per[cent] of the amount of gross income stated in the return." In *Colony*, however, the Court left open whether Congress had nonetheless "man-

ifested an intention to clarify or to change the 1939 Code." *Id.*, at 37. The 1954 revisions, of course, could not provide a direct response to *Colony*, which had not yet been decided. But there were indications that, whatever the earlier version of the statute had meant, Congress expected that the overstatement of basis would be considered an omission from gross income as a general rule going forward.

For example, the new law created a special exception for businesses by defining their gross income to be "the total of the amounts received or accrued from the sale of goods or services" without factoring in "the cost of such sales or services." 26 U. S. C. § 6501(e)(1)(A)(i) (1958 ed.) (currently § 6501(e)(1)(B)(i) (2006 ed., Supp. IV)). The principal purpose of this provision, perhaps motivated by the facts in the Third Circuit's *Uptegrove* decision, seems to have been to ensure that the extended statute of limitations would not be activated by a business' overstatement of the cost of goods sold. This did important work. There are, after all, unique complexities involved in calculating inventory costs. See, *e. g.*, O. Whittington & K. Pany, Principles of Auditing and Other Assurance Services 488 (15th ed. 2006) ("The audit of inventories presents the auditors with significant risk because: (*a*) they often represent a very substantial portion of current assets, (*b*) numerous valuation methods are used for inventories, (*c*) the valuation of inventories directly affects cost of goods sold, and (*d*) the determination of inventory quality, condition, and value is inherently complex"); see also Internal Revenue Service, Publication 538, Accounting Periods and Methods 17 (rev. Mar. 2008) (discussing methods for identifying the cost of items in inventory). Congress sought fit to make clear that errors in these kinds of calculations would not extend the limitations period.

Colony itself might be classified as a special "business inventory" case. Unlike the taxpayers here, the taxpayer in *Colony* claimed to be a business with income from the sale of goods, though the "goods" it held for sale were real estate lots. See *Intermountain Ins. Serv. of Vail* v. *Commis-*

sioner, 650 F. 3d 691, 703 (CADC 2011) (Tatel, J.) ("Colony described itself as a taxpayer in a trade or business with income from the sale of goods or services—i. e., as falling within [clause] (i)'s scope had the subsection applied pre-1954 . . . "). The Court, in turn, observed that its construction of the pre-1954 statute in favor of the taxpayer was "in harmony with the unambiguous language of [newly enacted] § 6501(e)(1)(A)." 357 U. S., at 37. Clause (i) of the new provision, as just noted, ensured that the extended limitations period would not cover overstated costs of goods sold. The revised statute's special treatment of these costs suggests that overstatements of basis in other cases could have the effect of extending the limitations period.

It is also significant that, after 1954, the statute continued to address the omission of a substantial "amount" that should have been included in gross income. In the same round of revisions to the Tax Code, Congress established an extended limitations period in certain cases where "items" had been omitted from an estate or gift tax return. 26 U. S. C. § 6501(e)(2) (1958 ed.). There is at least some evidence that this term was used at that time to "mak[e] it clear" that the extended limitations period would not apply "merely because of differences between the taxpayer and the Government as to the valuation of property." Staff of the Joint Committee on Internal Revenue Taxation, Summary of the New Provisions of the Internal Revenue Code of 1954, 84th Cong., 1st Sess., 130 (Comm. Print 1955). Congress' decision not to use the term "items" to achieve the same result when it reenacted the statutory provision at issue is presumed to have been purposeful. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983). This consideration casts further doubt on the premise that the new version of the statute, § 6501(e)(1)(A) (2006 ed., Supp. IV), necessarily has the same meaning as its predecessor.

II

In the instant case the Court concludes these statutory changes are "too fragile to bear the significant argumenta-

tive weight the Government seeks to place upon them." *Ante*, at 484. But in this context, the changes are meaningful. *Colony* made clear that the text of the earlier version of the statute could not be described as unambiguous, although it ultimately concluded that an overstatement of basis was not an omission from gross income. See 357 U. S., at 33. The statutory revisions, which were not considered in *Colony*, may not compel the opposite conclusion under the new statute; but they strongly favor it. As a result, there was room for the Treasury Department to interpret the new provision in that manner. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–845 (1984).

In an earlier case, and in an unrelated controversy not implicating the Internal Revenue Code, the Court held that a judicial construction of an ambiguous statute did not foreclose an agency's later, inconsistent interpretation of the same provision. *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 982–983 (2005) ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction"). This general rule recognizes that filling gaps left by ambiguities in a statute "involves difficult policy choices that agencies are better equipped to make than courts." *Id.*, at 980. There has been no opportunity to decide whether the analysis would be any different if an agency sought to interpret an ambiguous statute in a way that was inconsistent with this Court's own, earlier reading of the law. See *id.*, at 1003 (Stevens, J., concurring).

These issues are not implicated here. In *Colony* the Court did interpret the same phrase that must be interpreted in this case. The language was in a predecessor statute, however, and Congress has added new language that, in my view, controls the analysis and should instruct the Court to reach a different outcome today. The Treasury Depart-

ment's regulations were promulgated in light of these statutory revisions, which were not at issue in *Colony*. There is a serious difficulty to insisting, as the Court does today, that an ambiguous provision must continue to be read the same way even after it has been reenacted with additional language suggesting Congress would permit a different interpretation. Agencies with the responsibility and expertise necessary to administer ongoing regulatory schemes should have the latitude and discretion to implement their interpretation of provisions reenacted in a new statutory framework. And this is especially so when the new language enacted by Congress seems to favor the very interpretation at issue. The approach taken by the Court instead forecloses later interpretations of a law that has changed in relevant ways. Cf. *United States* v. *Mead Corp.*, 533 U. S. 218, 247 (2001) (SCALIA, J., dissenting) ("Worst of all, the majority's approach will lead to the ossification of large portions of our statutory law. Where *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification"). The Court goes too far, in my respectful view, in constricting Congress' ability to leave agencies in charge of filling statutory gaps.

Our legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application. See *Blakely* v. *Washington*, 542 U. S. 296, 326 (2004) (KENNEDY, J., dissenting) ("Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design"); *Mistretta* v. *United States*, 488 U. S. 361, 408 (1989) ("Our principle of separation of powers anticipates that the coordinate Branches will converse with each other on matters of vital common interest"). In some cases Congress will set out a general principle, to be administered in more detail by an agency in the exercise of its discretion. The agency may be in a proper position to evaluate the best means of implementing the statute in its practical applica-

tion. Where the agency exceeds its authority, of course, courts must invalidate the regulation. And agency interpretations that lead to unjust or unfair consequences can be corrected, much like disfavored judicial interpretations, by congressional action. These instructive exchanges would be foreclosed by an insistence on adhering to earlier interpretations of a statute even in light of new, relevant statutory amendments. Courts instead should be open to an agency's adoption of a different interpretation where, as here, Congress has given new instruction by an amended statute.

Under the circumstances, the Treasury Department had authority to adopt its reasonable interpretation of the new tax provision at issue. See *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44, 58 (2011). This was also the conclusion reached in well-reasoned opinions issued in several cases before the Courts of Appeals. *E. g.*, *Intermountain*, 650 F. 3d, at 705–706 (reaching this conclusion "because the Court in *Colony* never purported to interpret [the new provision]; because [the new provision]'s 'omits from gross income' text is at least ambiguous, if not best read to include overstatements of basis; and because neither the section's structure nor its [history and context] removes this ambiguity").

The Department's clarification of an ambiguous statute, applicable to these taxpayers, did not upset legitimate settled expectations. Given the statutory changes described above, taxpayers had reason to question whether *Colony*'s holding extended to the revised § 6501(e)(1). See, *e. g.*, *CC & F Western Operations L. P.* v. *Commissioner*, 273 F. 3d 402, 406, n. 2 (CA1 2001) ("Whether *Colony*'s main holding carries over to section 6501(e)(1) is at least doubtful"). Having worked no change in the law, and instead having interpreted a statutory provision without an established meaning, the Department's regulation does not have an impermissible retroactive effect. Cf. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 741, 744, n. 3 (1996) (rejecting retroactiv-

ity argument); *Manhattan Gen. Equipment Co.* v. *Commissioner*, 297 U. S. 129, 135 (1936) (same). It controls in this case.

* * *

For these reasons, and with respect, I dissent.

Syllabus

HALL ET UX. *v.* UNITED STATES

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

No. 10–875. Argued November 29, 2011—Decided May 14, 2012

Chapter 12 of the Bankruptcy Code allows farmer debtors with regular annual income to adjust their debts subject to a reorganization plan. The plan must provide for full payment of priority claims. 11 U. S. C. § 1222(a)(2). Under § 1222(a)(2)(A), however, certain governmental claims arising from the disposition of farm assets are stripped of priority status and downgraded to general, unsecured claims that are dischargeable after less than full payment. That exception applies only to claims "entitled to priority under [11 U. S. C. § 507]" in the first place. As relevant here, § 507(a)(2) covers "administrative expenses allowed under section 503(b)," which includes "any tax . . . incurred by the estate." § 503(b)(1)(B)(i).

Petitioners filed for Chapter 12 bankruptcy and then sold their farm. They proposed a plan under which they would pay off outstanding liabilities with proceeds from the sale. The Internal Revenue Service (IRS) objected, asserting a tax on the capital gains from the sale. Petitioners then proposed treating the tax as an unsecured claim to be paid to the extent funds were available, with the unpaid balance being discharged. The Bankruptcy Court sustained an IRS objection, the District Court reversed, and the Ninth Circuit reversed the District Court. The Ninth Circuit held that because a Chapter 12 estate is not a separate taxable entity under the Internal Revenue Code (IRC), 26 U. S. C. §§ 1398, 1399, it does not "incur" postpetition federal income taxes. The Ninth Circuit concluded that because the tax was not "incurred by the estate" under § 503(b), it was not a priority claim eligible for the § 1222(a)(2)(A) exception.

Held: The federal income tax liability resulting from petitioners' postpetition farm sale is not "incurred by the estate" under § 503(b) of the Bankruptcy Code and thus is neither collectible nor dischargeable in the Chapter 12 plan. Pp. 511–524.

(a) The phrase "incurred by the estate" bears a plain and natural reading. A tax "incurred by the estate" is a tax for which the estate itself is liable. Only certain estates are liable for federal income taxes. IRC §§ 1398 and 1399 define the division of responsibilities for the payment of taxes between the estate and the debtor on a chapter-by-chapter basis. Under those provisions, a Chapter 12 estate is not a

separately taxable entity. The debtor—not the trustee—is generally liable for taxes and files the only tax return. The postpetition income taxes are thus not "incurred by the estate." Pp. 511–513.

(b) Section 346 of the Bankruptcy Code and its longstanding interplay with IRC §§ 1398 and 1399 reinforce that whether an estate "incurs" taxes turns on Congress' chapter-specific guidance on which estates are separately taxable. The original § 346 established that state or local income taxes could be imposed only on the estate in an individual-debtor Chapter 7 or 11 bankruptcy, and only on the debtor in a Chapter 13 bankruptcy. Congress applied the framework of § 346 to federal taxes two years later: IRC §§ 1398 and 1399 established that the estate is separately taxable in individual-debtor Chapter 7 or 11 cases, and not separately taxable in Chapter 13 (and now Chapter 12) cases. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 subsequently amended § 346, expressly aligning its assignment of state or local taxes with the IRC separate taxable entity rules for federal taxes. This Court assumes that Congress is aware of existing law when it passes legislation, and the existing law at the enactment of § 1222(a)(2)(A) indicated that an estate's liability for taxes turned on separate taxable entity rules. Pp. 513–516.

(c) Chapter 13, on which Chapter 12 was modeled, further bolsters this Court's holding. Established understandings hold that postpetition income taxes are not "incurred by the [Chapter 13] estate" under § 503(b) because they are the liability of the Chapter 13 debtor alone. The Government has also long hewed to this position. Section 1305(a)(1), which gives holders of postpetition claims the option of collecting postpetition taxes within the bankruptcy case, would be superfluous if postpetition tax liabilities were automatically collectible inside the bankruptcy. It is thus clear that postpetition income taxes are not automatically collectible in a Chapter 13 plan and are not administrative expenses under § 503(b). To hold otherwise in Chapter 12 would disrupt settled practices in Chapter 13 cases. Pp. 516–519.

(d) None of the contrary arguments by petitioners and the dissent overcomes the statute's plain language, context, and structure. There is no textual basis for giving "incurred by the estate" a temporal meaning, such that it refers to all taxes "incurred postpetition." Nor does the text support deeming a tax "incurred by the estate" whenever it is paid by the debtor out of property of the estate. Section 503's legislative history is not inconsistent with this Court's holding, and the Court has cautioned against allowing ambiguous legislative history to muddy clear statutory language. See *Milner* v. *Department of Navy*, 562 U. S. 562, 572. Meanwhile, any cases suggesting that postpetition taxes were treated as administrative expenses are inapposite because they

involve corporate debtors, which Congress has singled out for responsibilities paralleling those borne by a separate taxable entity's trustee. Finally, petitioners contend that the purpose of § 1222(a)(2)(A) was to provide debtors with robust relief from tax debts. There may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable. But if Congress intended petitioners' result, it did not so provide in the statute. Pp. 519–523.

617 F. 3d 1161, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which KENNEDY, GINSBURG, and KAGAN, JJ., joined, *post*, p. 524.

Susan M. Freeman argued the cause for petitioners. With her on the briefs were *Lawrence A. Kasten* and *Clifford B. Altfeld.*

Pratik A. Shah argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General DiCicco*, *Deputy Solicitor General Stewart*, *Bruce R. Ellisen*, and *Patrick J. Urda.**

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Under Chapter 12 of the Bankruptcy Code, farmer debtors may treat certain claims owed to a governmental unit resulting from the disposition of farm assets as dischargeable, unsecured liabilities. 11 U. S. C. § 1222(a)(2)(A). One such claim is for "any tax . . . incurred by the estate." § 503(b)(1)(B)(i). The question presented is whether a federal income tax liability resulting from individual debtors' sale of a farm during the pendency of a Chapter 12 bankruptcy is "incurred by the estate" and thus dischargeable. We hold that it is not.

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*Briefs of *amici curiae* urging reversal were filed for Donald W. Dawes et al. by *G. Eric Brunstad, Jr.*, *Collin O'Connor Udell*, and *Matthew J. Delude;* and for Neil E. Harl et al. by *Joseph A. Peiffer.*

I

A

In 1986, Congress enacted Chapter 12 of the Bankruptcy Code, § 1201 *et seq.*, to allow farmer debtors with regular annual income to adjust their debts. Chapter 12 was modeled on Chapter 13, § 1301 *et seq.*, which permits individual debtors with regular annual income to preserve existing assets subject to a "court-approved plan under which they pay creditors out of their future income." *Hamilton* v. *Lanning*, 560 U. S. 505, 508 (2010). Chapter 12 debtors similarly file a plan of reorganization. § 1221. To be confirmed, the plan must provide for the full payment of priority claims. § 1222(a)(2).

In the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), § 1003, 119 Stat. 186, Congress created an exception to that requirement:

> "**Contents of plan**
>
> "(a) The plan shall—
>
> . . . . .
>
> "(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—
>
> "(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507, but the debt shall be treated in such manner only if the debtor receives a discharge." 11 U. S. C. § 1222.

Under § 1222(a)(2)(A), certain governmental claims resulting from the disposition of farm assets are downgraded to general, unsecured claims that are dischargeable after less than full payment. See § 1228(a). The claims are stripped of their priority status.

That exception, however, applies only to claims in the plan that are "entitled to priority under section 507" in the first place. Section 507 lists 10 categories of such claims. Two pertain to taxes: One category, § 507(a)(8), covers prepetition taxes, and is inapplicable in this case. The other, § 507(a)(2), covers "administrative expenses allowed under section 503(b)," which in turn includes "any tax . . . incurred by the estate." § 503(b)(1)(B)(i). Thus, for postpetition taxes to be entitled to priority under § 507 and eligible for the § 1222(a)(2)(A) exception, the taxes must be "incurred by the estate."

B

Petitioners Lynwood and Brenda Hall petitioned for bankruptcy under Chapter 12 and sold their farm shortly thereafter. Petitioners initially proposed a plan of reorganization under which they would pay off outstanding liabilities with proceeds from the sale. The Internal Revenue Service (IRS) objected, asserting a federal income tax of $29,000 on the capital gains from the farm sale.

Petitioners amended their proposal to treat the income tax as a general, unsecured claim to be paid to the extent funds were available, with the unpaid balance discharged. Again the IRS objected. Taxes on income from a postpetition farm sale, the IRS argued, remain the debtors' independent responsibility because they are neither collectible nor dischargeable in bankruptcy.

The Bankruptcy Court sustained the objection. The court reasoned that because a Chapter 12 estate is not a separate taxable entity under the Internal Revenue Code (IRC), see 26 U. S. C. §§ 1398, 1399, it cannot "incur" taxes for purposes of 11 U. S. C. § 503(b).

The District Court reversed, expressing doubt that IRC provisions are relevant to interpreting § 503(b). Based on its reading of legislative history, the District Court determined that Congress intended § 1222(a)(2)(A) to extend to petitioners' postpetition taxes.

The Court of Appeals for the Ninth Circuit reversed. 617 F. 3d 1161 (2010). The Court of Appeals held that the Chapter 12 estate does not "incur" the postpetition federal income taxes for purposes of § 503(b) because it is not a separate taxable entity under the IRC, and noted that Congress repeatedly has indicated the relevance of the IRC's taxable entity provisions to the Bankruptcy Code. Although "sympathetic" to the view that the postpetition tax liabilities should be dischargeable, the Court of Appeals held that "the operative language simply failed to make its way into the statute." *Id.*, at 1167. The Court of Appeals concluded that because the taxes do not qualify under § 503(b), they are not priority claims in the plan eligible for the § 1222(a)(2)(A) exception.

Judge Paez dissented, siding with a sister Circuit that had concluded that Congress intended § 1222(a)(2)(A) to extend to such postpetition federal income taxes. We granted certiorari to resolve the split of authority.[1] 564 U. S. 1003 (2011).

II

A

Our resolution of this case turns on the meaning of a phrase in § 503(b) of the Bankruptcy Code: "incurred by the estate." The parties agree that § 1222(a)(2)(A) applies only to priority claims collectible in the bankruptcy plan and that postpetition federal income taxes so qualify only if they constitute a "tax . . . incurred by the estate." § 503(b)(1)(B)(i).

The phrase "incurred by the estate" bears a plain and natural reading. See *FCC* v. *AT&T Inc.*, 562 U. S. 397, 403 (2011) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning' "). To "incur," one

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[1] Compare *In re Dawes*, 652 F. 3d 1236 (CA10 2011), and 617 F. 3d 1161 (CA9 2010) (case below), with *Knudsen* v. *IRS*, 581 F. 3d 696 (CA8 2009) (postpetition federal taxes are eligible for the § 1222(a)(2)(A) exception and thus dischargeable).

must "suffer or bring on oneself (a liability or expense)." Black's Law Dictionary 836 (9th ed. 2009); see also Webster's Third New International Dictionary 1146 (1976) ("to . . . become liable or subject to: bring down upon oneself"); Random House Dictionary 722 (1966) ("to become liable or subject to through one's own action; bring upon oneself"). A tax "incurred by the estate" is a tax for which the estate itself is liable.

As the IRC makes clear, only certain estates are liable for federal income taxes. Title 26 U. S. C. §§ 1398 and 1399 address taxation in bankruptcy and define the division of responsibilities for the payment of taxes between the estate and the debtor on a chapter-by-chapter basis. Section 1398 provides that when an individual debtor files for Chapter 7 or 11 bankruptcy, the estate shall be liable for taxes. In such cases, the trustee files a separate return on the estate's behalf and "[t]he tax" on "the taxable income of the estate . . . shall be paid by the trustee." § 1398(c)(1); see also § 6012(b)(4) ("Returns of . . . an estate of an individual under chapter 7 or 11 . . . shall be made by the fiduciary thereof"). Section 1399 provides that "[e]xcept in any case to which section 1398 applies, no separate taxable entity shall result from the commencement of a [bankruptcy] case." In Chapter 12 and 13 cases, then, there is no separately taxable estate. The debtor—not the trustee—is generally liable for taxes and files the only tax return. See *In re Lindsey*, 142 B. R. 447, 448 (Bkrtcy. Ct. WD Okla. 1992) ("It is clear that, pursuant to 26 U. S. C. § 1398 and 1399, the standing Chapter 12 trustee neither files a return nor pays federal income tax"); cf. *infra*, at 521–522 (discussing special trustee duties in corporate-debtor cases).

These provisions suffice to resolve this case: Chapter 12 estates are not taxable entities. Petitioners, not the estate itself, are required to file the tax return and are liable for the taxes resulting from their postpetition farm sale. The postpetition federal income tax liability is not "incurred by

the estate" and thus is neither collectible nor dischargeable in the Chapter 12 plan.[2]

B

Our reading of "incurred by the estate" as informed by the IRC's separate taxable entity rules draws support from a related provision of the Bankruptcy Code, 11 U. S. C. § 346, and its longstanding interplay with 26 U. S. C. §§ 1398 and 1399. That relationship illustrates that from the inception of the current Bankruptcy Code, Congress has specified on a chapter-by-chapter basis which estates are separately taxable and therefore liable for taxes. That relationship also refutes the dissent's suggestion that applying such rules is an incongruous importation of "*tax* law" unconnected to "bankruptcy principles (as Congress understood them)." *Post*, at 531 (opinion of BREYER, J.). And it reinforces the reasonableness of our view that whether an estate "incurs" taxes under § 503(b) turns on such chapter-by-chapter distinctions.

In the original Bankruptcy Code, Congress included a provision, § 346, that set out a chapter-specific division of tax liabilities between the estate and the debtor. Bankruptcy Reform Act of 1978, 92 Stat. 2565. Section 346(b)(1) provided that in an individual-debtor Chapter 7 or 11 bankruptcy, "any income of the estate may be taxed under a State or local law imposing a tax . . . *only to the estate*, and may not be taxed to *such individual*." 92 Stat. 2565 (emphasis added); see also 11 Collier on Bankruptcy ¶TX12.03[5][b][i], p. TX12–21 (16th ed. 2011) (hereinafter Collier) (Section 346(b) "provided that in a case under chapter 7 [or] 11 . . . the estate of an individual is a taxable entity"). Section 346(d) provided, meanwhile, that in a Chapter 13 bankruptcy, "any income of the estate or the debtor may be taxed under a

[2] Because we hold that the postpetition federal income taxes at issue are not collectible in the plan because they are not "incurred by the estate," we need not address the Government's broader alternative argument that Chapter 12 plans are exclusively limited to prepetition claims.

State or local law imposing a tax . . . *only to the debtor*, and may not be taxed to *the estate*." 92 Stat. 2566 (emphasis added). Congress thus established that the estate in an individual-debtor Chapter 7 or 11 bankruptcy is a separate taxable entity; the estate in a Chapter 13 bankruptcy is not.[3]

Although § 346 concerned state or local taxes,[4] Congress applied its framework to federal taxes two years later. In the Bankruptcy Tax Act of 1980, 94 Stat. 3397, Congress enacted 26 U. S. C. §§ 1398 and 1399. Section 1398 of the

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[3] For those of us for whom it is relevant, the legislative history confirms that Congress viewed § 346 as defining which estates were separate taxable entities. See H. R. Rep. No. 95–595, p. 275 (1977) (hereinafter H. R. Rep.) ("A threshold issue to be considered when a debtor files a petition under title 11 is whether the estate created . . . should be treated as a separate taxable entity"); *id.*, at 334 ("Subsection (d) indicates that the estate in a chapter 13 case is not a separate taxable entity"); accord, S. Rep. No. 95–989, p. 45 (1978) (hereinafter S. Rep.); H. R. Rep., at 335 (noting "the creation of the estate of an individual under chapters 7 or 11 of title 11 as a separate taxable entity"); accord, S. Rep., at 46.

The Reports also tie separate taxable entity status to the responsibility to file returns and pay taxes. See H. R. Rep., at 277 ("If the estate is a separate taxable entity, then the representative of the estate is responsible for filing any income tax returns and paying any taxes due by the estate"); *id.*, at 278 ("When the estate is not a separate taxable entity, then taxation of the debtor should be conducted on the same basis as if no petition were filed").

[4] A dispute over Committee jurisdiction led to the insertion of "State or local" before each mention of "law imposing a tax." Compare H. R. 8200, 95th Cong., 1st Sess., § 346 (1977), with § 346, 92 Stat. 2565. Nonetheless, the House Report underscored that the policy behind § 346 applied equally to federal taxes:

"[T]here is a strong bankruptcy policy that these provisions apply equally to Federal, State, and local taxes. However, in order to avoid any possible jurisdictional conflict with the Ways and Means Committee over the applicability of these provisions to Federal taxes, H. R. 8200 has been amended to make the sections inapplicable to Federal taxes. The amendment . . . will obviate the need for a sequential referral of the bill to Ways and Means, which will be considering these provisions and other bankruptcy-related tax law later in this Congress." H. R. Rep., at 275.

IRC, much like § 346(b) in the Bankruptcy Code, established that the estate is separately taxable in individual-debtor Chapter 7 or 11 cases. Section 1399 of the IRC, much like § 346(d) in the Bankruptcy Code, clarified that the estate is not separately taxable in Chapter 13 (and now Chapter 12) cases.

In 2005, Congress in BAPCPA amended § 346 and crystallized the connection between the Bankruptcy Code and the IRC. Section 346 now expressly aligns its assignment of state or local taxes with the rules for federal taxes, providing in relevant part:

> "(a) Whenever the Internal Revenue Code of 1986 provides that a separate taxable estate or entity is created in a case concerning a debtor under this title, and the income . . . of such estate shall be taxed to or claimed by the estate, a separate taxable estate is also created for purposes of any State and local law imposing a tax on or measured by income and such income . . . shall be taxed to or claimed by *the estate* and may not be taxed to or claimed by *the debtor*. . . .
>
> "(b) Whenever the Internal Revenue Code of 1986 provides that no separate taxable estate shall be created in a case concerning a debtor under this title, and the income . . . of an estate shall be taxed to or claimed by the debtor, such income . . . shall be taxed to or claimed by *the debtor* under a State or local law imposing a tax on or measured by income and may not be taxed to or claimed by *the estate*." (Emphasis added.)

Thus, whenever the estate is separately taxable under federal income tax law, that "is also" the case under state or local income tax law, § 346(a), and vice versa, § 346(b). And given that the Bankruptcy Code instructs that the assignment of state or local tax liabilities shall turn on the IRC's separate taxable entity rules, there is parity in turning to such rules in assigning federal tax liabilities.

In the same Act, Congress added § 1222(a)(2)(A). Section 1222(a)(2)(A) carves out an exception to the ordinary priority classification scheme. But § 1222(a)(2)(A) did not purport to redefine which claims are otherwise entitled to priority, much less alter the underlying division of tax liability between the estate and the debtor in Chapter 12 cases. "We assume that Congress is aware of existing law when it passes legislation," *Miles* v. *Apex Marine Corp.*, 498 U. S. 19, 32 (1990), and the existing law at the enactment of § 1222(a)(2)(A) indicated that an estate's liability for taxes turned on chapter-by-chapter separate taxable entity rules.

C

The statutory structure further reinforces our holding that petitioners' postpetition income taxes are not "incurred by the estate." As a leading bankruptcy treatise and lower courts recognize, "[b]ecause chapter 12 was modeled on chapter 13, and because so many of the provisions are identical, chapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases." 8 Collier ¶1200.01[5], at 1200–10; *In re Lopez*, 372 B. R. 40, 45, n. 13 (Bkrtcy. App. Panel CA9 2007); *Justice* v. *Valley Nat. Bank*, 849 F. 2d 1078, 1083 (CA8 1988). We agree. Section 1322(a)(2), like § 1222(a)(2), requires full payment of "all claims entitled to priority under section 507" under the plan. Both provisions cross-reference the same section of the Code, § 507, and in turn, the same subsection, § 503(b). Both are treated alike by IRC §§ 1398 and 1399. Whether postpetition taxes qualify under § 503(b) in Chapter 13 thus sheds light on whether they so qualify in petitioners' Chapter 12 case.

Bankruptcy courts and commentators have reasoned that postpetition income taxes are not "incurred by the estate" under § 503(b) because "a tax on postpetition income of the debtor or of the chapter 13 estate is not a liability of the chapter 13 estate; it is a liability of the debtor alone." 8

Collier ¶1305.02[1], at 1305–5 and 1305–6.[5] For over a decade, the Government has likewise hewed to the position that "since post-petition tax liabilities are, in Chapter 13 cases, incurred by the debtor, rather than the bankruptcy estate, characterizing such liabilities as administrative expenses is inconsistent with section 503." IRS Chief Counsel Advice No. 200113027, p. 6 (Mar. 30, 2001), 2001 WL 307746; see also Internal Revenue Manual § 5.9.10.9.2(3) (2006) (hereinafter IRM); IRS Litigation Guideline Memorandum GL–26, p. 9 (Dec. 16, 1996), 1996 WL 33107107. We see no reason to depart from those established understandings. To "'hold the Chapter 13 estate liable for [a] tax when it does not exist as a taxable entity defies common sense as well as Congress' intent.'" *In re Whall*, 391 B. R. 1, 4 (Bkrtcy. Ct. Mass. 2008). The same holds true for a Chapter 12 estate.

A provision in Chapter 13 confirms that postpetition income taxes fall outside § 503(b). Section 1305(a)(1) provides that "[a] proof of claim *may* be filed by any entity that holds a claim against the debtor . . . for taxes that become payable to a governmental unit while the case is pending." (Emphasis added.) That provision gives holders of postpetition claims the option of collecting postpetition taxes within the bankruptcy case—an option that the Government would never need to invoke if postpetition tax liabilities were already collectible inside the bankruptcy. Accordingly, lest we render § 1305 "'inoperative or superfluous,'" *Hibbs* v. *Winn*, 542 U. S. 88, 101 (2004), it is clear that postpetition income taxes are not automatically collectible in a Chapter 13 plan and, *a fortiori*, are not administrative expenses under § 503(b).

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[5] See, *e. g.*, *In re Maxfield*, No. 04–60355, 2009 WL 2105953, *5–*6 (Bkrtcy. Ct. ND Ind., Feb. 19, 2009); *In re Jagours*, 236 B. R. 616, 620 (Bkrtcy. Ct. ED Tex. 1999); *In re Whall*, 391 B. R. 1, 5–6 (Bkrtcy. Ct. Mass. 2008); *In re Brown*, No. 05–41071, 2006 WL 3370867, *3 (Bkrtcy. Ct. Mass., Nov. 20, 2006); *In re Gyulafia*, 65 B. R. 913, 916 (Bkrtcy. Ct. Kan. 1986).

It follows that postpetition income taxes are not automatically collectible in petitioners' Chapter 12 plan.[6] Because both chapters cross-reference § 503(b) in an identical manner, see §§ 1222(a)(2), 1322(a)(2), we are cognizant that any conflicting reading of § 503(b) here could disrupt settled Chapter 13 practices. See *Cohen* v. *de la Cruz*, 523 U. S. 213, 221 (1998) (the Court "'will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure'"). Chapter 13 filings outnumber Chapter 12 filings six hundredfold. See U. S. Bankruptcy Courts—Cases Commenced During the 12-Month Period Ending September 30, 2011 (Table F–2) (estimating 676 and 417,503 annual Chapter 12 and 13 filings,

[6] The dissent suggests that Chapter 12 can be distinguished from Chapter 13 because Chapter 12 bankruptcies tend to be longer, such that the treatment of taxes is more "important." *Post*, at 535. As a practical matter, it is not clear that Chapter 12 bankruptcies are substantially longer. Compare Brief for Neil E. Harl et al. as *Amici Curiae* 33 (median Chapter 12 case duration is under 8 months) with Tr. of Oral Arg. 49 ("on average we're talking about 4 months in a chapter 13 case"). In any event, there is no indication that Congress intended any difference in duration—if it anticipated a difference at all—to flip the characterization of postpetition income taxes from one chapter to the other. Nor does the absence of a § 1305 equivalent in Chapter 12 justify shoehorning postpetition taxes into § 503(b), as the dissent argues. That Chapter 12 lacks a provision allowing such taxes to be brought inside the plan only clarifies that such taxes fall outside of the plan.

The dissent alternatively suggests that it "do[es] not see the serious harm in treating the relevant taxes as 'administrative expenses' in *both* Chapter 12 and Chapter 13 cases." *Post*, at 536. The "harm" is to settled understandings in Chapter 13 to the contrary. The "harm" is also to § 1305; to avoid rendering § 1305 a nullity, the dissent recasts the provision as applicable not to all "taxes that become payable . . . while the case is pending," but only those payable "*after* the Chapter 13 Plan is confirmed." *Ibid.* The dissent does not claim, however, that this was Congress' intent for § 1305, as Congress' choice of words would be exceedingly overbroad if it were. And the dissent's novel reading contravenes ample Chapter 13 authority recognizing no such limitation on § 1305's scope. *E. g.*, 8 Collier ¶1305.02 (citing cases).

respectively), http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx (as visited May 14, 2012, and available in Clerk of Court's case file). Yet adopting petitioners' reading of § 503(b) would mean that, in every Chapter 13 case, the Government could ignore § 1305 and expect priority payment of postpetition income taxes in every plan.

At bottom, "identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U. S. 224, 232 (2007). Absent any indication that Congress intended a conflict between two closely related chapters, we decline to create one.[7]

III

Petitioners and the dissent advance several arguments for why the postpetition income taxes at issue should be considered "incurred by the estate," notwithstanding the IRC's separate taxable entity rules. But none provides sufficient reason to overcome the statute's plain language, context, and structure.

Petitioners primarily argue that "incurred by the estate" has a temporal meaning. Petitioners emphasize that the estate only comes into existence after a bankruptcy petition is filed. Thus, they reason, taxes "incurred by the estate" refers to all taxes "incurred postpetition," regardless of whether the estate is liable for the tax and regardless of the chapter under which a case is filed. Although all taxes "incurred by the estate" are necessarily incurred postpetition, not all taxes incurred postpetition are "incurred by the

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[7] IRS manuals dating back to 1998 indicate that the Government did not view postpetition federal income taxes as collectible in an individual debtor's Chapter 12 plan, even when that view was adverse to its interests. See IRM § 25.17.12.9.3 (2004); *id.*, § 25.17.12.9.3(1) (2002); *id.*, § 5.9, ch. 10.8(4) (1999); *id.*, § 5.9, ch. 10.8(4) (1998). Until the enactment of 11 U. S. C. § 1222(a)(2)(A), treating such taxes as priority claims in the plan would have assured the Government of full payment before or at the time of the plan.

estate." That an estate cannot incur liability until it exists does not mean that every liability that arises after that point automatically becomes the estate's liability. And there is no textual basis to focus on *when* the liability is incurred, as opposed to whether the liability is incurred "*by* the estate."

Alternatively, petitioners contend that a tax should be considered "incurred by the estate" so long as it is payable out of estate assets. Income from postpetition sales of farm assets is considered property of the estate. See § 1207(a). Petitioners argue that even if the debtor—and not the estate—is liable for a tax, the tax is still "incurred by the estate" because the funds the debtor uses to pay the tax are property of the estate. But that too strains the text beyond what it can bear. To concede that someone other than the estate is liable for filing the return and paying the tax, and yet maintain that the estate is the one that has "incurred" the tax, defies the ordinary meaning of "incur" as bringing a liability upon oneself.

The dissent, echoing both of these points, urges that we "simply . . . consider the debtor and estate as *merged*." *Post*, at 534. "The English language," the dissent reasons, "permits this reading" and "do[es] not require" our reading. *Post*, at 531. But any reading of "tax . . . incurred *by the estate*" that is contingent on merging the debtor and estate—despite Congress' longstanding efforts to *distinguish* between when tax liabilities are borne by the debtor or borne by the estate—is not a natural construction of the statute as written.

Moreover, these alternative readings create a conflict between § 503(b) and § 346(b). Petitioners consider postpetition state or local income taxes, like federal income taxes, to be "incurred by the estate" under § 503(b). See Tr. of Oral Arg. 4–5. But § 346(b) requires that such taxes be borne by the Chapter 12 debtor, not the estate. It is implausible to maintain that taxes are "incurred by the estate" when

§ 346(b) specifically prohibits such taxes from being "taxed to or claimed by the estate."

To buttress their counterintuitive readings of the text, petitioners and the dissent suggest that there is a long history of treating postpetition taxes as administrative expenses entitled to priority. Both point to two legislative Reports accompanying the 1978 enactment of § 503. But neither snippet from which they quote is inconsistent with today's holding,[8] and we have cautioned against "allowing ambiguous legislative history to muddy clear statutory language." *Milner* v. *Department of Navy*, 562 U. S. 562, 572 (2011).

Petitioners also point to cases suggesting that postpetition taxes were treated as administrative expenses. *E. g.*, *United States* v. *Noland*, 517 U. S. 535, 543 (1996) (corporate Chapter 11 debtor); *Nicholas* v. *United States*, 384 U. S. 678, 687–688 (1966) (corporate Chapter XI case under predecessor Bankruptcy Act). But those cases involve corporate debtors and are therefore inapposite. Among estates that are not separately taxable, those involving corporate debtors have long been singled out by Congress for special responsibilities.[9] See H. R. Rep., at 277 (even "[i]f the estate is not

[8] The House Report stated—after noting that, in addition to prepetition taxes, "certain other taxes are entitled to priority"—that "[t]axes arising from the operation of the estate after bankruptcy are entitled to priority as administrative expenses." H. R. Rep., at 193. That is still true. Many taxes arising after bankruptcy, as in individual-debtor Chapter 7 or 11 cases, remain entitled to priority as administrative expenses. The Senate Report, meanwhile, stated: "*In general*, administrative expenses include taxes which the trustee incurs in administering the debtor's estate, including taxes on capital gains from sales of property *by the trustee* and taxes on income earned by the estate during the case." S. Rep., at 66 (emphasis added). That likewise remains true. Administrative expenses still include income taxes that "the trustee," as opposed to the debtor, has incurred—again, as in individual-debtor Chapter 7 or 11 cases.

[9] The original § 346 established that the estate of a corporate debtor is not a separate taxable entity, but nonetheless provided that "the trustee shall make any [State or local] tax return otherwise required . . . to be

a separate taxable entity," administrative responsibility can "var[y] according to the nature of the debtor"). Although estates of corporate debtors are not separate taxable entities under 26 U. S. C. §§ 1398 and 1399, the IRC requires a trustee that "has possession of or holds title to all or substantially all the property or business of a corporation" to "make the return of income for such corporation." § 6012(b)(3). In effect, Congress provided that the trustee in a corporate-debtor case may shoulder responsibility that parallels that borne by the trustee of a separate taxable entity. In any event, petitioners do not deny that neither the separate taxable entity provisions nor the special provisions for corporate debtors apply to them.

Finally, petitioners and the dissent contend that the purpose of 11 U. S. C. § 1222(a)(2)(A) was to provide debtors with robust relief from tax debts, relying on statements by a single Senator on unenacted bills introduced in years preceding the enactment. See Brief for Petitioners 23–36. They argue that deeming § 1222(a)(2)(A) inapplicable to their post-petition income taxes would undermine that purpose and confine the exception to prepetition taxes. But we need not resolve here what other claims, if any, are covered by § 1222(a)(2)(A).[10] Whatever the 2005 Congress' intent with respect to § 1222(a)(2)(A), that provision merely carved out

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filed by or on behalf of such . . . corporation." §§ 346(c)(1)–(2), 92 Stat. 2566. The current § 346 similarly states, in the same provision deeming the debtor taxable when there is no separate taxable estate, that "[t]he trustee shall make such tax returns of income of corporations . . . . The estate shall be liable for any [State or local] tax imposed on such corporation." § 346(b).

[10] The dissent opines that employment taxes must be administrative expenses "incurred by the estate" because, in its view, they "do not fit easily" within the category of administrative expenses under § 503(b)(1)(A)(i), notwithstanding the Government's contrary representations on both points. *Post*, at 535. Because employment taxes are not at issue in this case, we offer no opinion on either question.

an exception to the pre-existing priority classification scheme. The exception could only apply to claims "entitled to priority under section 507" in the first place. That pre-existing scheme was in turn premised on antecedent, decades-old understandings about the scope of § 503(b) and the division of tax liabilities between estates and debtors. See *Dewsnup* v. *Timm*, 502 U. S. 410, 419 (1992) ("When Congress amends the bankruptcy laws, it does not write 'on a clean slate' "). If Congress wished to alter these background norms, it needed to enact a provision to enable postpetition income taxes to be collected in the Chapter 12 plan in the first place.

The dissent concludes otherwise by an inverted analysis. Rather than demonstrate that such claims were treated as § 507 priority claims in the first place, the dissent begins with the single Senator's stated purpose for the exception to that priority scheme. *Post*, at 529–530. It then reasons backwards from there, and in the process upsets background norms in both Chapters 12 and 13.

Certainly, there may be compelling policy reasons for treating postpetition income tax liabilities as dischargeable. But if Congress intended that result, it did not so provide in the statute. Given the statute's plain language, context, and structure, it is not for us to rewrite the statute, particularly in this complex terrain of interconnected provisions and exceptions enacted over nearly three decades. Petitioners' position threatens ripple effects beyond this individual case for debtors in Chapter 13 and the broader bankruptcy scheme that we need not invite. As the Court of Appeals noted, "Congress is entirely free to change the law by amending the text." 617 F. 3d, at 1167.

* * *

We hold that the federal income tax liability resulting from petitioners' postpetition farm sale is not "incurred by the

estate" under § 503(b) and thus is neither collectible nor dischargeable in the Chapter 12 plan. We therefore affirm the judgment of the Court of Appeals for the Ninth Circuit.

It is so ordered.

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

Chapter 12 of the Bankruptcy Code helps family farmers in economic difficulty reorganize their debts without losing their farms. Consistent with the chapter's purposes, Congress amended § 1222(a) of the Code (hereinafter Amendment) to enable the debtor to treat certain capital gains tax claims as ordinary unsecured claims. 11 U. S. C. § 1222(a)(2)(A). The Court's holding prevents the Amendment from carrying out this basic objective. I would read the statute differently, interpreting it in a way that, in my view, both is consistent with its language and allows the Amendment better to achieve its purposes.

I

A

Chapter 12 of the Bankruptcy Code helps indebted family farmers (and fishermen) keep their farms by making commitments to pay those debts (in part) out of future income. An eligible farmer whose debts exceed his assets may enter Chapter 12 bankruptcy, at which point he must develop a detailed plan (hereinafter Plan) setting forth how he will pay his debts. That Plan must satisfy certain statutory criteria. §§ 1221, 1222, 1225.

A brief overview of these requirements helps to illuminate what is at stake in this case. Roughly speaking, the chapter requires that a holder of a *secured claim* receive the full amount of that claim up to the value of the collateral securing the loan. The claim may be paid over an extended period. If the claim exceeds the value of the collateral, the creditor is given an unsecured claim in the remainder. §§ 506(a), 1225(a)(5).

The holder of a *§ 507 priority claim* (a category that includes, among other things, domestic support obligations, debts for taxes incurred before filing the bankruptcy petition, and administrative expenses) must receive the full amount of the priority claim in deferred cash payments paid over the life of the Plan. § 1222(a)(2).

The holder of an *ordinary unsecured claim—i. e.*, an unsecured claim of a kind not listed in § 507—may receive at least a partial payment from the amount left over after the payment of the secured and § 507 priority claims. This amount may well be more than zero, for the Plan must provide that the farmer will devote all "disposable income" (as defined by § 1225(b)(2)) or property of equivalent value to the repayment of his debts over the next three years (sometimes extended to five years). §§ 1222(c), 1225(b)(1). And that amount must prove sufficient to provide the unsecured creditor with no less than that creditor would receive in a Chapter 7 liquidation. § 1225(a)(4).

Once the farmer completes his Plan payments, he will receive a discharge even if his payments did not *fully* satisfy all unsecured claims. The Code does not, however, permit all debts to be discharged. There are categories of *nondischargeable* debts (including, for example, secured claims), which creditors can pursue after bankruptcy. § 1228(a).

For present purposes, it is important to understand that if the debtor owes too much money to his § 507 priority creditors, he may not have sufficient assets or future income to pay all his secured creditors and his § 507 priority creditors while leaving enough funds over to guarantee unsecured creditors the minimum amounts that Chapter 12 requires. If so, the farmer may not be able to proceed under Chapter 12. See §§ 1225(a)(1), (6) (bankruptcy court will not confirm Plan unless it satisfies statutory criteria and debtor will be able to make good on his commitments under the Plan).

It is also important to understand that the same kind of insufficient-assets-and-income problem might occur where

the debtor owes the Government a large *post*-petition tax debt. In general, postpetition claims are not part of the bankruptcy proceedings. See 7 Norton Bankruptcy Law and Practice § 135:14 (3d ed. 2011) (hereinafter Norton). Unless the Government's debt falls within an exception to this general rule, bankruptcy law would leave the Government to collect its postpetition claim outside of bankruptcy as best it could. Again, the result will be to leave the farmer with fewer assets and income to devote to his Chapter 12 Plan—perhaps to the point where he cannot proceed under Chapter 12 at all.

B

With this general summary in mind, it is easier to understand the significance of the question this case presents. The question arises out of an Amendment to a Chapter 12 provision. The provision as amended says:

> "**Contents of plan**
>
> "(a) The plan shall—
>
> . . . . .
>
> "(2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507, unless—
>
> "(A) the claim is a claim owed to a governmental unit that arises as a result of the sale, transfer, exchange, or other disposition of any farm asset used in the debtor's farming operation, *in which case the claim shall be treated as an unsecured claim that is not entitled to priority under section 507*, but the debt shall be treated in such manner only if the debtor receives a discharge; or
>
> "(B) the holder of a particular claim agrees to a different treatment of that claim." § 1222(a) (emphasis added).

The Amendment consists of subparagraph (A).

At first blush, the Amendment seems to relegate the capital gains tax collector to the status of an ordinary unsecured creditor. See *ibid.* (exception applies to claims "owed to a governmental unit that arises as a result of the sale . . . of any farm asset"). If, as petitioners claim, that is so, then it is unlikely that such a debt could stop a farmer from proceeding under Chapter 12, since its treatment as an ordinary unsecured claim means that the farmer will not necessarily have to pay the debt in full.

But if the Government and the majority are right, then the capital gains tax falls outside the category of § 507 priority claims—and therefore falls outside the scope of the Amendment; in fact, it falls outside the bankruptcy proceeding altogether. And the Government then might well be able to collect the debt in full outside the bankruptcy proceeding—even if doing so would reduce the farmer's assets and future income to the point where the farmer would not be able to proceed under Chapter 12. The question before us is whether we must interpret the Amendment in a way that could bring about this result.

C

1

Congress did not intend this result. In a significant number of instances a Chapter 12 farmer, in order to have enough money to pay his creditors, might have to sell farmland or other farm assets at a price that would give rise to considerable capital gains taxes (particularly if the family has held the land or assets for many years). If the resulting tax debt were treated as a § 507 priority claim, then it might well absorb much of the money raised to the point where (depending upon the size of his other debts) the farmer might be unable to proceed under Chapter 12. The Amendment accordingly seeks to place the tax authorities further back in the creditor queue, requiring them, like ordinary unsecured

creditors, to seek payment from the funds that remain after the § 507 priority creditors (and secured claimholders) have been paid.

The Amendment's chief legislative sponsor, Senator Charles Grassley, explained this well when he told the Senate:

> "Under current law, farmers often face a crushing tax liability if they need to sell livestock or land in order to reorganize their business affairs. . . . [H]igh taxes have caused farmers to lose their farms. Under the bankruptcy code, the I. R. S. must be paid in full for any tax liabilities generated during a bankruptcy reorganization. If the farmer can't pay the I. R. S. in full, then he can't keep his farm. This isn't sound policy. Why should the I. R. S. be allowed to veto a farmer's reorganization plan? [The Amendment] takes this power away from the I. R. S. by reducing the priority of taxes during proceedings. This will free up capital for investment in the farm, and help farmers stay in the business of farming." 145 Cong. Rec. 1113 (1999).

See also 14A J. Mertens, Law of Federal Income Taxation § 54:61, p. 11 (Oct. 2011 Supp.) ("This provision attempts to mitigate the tax expense often incurred by farmers who have significant taxable capital gains or depreciation recapture when their low basis farm assets are foreclosed, sold, or otherwise disposed of by their creditors").

2

The majority, following the Government's suggestion, interprets the relevant language in a way that denies the Amendment its intended effect. It holds that the only income tax claims to which § 507 accords priority are claims for taxes due for years *prior to the taxable year* in which the farmer filed for bankruptcy. (We shall call these "prepetition tax claims.") In the majority's view, § 507 does not

cover income tax liabilities that arise during the year of filing or during the Chapter 12 proceedings. (We shall call these "postpetition tax claims.") *Ante*, at 511–513; see Brief for United States 8 (the Amendment "provides farmers relief from [only] those tax claims that are otherwise entitled to priority under 11 U. S. C. 507(a)(8), namely pre-petition claims arising from the sale of farm assets"); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, § 705(1)(A), 119 Stat. 126 (amending § 507(a)(8) to clarify that it only covers income tax claims for taxable years that end on or before the date of the filing of the bankruptcy petition).

The majority then observes that the Amendment creates an exception only in respect to § 507 priority claims. § 1222(a)(2) ("The plan shall . . . provide for the full payment . . . of all claims entitled to priority under section 507, *unless* . . . " (emphasis added)). *Ante*, at 509–510. Thus, if (without the Amendment) § 507 would not cover postpetition capital gains taxes in the first place, the Amendment (creating only a § 507 exception) cannot affect postpetition tax claims. An exception from nothing amounts to nothing.

Consequently, the majority concludes that postpetition tax claims fall outside the bankruptcy proceeding entirely; the tax authorities can collect them as if they were ordinary tax debts; and the Government's efforts to collect them can lead to the very results (blocking the use of Chapter 12) that the Amendment sought to avoid.

Therein lies the problem. These results are the very opposite of what Congress intended. Congress did not want to relegate to ordinary-unsecured-claim status only prepetition tax claims, *i. e.*, tax claims that accrued well before the Chapter 12 proceedings began. Rather, Congress was concerned about the effect on the farmer of collecting capital gains tax debts that arose during (and were connected with) the Chapter 12 proceedings themselves. See 145 Cong. Rec. 1113 (the Amendment will have the effect of "reducing the priority of taxes *during proceedings*" (statement of Sen.

Grassley during a failed attempt to enact the Amendment; emphasis added)); Hearing on the Bankruptcy Reform Act of 2001 before the Senate Committee on the Judiciary, 107th Cong., 1st Sess., 121 (2001) (statement of Sen. Grassley) ("[The Amendment] also reduces the priority of capital gains tax liabilities for *farm assets sold as a part of a reorganization plan*" (emphasis added)). The majority does not deny the importance of Congress' objective. Rather, it feels compelled to hold that Congress put the Amendment in the wrong place.

II

Unlike the majority, I believe the relevant Bankruptcy Code language can be and is better interpreted in a way that would give full effect to the Amendment. In particular, the relevant language is better interpreted so that in the absence of the Amendment § 507 would cover these postpetition tax claims. Hence the Amendment creates an exception from what otherwise would amount to a § 507 priority claim. And it can take effect as written.

It is common ground that subsection (a)(2) of § 507 covers, and gives § 507 priority to, "administrative expenses allowed under section 503(b)." § 507(a)(2) (2006 ed., Supp. IV). It is also common ground that the relevant definitional section, namely, § 503(b), defines allowed "administrative expenses" as "including . . . any tax . . . incurred by the estate." § 503(b)(1)(B)(i) (2006 ed.). But after this point, we part company.

The majority believes that the words any tax "incurred by the estate" cannot include postpetition taxes. It emphasizes that *tax* law does not treat a Chapter 12 bankruptcy estate as a "separate taxable entity," *i. e.*, as separate from the farmer-debtor for federal income tax purposes. 26 U. S. C. §§ 1398, 1399. This means that there is just one entity—the debtor—for these purposes. And § 346 of the Bankruptcy Code makes clear that any state and local income tax liabilities incurred by a Chapter 12 estate must also be taxed to

the *debtor*. The majority says that these provisions mean that only the debtor, and not the estate, can "'incu[r]'" taxes within the meaning of 11 U. S. C. § 503(b)(1)(B)(i). *Ante,* at 511–512.

In my view, however, these tax law circumstances do not require the majority's narrow reading of this Bankruptcy Code provision. That is to say, the phrase tax "incurred by the [bankruptcy] estate" can include a tax incurred by the farmer while managing his estate in the midst of his bankruptcy proceedings, *i. e.,* between the time the farmer files for Chapter 12 bankruptcy and the time the bankruptcy court confirms the farmer's Chapter 12 Plan.

The bankruptcy estate is in existence during this time. Cf. § 1227(b) (property of the estate vests in the debtor at confirmation unless the Plan provides otherwise). The bankruptcy court has jurisdiction over the farmer's assets during this time. See §§ 541, 1207; 4 Norton § 61:1, at 61–2 (Section 541's "broad definition of estate property . . . centralizes all of the estate's assets under the jurisdiction of the bankruptcy court"). And, as a matter of both the English language and bankruptcy principles, one can consider a tax liability that the farmer incurs during this period (such as a capital gains tax arising from a sale of a portion of his farm assets to raise funds for creditors) as a liability that, in a bankruptcy sense, the estate incurs.

The English language permits this reading of the phrase tax "incurred by the estate." When the farmer, in the midst of Chapter 12 proceedings, sells a portion of his farm to raise money to help pay his creditors, one can say, as a matter of English, that the bankruptcy estate has "incurred" the associated tax, even if it is ultimately taxed to the farmer, just as one can say that an employee who makes purchases using a company credit card "incurs costs" for which his employer is liable.

As a matter of general bankruptcy principles (as Congress understood them), the history of the 1978 Bankruptcy Code

revision is replete with statements to the effect that "*[t]axes arising from the operation of the estate* after bankruptcy are entitled to priority as administrative expenses." H. R. Rep. No. 95–595, p. 193 (1977) (emphasis added). See S. Rep. No. 95–1106, p. 13 (1978) (administrative expenses include "[t]axes incurred *during the administration of the estate*" (emphasis added)); S. Rep. No. 95–989, p. 66 (1978) ("In general, administrative expenses include taxes which the trustee *incurs in administering the debtor's estate*, including taxes on capital gains from sales of property by the trustee and taxes on income earned by the estate *during the case*" (emphasis added)); 124 Cong. Rec. 32415 (1978) ("The amendment generally follows the Senate amendment in providing expressly that taxes incurred *during the administration of the estate* share the first priority given to administrative expenses generally" (emphasis added)); *id.*, at 34014 (Senate version of the joint floor statement saying exactly the same).

And importantly, as the majority concedes, *ante*, at 521, bankruptcy law treats taxes incurred by corporate debtors while they are in bankruptcy proceedings as "tax[es] incurred by the estate," even though the Tax Code does *not* treat the bankruptcy estate of a corporate debtor as a "separate taxable entity." See, *e. g.*, *United States* v. *Noland*, 517 U. S. 535, 543 (1996) (treating Chapter 11 corporate debtor's postpetition taxes as administrative expenses); *In re Pacific-Atlantic Trading Co.*, 64 F. 3d 1292, 1298 (CA9 1995) (same); *In re L. J. O'Neill Shoe Co.*, 64 F. 3d 1146, 1151–1152 (CA8 1995) (same); *In re Hillsborough Holdings Corp.*, 156 B. R. 318, 320 (Bkrtcy. Ct. MD Fla. 1993) ("[A]dministrative expenses should include taxes which the trustee, and, in Chapter 11 cases, the Debtor-in-Possession, incurs in administering the estate, including taxes based on capital gains from sales of property and taxes on income earned by the estate during the case post-petition").

Even though, as the majority says, corporate bankruptcies have some special features (in particular, a trustee in a corporate bankruptcy is required to file the estate's income tax return), it is unclear why these features should have any bearing on the definition of administrative expenses. See *ante*, at 522 (discussing 26 U. S. C. § 6012(b)(3)). Indeed, in many corporate Chapter 11 bankruptcies, there is no trustee, in which case the debtor-in-possession, just like an individual Chapter 12 debtor, must file the tax return. See 11 U. S. C. §§ 1104, 1107 (2006 ed. and Supp. IV); 5 Norton §§ 91:3, 93:1 (typically, no trustee is appointed in a Chapter 11 bankruptcy, and the debtor-in-possession assumes most of the duties and powers of a trustee, continuing in possession and managing the business until the court determines, upon request of a party in interest, that grounds exist for the appointment of a trustee); *Holywell Corp.* v. *Smith*, 503 U. S. 47, 54 (1992) ("As the assignee of 'all' or 'substantially all' of the property of the corporate debtors, the trustee must file *the returns that the corporate debtors would have filed had the plan not assigned their property to the trustee*" (emphasis added)).

Consequently, I can find no strong bankruptcy law reason for treating taxes incurred by a corporate debtor differently from those incurred by an individual Chapter 12 debtor. To the contrary, since corporations can file for bankruptcy under Chapter 12, the majority's argument implies that the treatment of postpetition taxes in Chapter 12 proceedings turns on whether the debtor happens to be a corporation. See § 101(18)(B) (2006 ed.) (defining "family farmer" to include certain corporations); § 109(f) ("Only a family farmer or family fisherman with regular annual income may be a debtor under chapter 12"); Brief for United States 26, n. 9 ("[T]he estate of a corporate (as opposed to individual) Chapter 12 debtor . . . could be viewed as incurring post-petition income taxes . . . collectible as administrative expenses . . . rather

than outside the bankruptcy case as required for an individual Chapter 12 debtor").

The majority does not point to any adverse consequences that might arise were bankruptcy law to treat taxes incurred in administering the bankruptcy estate (*i. e.*, taxes incurred after filing and before Plan confirmation) as administrative expenses. The effect of doing so would simply be to consider the debtor and estate as *merged* for purposes of determining which taxes fall within the Bankruptcy's Code's definition of "administrative expenses," *i. e.*, determining for that purpose that the estate may "incur" tax liabilities on behalf of the whole (with the ultimate liability assigned to the debtor), much like a married couple filing jointly, 26 U. S. C. § 6013(a), or an affiliated group of corporations filing a consolidated tax return, § 1501. Cf. *In re Lumara Foods of America, Inc.*, 50 B. R. 809, 814–815 (Bkrtcy. Ct. ND Ohio 1985) (describing the history of § 503(b)(1)(B)(i) and concluding that "the elevation [of a tax] to an administrative priority is dependent upon when the tax accrued"). In fact, the very tax provisions that separate the estate from the individual debtor in Chapter 7 and Chapter 11 proceedings, §§ 1398 and 1399, say that the Chapter 12 estate is *not separate* from the debtor for tax purposes—a concept consistent, not at odds, with merging the two for this bankruptcy purpose.

Nor is the majority's reading free of conceptual problems. If we read the phrase tax "incurred by the estate" as *excluding* tax liabilities incurred while the farmer is in Chapter 12 bankruptcy, we must read it as excluding not only capital gains taxes but also other kinds of taxes, such as an employer's share of Social Security taxes, Medicare taxes, or other employee taxes. But no one claims that *all* of these taxes fall outside the scope of the term "administrative expenses." See *In re Ryan*, 228 B. R. 746 (Bkrtcy. Ct. Ore. 1999) (treating postpetition employment taxes as administrative expenses in a Chapter 12 proceeding); IRS Chief Counsel Advice No. 200518002 (May 6, 2005), 2005 WL

1060956 (assuming that some postpetition federal taxes can be treated as administrative expenses in a Chapter 12 bankruptcy).

In fact, the Government, realizing it cannot go this far, concedes that many of these other (*e. g.*, employer) taxes are "administrative expenses," but only, it suggests, because they fall within a different part of the "administrative expenses" definition, namely, 11 U. S. C. § 503(b)(1)(A), which says that "administrative expenses" include "the actual, *necessary costs and expenses of preserving the estate* including . . . wages, salaries, and commissions for services rendered after the commencement of the case." (Emphasis added.) See Brief for United States 27–28, n. 11. Employment taxes, however, do not fit easily within the rubric "wages, salaries, and commissions." They may well be "necessary costs and expenses of preserving the estate." But then so are the capital gains taxes at issue here.

Finally, the majority makes what I believe to be its strongest argument. *Ante*, at 516–519. Chapter 13, it points out, allows individuals (typically those who are not farmers or fishermen) to reorganize their debts in much the same way as does Chapter 12. And there is authority holding that taxes on income earned between the time the Chapter 13 debtor files for bankruptcy and the time the bankruptcy Plan is confirmed are not "tax[es] incurred by the estate." See *In re Whall*, 391 B. R. 1, 5–6 (Bkrtcy. Ct. Mass. 2008); *In re Brown*, No. 05–41071, 2006 WL 3370867, *3 (Bkrtcy. Ct. Mass., Nov. 20, 2006); *In re Jagours*, 236 B. R. 616, 620, n. 4 (Bkrtcy. Ct. ED Tex. 1999); *In re Gyulafia*, 65 B. R. 913, 916 (Bkrtcy. Ct. Kan. 1986). Why, asks the majority, should the law treat Chapter 12 taxes differently?

For one thing, the issue is less important in a Chapter 13 case, for the relevant time period—between filing and Plan confirmation—is typically very short. Compare H. R. Rep. No. 95–595, at 276 ("most chapter 13 estates will only remain open for 1 or 2 months until confirmation of the plan"), with

Brief for Neil E. Harl et al. as *Amici Curiae* 32–33 (survey of Chapter 12 bankruptcies found the average time from filing to confirmation in a district ranged from nearly five months to over three years). See also 7 Norton § 122:14, at 122–27 ("In Chapter 13, the plan must be filed within 15 days after the filing of the petition, unless the time is extended for cause. A Chapter 12 plan must be filed no later than 90 days after the order for relief, unless the court finds that an extension is substantially justified" (footnote omitted)).

For another, the issue arises differently in a Chapter 13 case. That chapter, unlike Chapter 12, contains a special provision that permits the Government to seek § 507 priority treatment of all taxes incurred while the bankruptcy case is pending. § 1305 (Government can file proof of claim to have postpetition taxes treated as if they had arisen before the petition was filed).

Finally, if uniformity of interpretation between these two chapters is critical, I do not see the serious harm in treating the relevant taxes as "administrative expenses" in *both* Chapter 12 and Chapter 13 cases rather than in neither. The majority apparently believes that this would render § 1305 (the provision permitting the Government to seek § 507 priority treatment) superfluous. *Ante*, at 517–519. But that is not so. This interpretation would simply limit the scope of operation of § 1305 to the period of time *after* the Chapter 13 Plan is confirmed but while the Chapter 13 case is still pending. And that is likely to be a significant period of time relative to the preconfirmation period. See H. R. Rep. No. 95–595, at 276 ("[M]ost chapter 13 estates will only remain open for 1 or 2 months until confirmation of the plan"); §§ 1325(b)(1), (4) (debtor must commit all his projected disposable income over a 3-year period (sometimes extended to five) to the Plan, unless all unsecured claims can be paid off over a shorter period). The greatest Chapter 13 harm this interpretation could cause is to require the Government to pursue those tax liabilities as § 507 priority ad-

ministrative expense claims (rather than allow it to choose between § 507 priority treatment and pursuing those claims outside bankruptcy) during the relatively brief period of time between the filing of a petition and the Plan's confirmation.

In sum, I would treat a postpetition/preconfirmation tax liability as a tax "incurred by the estate," hence as an "administrative expense," hence as a "clai[m] entitled to priority under section 507, unless . . . ," hence as a claim falling within the scope of the Amendment. Doing so would allow the Amendment to take effect as Congress intended.

III

The Government argues that, even if tax liabilities arising during the bankruptcy proceedings are "administrative expenses," they still do not fall within the Amendment's scope. It says that neither the Amendment nor anything else in § 1222(a) provides for the payment of administrative expenses. Rather, that section and its Amendment provide only for the payment of "claims." § 1222(a)(2) ("The plan shall . . . provide for the full payment . . . of all *claims* entitled to priority under section 507, unless . . . " (emphasis added)). And administrative expenses, the Government says, like all debts that are incurred postpetition, are not "claims."

The Government finds support for its view in the fact that § 1222 deals with the contents of a "plan," while a later section, § 1227(a), says that the provisions of a "confirmed plan bind the debtor, each *creditor*, [and certain others of no relevance here]." (Emphasis added.) This is because the Code defines "*creditor*" to include only holders of *pre*-petition claims, thus excluding holders of *post*-petition claims, such as administrative expenses. § 101(10).

The Government points out that a *different* Code section, namely, § 1226(b)(1), provides for the payment of administrative expenses. That section says that "[b]efore or at the time of each payment to creditors under the plan, there shall

be paid . . . any unpaid claim of the kind specified in section 507(a)(2)," namely, "administrative expenses." And Congress did not amend § 1226(b)(1); it amended the earlier section, § 1222(a).

In short, the Government says, the Plan only covers those § 507 priority "expenses and claims" that are described as "claims" and can be held by "creditors." Section 1226(b)(1), not § 1222, deals with administrative expenses. The bottom line of the Government's chain of logic is, once again, that Congress put the Amendment in the wrong place.

I concede that there is some text and legislative history that supports the Government's view that the word "claim" in § 1222(a) does not include "administrative expenses." See, *e. g.*, § 507(a) (referring to "expenses and claims" as if they are separate categories); S. Rep. No. 95–1106, at 20 ("The committee amendments contain several changes designed to clarify the distinction between a 'claim' (which generally relates to a debt incurred before the bankruptcy petition is filed) and an administrative expense (which is an expense incurred by the trustee after the filing of the petition)").

But the language does not demand the Government's reading. For the Code also uses the word "claim" to cover *both* prepetition and postpetition claims (such as administrative expenses). *E. g.*, § 101(5)(A) (defining a claim as a "right to payment"); § 726(b) (2006 ed., Supp. IV) (referring to "claims" that include administrative expenses). Indeed, the very section that the Government says permits separate collection of administrative expenses, namely, § 1226(b)(1), refers to "any unpaid *claim*" for administrative expenses. (Emphasis added.) And one can easily read that section as setting forth *when*, not *whether*, administrative expenses will be paid under the Plan (*i. e.*, as specifying that the Plan must provide for the payment of administrative expenses before payments to other creditors are made). Thus, reading

§ 1222(a)(2)'s reference to "claims" as including administrative expenses need not render § 1226(b)(1) surplusage.

What about § 1227(a), which refers only to "creditor[s]"? One must read it in conjunction with § 1228(a), which provides that once the debtor has completed all payments under the Plan, "the court shall grant the debtor a discharge of [1] all debts provided for by the plan[,] [2] *allowed under section 503 of this title [which describes 'administrative expenses']* or [3] disallowed under section 502 of this title . . . ." (Emphasis added.) (The first few words of § 1227(a)—"[e]xcept as provided in section 1228(a)"—explain why I say "must"; the comma comes from 7 Norton § 137:2, at 137–3, n. 1, which says that its omission was a typographical error.) Thus, by here referring to "administrative expenses" (through its reference to § 503), Chapter 12 makes clear that at least *some* postpetition claims are to be discharged once the debtor has completed his payments under the Plan. That fact, in turn, suggests that the Plan may provide for their payment and that the holders of such claims may be bound by the terms of a confirmed Plan.

The upshot is that the Government's second argument presents a plausible, but not the *only* plausible, interpretation of the Code's language. And the Government's second argument, like the majority's argument, has a problem, namely, that it reduces Congress' Amendment to rubble. For that reason I believe it does not offer the better interpretation of the relevant language.

IV

In sum the phrase tax "incurred by the estate" in § 503(b) (the "administrative expense" section) and the word "claim" in § 1222(a) are open to different interpretations. Each of the narrower interpretations advanced by the Government or adopted by the Court would either exclude postpetition taxes from the phrase taxes "incurred by the estate" or exclude all postpetition debts, including administrative

expenses, from the word "claim." In these ways, these interpretations would, as I have said, prevent the Amendment from accomplishing its basic purpose.

A broader interpretation of the word "claim" may allow the Plan to include certain postpetition debts. This, taken together with a broader interpretation of the phrase tax "incurred by the estate," prevents the Government from collecting postpetition/preconfirmation tax debts outside of Chapter 12, requiring it to assume a place in the creditor queue. Together these broader interpretations permit the Amendment to take effect as intended.

I find this last-mentioned consideration determinative. It seems to me unlikely that Congress, having worked on revisions of the Code for many years with the help of bankruptcy experts, and having considered the Amendment several times over a period of years, would have made the drafting mistake that the Government and the majority necessarily imply that it made. Moreover, I believe it important that courts interpreting statutes make significant efforts to allow the provisions of congressional statutes to function in the ways that the elected branch of Government likely intended and for which it can be held democratically accountable.

For these reasons, with respect, I dissent.

Syllabus

ASTRUE, COMMISSIONER OF SOCIAL SECURITY *v.* CAPATO, ON BEHALF OF B. N. C. ET AL.

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

No. 11–159. Argued March 19, 2012—Decided May 21, 2012

Eighteen months after her husband, Robert Capato, died of cancer, respondent Karen Capato gave birth to twins conceived through in vitro fertilization using her husband's frozen sperm. Karen applied for Social Security survivors benefits for the twins. The Social Security Administration (SSA) denied her application, and the District Court affirmed. In accord with the SSA's construction of the Social Security Act (Act), the court determined that the twins would qualify for benefits only if, as 42 U. S. C. § 416(h)(2)(A) specifies, they could inherit from the deceased wage earner under state intestacy law. The court then found that Robert was domiciled in Florida at his death, and that under Florida law, posthumously conceived children do not qualify for inheritance through intestate succession. The Third Circuit reversed. It concluded that, under § 416(e), which defines child to mean, *inter alia*, "the child or legally adopted child of an [insured] individual," the undisputed biological children of an insured and his widow qualify for survivors benefits without regard to state intestacy law.

Held: The SSA's reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime. Moreover, even if the SSA's longstanding interpretation is not the only reasonable one, it is at least a permissible construction entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837. Pp. 547–559.

(a) Congress amended the Act in 1939 to provide that, as relevant here, "[e]very child (as defined in section 416(e) of this title)" of a deceased insured individual "shall be entitled to a child's insurance benefit." § 402(d). Section 416(e), in turn, defines "child" to mean: "(1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [under certain conditions]." Unlike §§ 416(e)(2) and (e)(3), § 416(e)(1) lacks any elaboration of the conditions under which a child qualifies for benefits. Section 416(h)(2)(A), however, further addresses the term "child," providing: "In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall

apply [the intestacy law of the insured individual's domiciliary State]." An applicant who does not meet § 416(h)(2)(A)'s intestacy-law criterion may nonetheless qualify for benefits under other criteria set forth in §§ 416(h)(2)(B) and (h)(3), but respondent does not claim eligibility under those other criteria. Regulations promulgated by the SSA closely track §§ 416(h)(2) and (h)(3) in defining "[w]ho is the insured's natural child," 20 CFR § 404.355. As the SSA reads the statute, 42 U. S. C. § 416(h) governs the meaning of "child" in § 416(e)(1) and serves as a gateway through which all applicants for insurance benefits as a "child" must pass. Pp. 547–550.

(b) While the SSA regards § 416(h) as completing § 416(e)'s sparse definition of "child," the Third Circuit held, and respondent contends, that § 416(e) alone governs whenever the claimant is a married couple's biological child. There are conspicuous flaws in the Third Circuit's and respondent's reading; the SSA offers the more persuasive interpretation. Pp. 550–557.

(1) Nothing in § 416(e)'s tautological definition suggests that Congress understood the word "child" to refer only to the children of married parents. The dictionary definitions offered by respondent are not so confined. Moreover, elsewhere in the Act, Congress expressly limited the category of children covered to offspring of a marital union, see § 402(d)(3)(A), and contemporaneous statutes similarly distinguish child of a marriage from the unmodified term "child." Nor does § 416(e) indicate that Congress intended "biological" parentage to be prerequisite to "child" status. A biological parent is not always a child's parent under law. Furthermore, marriage does not necessarily make a child's parentage certain, nor does the absence of marriage necessarily make a child's parentage uncertain. Finally, it is far from obvious that respondent's proposed definition would cover her posthumously conceived twins, for under Florida law a marriage ends upon the death of a spouse. Pp. 551–552.

(2) The SSA finds a key textual cue in § 416(h)(2)(A)'s opening instruction: "In determining whether an applicant is the child . . . of [an] insured individual for purposes of this subchapter," the Commissioner shall apply state intestacy law. Respondent notes the absence of any cross-reference in § 416(e) to § 416(h), but she overlooks that § 416(h) provides the crucial link: It requires reference to state intestacy law to determine child status not just for § 416(h) purposes, but "for purposes of this subchapter," which includes both §§ 402(d) and 416(e). Having explicitly complemented § 416(e) by the definitional provisions contained in § 416(h), Congress had no need to place a redundant cross-reference in § 416(e).

Syllabus

The Act commonly refers to state law on matters of family status, including an applicant's status as a wife, widow, husband, or widower. See, *e. g.*, §§ 416(b), (h)(1)(A). The Act also sets duration-of-relationship limitations, see *Weinberger* v. *Salfi*, 422 U. S. 749, 777–782, and time limits qualify the statutes of several States that accord inheritance rights to posthumously conceived children. In contrast, no time constraint attends the Third Circuit's ruling in this case, under which the biological child of married parents is eligible for survivors benefits, no matter the length of time between the father's death and the child's conception and birth.

Because a child who may take from a father's estate is more likely to "be dependent during the parent's life and at his death," *Mathews* v. *Lucas*, 427 U. S. 495, 514, reliance on state intestacy law to determine who is a "child" serves the Act's driving objective, which is to "provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings," *Califano* v. *Jobst*, 434 U. S. 47, 52. Although the Act and regulations set different eligibility requirements for adopted children, stepchildren, grandchildren, and stepgrandchildren, it hardly follows, as respondent argues, that applicants in those categories are treated more advantageously than are children who must meet a § 416(h) criterion. Respondent charges that the SSA's construction of the Act raises serious constitutional concerns under the equal protection component of the Due Process Clause. But under rational-basis review, the appropriate standard here, the regime passed by Congress easily passes inspection. Pp. 553–557.

(c) Because the SSA's interpretation of the relevant provisions is at least reasonable, the agency's reading is entitled to this Court's deference under *Chevron*, 467 U. S. 837. *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U. S. 218, 226–227. Here, the SSA's longstanding interpretation, set forth in regulations published after notice-and-comment rulemaking, is neither "arbitrary or capricious in substance, [n]or manifestly contrary to the statute." *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44, 53. It therefore warrants the Court's approbation. P. 558.

631 F. 3d 626, reversed and remanded.

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

Eric D. Miller argued the cause for petitioner. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Kneedler*, *Michael S. Raab*, and *Kelsi Brown Corkran*.

Charles A. Rothfeld argued the cause for respondent. With him on the brief were *Andrew J. Pincus*, *Michael B. Kimberly*, *Bernard A. Kuttner*, and *Jeffrey A. Meyer*.*

JUSTICE GINSBURG delivered the opinion of the Court.

Karen and Robert Capato married in 1999. Robert died of cancer less than three years later. With the help of in vitro fertilization, Karen gave birth to twins 18 months after her husband's death. Karen's application for Social Security survivors benefits for the twins, which the Social Security Administration (SSA) denied, prompted this litigation. The technology that made the twins' conception and birth possible, it is safe to say, was not contemplated by Congress when the relevant provisions of the Social Security Act (Act) originated (1939) or were amended to read as they now do (1965).

Karen Capato, respondent here, relies on the Act's initial definition of "child" in 42 U. S. C. § 416(e): "'[C]hild' means . . . the child or legally adopted child of an [insured] individual." Robert was an insured individual, and the twins, it is uncontested, are the biological children of Karen and Robert. That satisfies the Act's terms, and no further inquiry is in order, Karen maintains. The SSA, however, identifies subsequent provisions, §§ 416(h)(2) and (h)(3)(C), as critical, and reads them to entitle biological children to benefits only if they qualify for inheritance from the decedent under state

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*Briefs of *amici curiae* urging affirmance were filed for the Cancer Legal Resource Center of the Disability Rights Legal Center by *Mark B. Helm*, *Charles D. Siegal*, and *David C. Thompson;* and for the National Senior Citizens Law Center et al. by *Rochelle Bobroff* and *Lawrence D. Rohlfing*.

Catherine W. Short filed a brief for Jennifer Lahl et al. as *amici curiae*.

intestacy law, or satisfy one of the statutory alternatives to that requirement.

We conclude that the SSA's reading is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime. And even if the SSA's longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court's respect under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

I

Karen Capato married Robert Capato in May 1999. Shortly thereafter, Robert was diagnosed with esophageal cancer and was told that the chemotherapy he required might render him sterile. Because the couple wanted children, Robert, before undergoing chemotherapy, deposited his semen in a sperm bank, where it was frozen and stored. Despite Robert's aggressive treatment regime, Karen conceived naturally and gave birth to a son in August 2001. The Capatos, however, wanted their son to have a sibling.

Robert's health deteriorated in late 2001, and he died in Florida, where he and Karen then resided, in March 2002. His will, executed in Florida, named as beneficiaries the son born of his marriage to Karen and two children from a previous marriage. The will made no provision for children conceived after Robert's death, although the Capatos had told their lawyer they wanted future offspring to be placed on a par with existing children. Shortly after Robert's death, Karen began in vitro fertilization using her husband's frozen sperm. She conceived in January 2003 and gave birth to twins in September 2003, 18 months after Robert's death.

Karen Capato claimed survivors insurance benefits on behalf of the twins. The SSA denied her application, and the U. S. District Court for the District of New Jersey affirmed the agency's decision. See App. to Pet. for Cert. 33a (decision of the Administrative Law Judge); *id.*, at 15a (District

Court opinion). In accord with the SSA's construction of the statute, the District Court determined that the twins would qualify for benefits only if, as § 416(h)(2)(A) specifies, they could inherit from the deceased wage earner under state intestacy law. Robert Capato died domiciled in Florida, the court found. Under that State's law, the court noted, a child born posthumously may inherit through intestate succession only if conceived during the decedent's lifetime. *Id.*, at 27a–28a.[1]

The Court of Appeals for the Third Circuit reversed. Under § 416(e), the appellate court concluded, "the undisputed biological children of a deceased wage earner and his widow" qualify for survivors benefits without regard to state intestacy law. 631 F. 3d 626, 631 (2011).[2] Courts of Appeals have divided on the statutory interpretation question this case presents. Compare *ibid.* and *Gillett-Netting* v. *Barnhart*, 371 F. 3d 593, 596–597 (CA9 2004) (biological but posthumously conceived child of insured wage earner and his widow qualifies for benefits), with *Beeler* v. *Astrue*, 651 F. 3d 954, 960–964 (CA8 2011), and *Schafer* v. *Astrue*, 641 F. 3d 49, 54–63 (CA4 2011) (posthumously conceived child's qualification for benefits depends on intestacy law of State in which wage earner was domiciled). To resolve the conflict, we granted the Commissioner's petition for a writ of certiorari. 565 U. S. 1033 (2011).

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[1] The District Court observed that Fla. Stat. Ann. § 732.106 (West 2010) defines "'afterborn heirs'" as "'heirs of the decedent *conceived before his or her death*, but born thereafter.'" App. to Pet. for Cert. 27a (emphasis added by District Court). The court also referred to § 742.17(4), which provides that a posthumously conceived child "'shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will.'" *Id.*, at 28a.

[2] Because the Third Circuit held that posthumously conceived children qualify for survivors benefits as a matter of federal law, it did not definitively determine "where [Robert] Capato was domiciled at his death or . . . delve into the law of intestacy of that state." 631 F. 3d, at 632, n. 6. These issues, if preserved, may be considered on remand.

II

Congress amended the Social Security Act in 1939 to provide a monthly benefit for designated surviving family members of a deceased insured wage earner. "Child's insurance benefits" are among the Act's family-protective measures. 53 Stat. 1364, as amended, 42 U. S. C. § 402(d). An applicant qualifies for such benefits if she meets the Act's definition of "child," is unmarried, is below specified age limits (18 or 19) or is under a disability which began prior to age 22, and was dependent on the insured at the time of the insured's death. § 402(d)(1).[3]

To resolve this case, we must decide whether the Capato twins rank as "child[ren]" under the Act's definitional provisions. Section 402(d) provides that "[e]very child (as defined in section 416(e) of this title)" of a deceased insured individual "shall be entitled to a child's insurance benefit." Section 416(e), in turn, states: "The term 'child' means (1) the child or legally adopted child of an individual, (2) a stepchild [under certain circumstances], and (3) . . . the grandchild or stepgrandchild of an individual or his spouse [who meets certain conditions]."

The word "child," we note, appears twice in § 416(e)'s opening sentence: initially in the prefatory phrase, "[t]he term 'child' means . . . ," and, immediately thereafter, in subsection (e)(1) ("child or legally adopted child"), delineating the first of three beneficiary categories. Unlike §§ 416(e)(2) and

[3] Applicants not in fact dependent on the insured individual may be "deemed dependent" when the Act so provides. For example, a "legitimate" child, even if she is not living with or receiving support from her parent, is ordinarily "deemed dependent" on that parent. 42 U. S. C. § 402(d)(3). Further, applicants "deemed" the child of an insured individual under § 416(h)(2)(B) or (h)(3) are also "deemed legitimate," hence dependent, even if not living with or receiving support from the parent. § 402(d)(3). See also *Mathews* v. *Lucas*, 427 U. S. 495, 499, n. 2 (1976) (deeming dependent any child who qualifies under § 416(h)(2)(A)); Tr. of Oral Arg. 13–14 (counsel for the SSA stated, in response to the Court's question, that statutory presumptions of dependency are irrebuttable).

(e)(3), which specify the circumstances under which stepchildren and grandchildren qualify for benefits, § 416(e)(1) lacks any elaboration. Compare § 416(e)(1) (referring simply to "the child . . . of an individual") with, *e. g.*, § 416(e)(2) (applicant must have been a stepchild for at least nine months before the insured individual's death).

A subsequent definitional provision further addresses the term "child." Under the heading "Determination of family status," § 416(h)(2)(A) provides: "In determining whether an applicant is the child or parent of [an] insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply [the intestacy law of the insured individual's domiciliary State]." [4]

An applicant for child benefits who does not meet § 416(h)(2)(A)'s intestacy-law criterion may nonetheless qualify for benefits under one of several other criteria the Act prescribes. First, an applicant who "is a son or daughter" of an insured individual, but is not determined to be a "child" under the intestacy-law provision, nevertheless ranks as a "child" if the insured and the other parent went through a marriage ceremony that would have been valid but for certain legal impediments. § 416(h)(2)(B). Further, an applicant is deemed a "child" if, before death, the insured acknowledged in writing that the applicant is his or her son or daughter, or if the insured had been decreed by a court to be the father or mother of the applicant, or had been ordered to pay child support. § 416(h)(3)(C)(i). In addition, an ap-

[4] Section 416(h)(2)(A) also states that persons who, under the law of the insured's domicile, "would have the same status relative to taking intestate personal property as a child or parent shall be deemed such." Asked about this prescription, counsel for the SSA responded that it would apply to equitably adopted children. Tr. of Oral Arg. 8–9, 54; see 20 CFR § 404.359 (2011) (an equitably adopted child may be eligible for benefits if the agreement to adopt the child would be recognized under state law as enabling the child to inherit upon the intestate death of the adopting parent).

plicant may gain "child" status upon proof that the insured individual was the applicant's parent and "was living with or contributing to the support of the applicant" when the insured individual died. § 416(h)(3)(C)(ii).[5]

The SSA has interpreted these provisions in regulations adopted through notice-and-comment rulemaking. The regulations state that an applicant may be entitled to benefits "as a natural child, legally adopted child, stepchild, grandchild, stepgrandchild, or equitably adopted child." 20 CFR § 404.354. Defining "[w]ho is the insured's natural child," § 404.355, the regulations closely track 42 U. S. C. §§ 416(h)(2) and (h)(3). They state that an applicant may qualify for insurance benefits as a "natural child" by meeting any of four conditions: (1) The applicant "could inherit the insured's personal property as his or her natural child under State inheritance laws"; (2) the applicant is "the insured's natural child and [his or her parents] went through a ceremony which would have resulted in a valid marriage between them except for a legal impediment"; (3) before death, the insured acknowledged in writing his or her parentage of the applicant, was decreed by a court to be the applicant's parent, or was ordered by a court to contribute to the applicant's support; or (4) other evidence shows that the insured is the applicant's "natural father or mother" and was either living with, or contributing to the support of, the applicant. 20 CFR § 404.355(a) (internal quotation marks omitted).

As the SSA reads the statute, 42 U. S. C. § 416(h) governs the meaning of "child" in § 416(e)(1). In other words, § 416(h) is a gateway through which all applicants for insurance benefits as a "child" must pass. See *Beeler*, 651 F. 3d, at 960 ("The regulations make clear that the SSA interprets the Act to mean that the provisions of § 416(h) are the exclu-

[5] Respondent does not invoke any of the alternative criteria as a basis for the twins' "child" status.

sive means by which an applicant can establish 'child' status under § 416(e) as a natural child.").[6]

III

Karen Capato argues, and the Third Circuit held, that § 416(h), far from supplying the governing law, is irrelevant in this case. Instead, the Court of Appeals determined, § 416(e) alone is dispositive of the controversy. 631 F. 3d, at 630–631. Under § 416(e), "child" means "child of an [insured] individual," and the Capato twins, the Third Circuit observed, clearly fit that definition: They are undeniably the children of Robert Capato, the insured wage earner, and his widow, Karen Capato. Section 416(h) comes into play, the court reasoned, only when "a claimant's status as a deceased wage-earner's child is in doubt." *Id.*, at 631. That limitation, the court suggested, is evident from § 416(h)'s caption: "Determination of family status." Here, "there is no family status to determine," the court said, *id.*, at 630, so § 416(h) has no role to play.

In short, while the SSA regards § 416(h) as completing § 416(e)'s sparse definition of "child," the Third Circuit considered each subsection to control different situations: § 416(h) governs when a child's family status needs to be determined; § 416(e), when it does not. When is there no need to determine a child's family status? The answer that the Third Circuit found plain: whenever the claimant is "the biological child of a married couple." *Id.*, at 630.[7]

We point out, first, some conspicuous flaws in the Third Circuit's and respondent Karen Capato's reading of the Act's

[6] The Commissioner of Social Security has acquiesced in the Ninth Circuit's conflicting interpretation for cases arising in that Circuit. See Social Security Acquiescence Ruling 05–1(9), 70 Fed. Reg. 55656 (2005).

[7] Because the Court of Appeals found the statutory language unambiguous, it had no occasion to "determine whether the [SSA's] interpretation is a permissible construction of the statute." 631 F. 3d, at 631, n. 5 (citing *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984)).

provisions, and then explain why we find the SSA's interpretation persuasive.

A

Nothing in § 416(e)'s tautological definition ("'child' means . . . the child . . . of an individual") suggests that Congress understood the word "child" to refer only to the children of married parents. The dictionary definitions offered by respondent are not so confined. See Webster's New International Dictionary 465 (2d ed. 1934) (defining "child" as, *inter alia*, "[i]n *Law*, legitimate offspring; also, sometimes, esp. in wills, an adopted child, or an illegitimate offspring, or any direct descendant, as a grandchild, as the intention may appear"); Merriam-Webster's Collegiate Dictionary 214 (11th ed. 2003) ("child" means "son or daughter," or "descendant"). See also Restatement (Third) of Property § 2.5(1) (1998) ("[a]n individual is the child of his or her genetic parents," and that may be so "whether or not [the parents] are married to each other"). Moreover, elsewhere in the Act, Congress expressly limited the category of children covered to offspring of a marital union. See § 402(d)(3)(A) (referring to the "legitimate . . . child" of an individual). Other contemporaneous statutes similarly differentiate child of a marriage ("legitimate child") from the unmodified term "child." See, *e. g.*, Servicemen's Dependents Allowance Act of 1942, ch. 443, § 120, 56 Stat. 385 (defining "child" to include "legitimate child," "child legally adopted," and, under certain conditions, "stepchild" and "illegitimate child" (internal quotation marks omitted)).

Nor does § 416(e) indicate that Congress intended "biological" parentage to be prerequisite to "child" status under that provision. As the SSA points out, "[i]n 1939, there was no such thing as a scientifically proven biological relationship between a child and a father, which is . . . part of the reason that the word 'biological' appears nowhere in the Act." Reply Brief 6. Notably, a biological parent is not necessarily a child's parent under law. Ordinarily, "a parent-child

relationship does not exist between an adoptee and the adoptee's genetic parents." Uniform Probate Code § 2–119(a), 8 U. L. A. 55 (Supp. 2011) (amended 2008). Moreover, laws directly addressing use of today's assisted reproduction technology do not make biological parentage a universally determinative criterion. See, *e. g.*, Cal. Fam. Code Ann. § 7613(b) (West Supp. 2012) ("The donor of semen . . . for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child."); Mass. Gen. Laws, ch. 46, § 4B (West 2010) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.").

We note, in addition, that marriage does not ever and always make the parentage of a child certain, nor does the absence of marriage necessarily mean that a child's parentage is uncertain. An unmarried couple can agree that a child is theirs, while the parentage of a child born during a marriage may be uncertain. See Reply Brief 11 ("Respondent errs in treating 'marital' and 'undisputed' as having the same meaning.").

Finally, it is far from obvious that Karen Capato's proposed definition—"biological child of married parents," see Brief for Respondent 9—would cover the posthumously conceived Capato twins. Under Florida law, a marriage ends upon the death of a spouse. See *Price* v. *Price*, 114 Fla. 233, 235, 153 So. 904, 905 (1934). If that law applies, rather than a court-declared preemptive federal law, the Capato twins, conceived *after* the death of their father, would not qualify as "marital" children.[8]

[8] Respondent urges that it would be bizarre to deny benefits to the Capato twins when, under § 416(h)(2)(B), they would have gained benefits had their parents gone through a marriage ceremony that would have

B

Resisting the importation of words not found in § 416(e)—"child" means "the biological child of married parents," Brief for Respondent 9—the SSA finds a key textual cue in § 416(h)(2)(A)'s opening instruction: "In determining whether an applicant is the child . . . of [an] insured individual *for purposes of this subchapter*," the Commissioner shall apply state intestacy law. (Emphasis added.) Respondent notes the absence of any cross-reference in § 416(e) to § 416(h). *Id.*, at 18. She overlooks, however, that § 416(h) provides the crucial link. The "subchapter" to which § 416(h) refers is Subchapter II of the Act, which spans §§ 401 through 434. Section 416(h)'s reference to "this subchapter" thus includes both §§ 402(d) and 416(e). Having explicitly complemented § 416(e) by the definitional provisions contained in § 416(h), Congress had no need to place a redundant cross-reference in § 416(e). See *Schafer*, 641 F. 3d, at 54 (Congress, in § 416(h)(2)(A), provided "plain and explicit instruction on how the determination of child status should be made"; on this point, the statute's text "could hardly be more clear.").

The original version of today's § 416(h) was similarly drafted. It provided that, "[i]n determining whether an applicant is the . . . child . . . of [an] insured individual *for purposes of sections 401–409* of this title, the Board shall apply [state intestacy law]." 42 U. S. C. § 409(m) (1940 ed.) (emphasis added). Sections 401–409 embraced §§ 402(c) and 409(k), the statutory predecessors of 42 U. S. C. §§ 402(d) and 416(e) (2006 ed.), respectively.

Reference to state law to determine an applicant's status as a "child" is anything but anomalous. Quite the opposite. The Act commonly refers to state law on matters of family

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been valid save for a legal impediment. Brief for Respondent 26, n. 10; see *supra*, at 548. Whether the Capatos' marriage ceremony was flawed or flawless, the SSA counters, no marital union was extant when the twins were conceived. Reply Brief 11.

status. For example, the Act initially defines "wife" as "the wife of an [insured] individual," if certain conditions are satisfied. § 416(b). Like § 416(e), § 416(b) is, at least in part, tautological ("'wife' means the [insured's] wife"). One must read on, although there is no express cross-reference, to § 416(h) (rules on "[d]etermination of family status") to complete the definition. Section 416(h)(1)(A) directs that, "*for purposes of this subchapter*," the law of the insured's domicile determines whether "[the] applicant and [the] insured individual were validly married," and if they were not, whether the applicant would nevertheless have "the same status" as a wife under the State's intestacy law. (Emphasis added.) The Act similarly defines the terms "widow," "husband," and "widower." See §§ 416(c), (f), (g), (h)(1)(A).

Indeed, as originally enacted, a single provision mandated the use of state intestacy law for "determining whether an applicant is the wife, widow, child, or parent of [an] insured individual." 42 U. S. C. § 409(m) (1940 ed.). All wife, widow, child, and parent applicants thus had to satisfy the same criterion. To be sure, children born during their parents' marriage would have readily qualified under the 1939 formulation because of their eligibility to inherit under state law. But requiring all "child" applicants to qualify under state intestacy law installed a simple test, one that ensured benefits for persons plainly within the legislators' contemplation, while avoiding congressional entanglement in the traditional state-law realm of family relations.

Just as the Act generally refers to state law to determine whether an applicant qualifies as a wife, widow, husband, widower, 42 U. S. C. § 416(h)(1) (2006 ed.), child or parent, § 416(h)(2)(A), so in several sections (§§ 416(b), (c), (e)(2), (f), (g)), the Act sets duration-of-relationship limitations. See *Weinberger* v. *Salfi*, 422 U. S. 749, 777–782 (1975) (discussing § 416(e)(2)'s requirement that, as a check against deathbed marriages, a parent-stepchild relationship must exist "not less than nine months immediately preceding [insured's

death]"). Time limits also qualify the statutes of several States that accord inheritance rights to posthumously conceived children. See Cal. Prob. Code Ann. § 249.5(c) (West Supp. 2012) (allowing inheritance if child is in utero within two years of parent's death); Colo. Rev. Stat. Ann. § 15–11–120(11) (2011) (child in utero within three years or born within 45 months); Iowa Code Ann. § 633.220A(1) (West Supp. 2012) (child born within two years); La. Rev. Stat. Ann. § 9:391.1(A) (West 2008) (child born within three years); N. D. Cent. Code Ann. § 30.1–04–19(11) (Lexis 2010) (child in utero within three years or born within 45 months). See also Uniform Probate Code § 2–120(k), 8 U. L. A. 58 (Supp. 2011) (treating a posthumously conceived child as "in gestation at the individual's death," but only if specified time limits are met). No time constraints attend the Third Circuit's ruling in this case, under which the biological child of married parents is eligible for survivors benefits, no matter the length of time between the father's death and the child's conception and birth. See Tr. of Oral Arg. 36–37 (counsel for Karen Capato acknowledged that, under the preemptive federal rule he advocated, and the Third Circuit adopted, a child born four years after her father's death would be eligible for benefits).

The paths to receipt of benefits laid out in the Act and regulations, we must not forget, proceed from Congress' perception of the core purpose of the legislation. The aim was not to create a program "generally benefiting needy persons"; it was, more particularly, to "provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings." *Califano* v. *Jobst*, 434 U. S. 47, 52 (1977). We have recognized that "where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death." *Mathews* v. *Lucas*, 427 U. S. 495, 514 (1976). Reliance on state

intestacy law to determine who is a "child" thus serves the Act's driving objective. True, the intestacy criterion yields benefits to some children outside the Act's central concern. Intestacy laws in a number of States, as just noted, do provide for inheritance by posthumously conceived children, see *supra*, at 555,[9] and under federal law, a child conceived shortly before her father's death may be eligible for benefits even though she never actually received her father's support. It was nonetheless Congress' prerogative to legislate for the generality of cases. It did so here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings.

Respondent argues that on the SSA's reading, natural children alone must pass through a § 416(h) gateway. Adopted children, stepchildren, grandchildren, and stepgrandchildren, it is true, are defined in § 416(e), and are not further defined in § 416(h). Respondent overlooks, however, that although not touched by § 416(h), beneficiaries described in §§ 416(e)(2) and (e)(3) must meet *other* statutorily prescribed criteria. In short, the Act and regulations set *different* eligibility requirements for adopted children, stepchildren, grandchildren, and stepgrandchildren, see 20 CFR §§ 404.356–404.358, but it hardly follows that applicants in those categories are treated more advantageously than are children who must meet a § 416(h) criterion.

The SSA's construction of the Act, respondent charges, raises serious constitutional concerns under the equal protection component of the Due Process Clause. Brief for Re-

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[9] But see N. Y. Est., Powers & Trusts Law Ann. § 4–1.1(c) (West 1998) ("Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime."). Similar provisions are contained in Ga. Code Ann. § 53–2–1(b)(1) (2011), Idaho Code § 15–2–108 (Lexis 2009), Minn. Stat. Ann. § 524.2–120(10) (West Supp. 2012), S. C. Code Ann. § 62–2–108 (2009), and S. D. Codified Laws § 29A–2–108 (Supp. 2011).

spondent 42; see *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 638, n. 2 (1975). She alleges: "Under the government's interpretation . . . , posthumously conceived children are treated as an inferior subset of natural children who are ineligible for government benefits simply because of their date of birth and method of conception." Brief for Respondent 42–43.

Even the Courts of Appeals that have accepted the reading of the Act respondent advances have rejected this argument. See 631 F. 3d, at 628, n. 1 (citing *Vernoff* v. *Astrue*, 568 F. 3d 1102, 1112 (CA9 2009)). We have applied an intermediate level of scrutiny to laws "burden[ing] illegitimate children for the sake of punishing the illicit relations of their parents, because 'visiting this condemnation on the head of an infant is illogical and unjust.'" *Clark* v. *Jeter*, 486 U. S. 456, 461 (1988) (quoting *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175 (1972)). No showing has been made that posthumously conceived children share the characteristics that prompted our skepticism of classifications disadvantaging children of unwed parents. We therefore need not decide whether heightened scrutiny would be appropriate were that the case.[10] Under rational-basis review, the regime Congress adopted easily passes inspection. As the Ninth Circuit held, that regime is "reasonably related to the government's twin interests in [reserving] benefits [for] those children who have lost a parent's support, and in using reasonable presumptions to minimize the administrative burden of proving dependency on a case-by-case basis." *Vernoff*, 568 F. 3d, at 1112 (citing *Mathews*, 427 U. S., at 509).

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[10] Ironically, while drawing an analogy to the "illogical and unjust" discrimination children born out of wedlock encounter, see *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 175–176 (1972), respondent asks us to differentiate between children whose parents were married and children whose parents' liaisons were not blessed by clergy or the State. She would eliminate the intestacy test only for biological children of *married parents*.

IV

As we have explained, § 416(e)(1)'s statement, "[t]he term 'child' means . . . the child . . . of an individual," is a definition of scant utility without aid from neighboring provisions. See *Schafer*, 641 F. 3d, at 54. That aid is supplied by § 416(h)(2)(A), which completes the definition of "child" "for purposes of th[e] subchapter" that includes § 416(e)(1). Under the completed definition, which the SSA employs, § 416(h)(2)(A) refers to state law to determine the status of a posthumously conceived child. The SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference under *Chevron*, 467 U. S. 837.

Chevron deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U. S. 218, 226–227 (2001). Here, as already noted, the SSA's longstanding interpretation is set forth in regulations published after notice-and-comment rulemaking. See *supra*, at 549. Congress gave the Commissioner authority to promulgate rules "necessary or appropriate to carry out" the Commissioner's functions and the relevant statutory provisions. See 42 U. S. C. §§ 405(a), 902(a)(5). The Commissioner's regulations are neither "arbitrary or capricious in substance, [n]or manifestly contrary to the statute." *Mayo Foundation for Medical Ed. and Research* v. *United States*, 562 U. S. 44, 53 (2011) (internal quotation marks omitted). They thus warrant the Court's approbation. See *Barnhart* v. *Walton*, 535 U. S. 212, 217–222, 225 (2002) (deferring to the Commissioner's "considerable authority" to interpret the Act).

V

Tragic circumstances—Robert Capato's death before he and his wife could raise a family—gave rise to this case. But the law Congress enacted calls for resolution of Karen Capato's application for child's insurance benefits by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the statute's text scarcely supports.

* * *

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

It is so ordered.

Syllabus

TANIGUCHI *v.* KAN PACIFIC SAIPAN, LTD., DBA MARIANAS RESORT AND SPA

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

No. 10–1472. Argued February 21, 2012—Decided May 21, 2012

Title 28 U. S. C. § 1920, as amended by the Court Interpreters Act, includes "compensation of interpreters" among the costs that may be awarded to prevailing parties in federal-court lawsuits. § 1920(6). In this case, the District Court awarded costs to respondent as the prevailing party in a civil action instituted by petitioner. The award included the cost of translating from Japanese to English certain documents that respondent used in preparing its defense. The Ninth Circuit affirmed, concluding that § 1920(6) covers the cost of translating documents as well as the cost of translating live speech.

Held: Because the ordinary meaning of "interpreter" is someone who translates orally from one language to another, the category "compensation of interpreters" in § 1920(6) does not include the cost of document translation. Pp. 564–575.

(a) Section 1920 reflects the substance of an 1853 Act that specified for the first time what costs are allowable in federal court. That provision defines the term "costs" as used in Federal Rule of Civil Procedure 54(d), which gives courts the discretion to award costs to prevailing parties. *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 441. As originally configured, § 1920 contained five categories of taxable costs, but in 1978, Congress enacted the Court Interpreters Act, which added a sixth category that includes "compensation of interpreters." § 1920(6). Pp. 564–566.

(b) Because the term "interpreter" is not defined in the Court Interpreters Act or in any other relevant statutory provision, it must be given its ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187. When Congress passed that Act in 1978, many dictionaries defined "interpreter" as one who translates spoken, as opposed to written, language. Pre-1978 legal dictionaries also generally defined "interpreter" and "interpret" in terms of oral translation. Respondent relies almost exclusively on a version of Webster's Third New International Dictionary that defined "interpreter" as "one that translates; *esp*: a person who translates orally for parties conversing in different tongues." Although the sense divider *esp* (for especially) indicates that the most common meaning of the term is one "who translates orally," that mean-

ing is subsumed within the more general definition "one that translates." That a definition is broad enough to encompass one sense of a word does not establish, however, that the word is ordinarily understood in that sense. See *Mallard* v. *United States Dist. Court for Southern Dist. of Iowa*, 490 U. S. 296, 301. Although all relevant dictionaries defined "interpreter" at the time of the statute's enactment as including persons who translate orally, only a handful defined the word broadly enough to encompass translators of written materials. Notably, the Oxford English Dictionary, one of the most authoritative, recognized that "interpreter" can mean one who translates writings, but it expressly designated that meaning as obsolete. Any definition of a word that is absent from many dictionaries and is deemed obsolete in others is hardly a common or ordinary meaning. Given this survey of relevant dictionaries, the ordinary meaning of "interpreter" does not include those who translate writings. Nothing in the Court Interpreters Act or in § 1920 hints that Congress intended to go beyond this ordinary meaning. If anything, the statutory context suggests that "interpreter" includes only those who translate orally. See 28 U. S. C. § 1827. Moreover, Congress' use of technical terminology reflects the distinction in relevant professional literature between interpreters, who are used for oral conversations, and translators, who are used for written communications. Pp. 566–572.

(c) No other rule of construction compels a departure from the ordinary meaning of "interpreter." This Court has never held that Rule 54(d) creates a presumption in favor of the broadest possible reading of the costs enumerated in § 1920. To the contrary, the Court has made clear that the "discretion granted by Rule 54(d) is not a power to evade" the specific categories of costs set forth by Congress, *Crawford Fitting*, 482 U. S., at 442, but "is solely a power to decline to tax, as costs, the items enumerated in § 1920," *ibid.* This Court's conclusion is in keeping with the narrow bounds of taxable costs, which are limited by statute and modest in scope. Respondent's extratextual arguments—that documentary evidence is no less important than testimonial evidence and that some translation tasks are not entirely oral or entirely written—are more properly directed at Congress. In any event, neither argument is so compelling that Congress must have intended to dispense with the ordinary meaning of "interpreter" in § 1920(6). Pp. 572–575.

633 F. 3d 1218, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, and KAGAN, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined, *post*, p. 575.

Michael S. Fried argued the cause for petitioner. With him on the briefs were *Donald B. Ayer*, *Christopher J. Smith*, and *Douglas F. Cushnie.*

Dan Himmelfarb argued the cause for respondent. With him on the brief were *Michael B. Kimberly* and *Thomas L. Roberts.**

JUSTICE ALITO delivered the opinion of the Court.

The costs that may be awarded to prevailing parties in lawsuits brought in federal court are set forth in 28 U. S. C. § 1920. The Court Interpreters Act amended that statute to include "compensation of interpreters." § 1920(6); see also § 7, 92 Stat. 2044. The question presented in this case is whether "compensation of interpreters" covers the cost of translating documents. Because the ordinary meaning of the word "interpreter" is a person who translates orally from one language to another, we hold that "compensation of interpreters" is limited to the cost of oral translation and does not include the cost of document translation.

I

This case arises from a personal injury action brought by petitioner Kouichi Taniguchi, a professional baseball player in Japan, against respondent Kan Pacific Saipan, Ltd., the owner of a resort in the Northern Mariana Islands. Petitioner was injured when his leg broke through a wooden deck during a tour of respondent's resort property. Initially, petitioner said that he needed no medical attention,

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**Mark T. Stancil*, *David T. Goldberg*, *Daniel R. Ortiz*, *James E. Ryan*, and *John P. Elwood* filed a brief for the National Association of Judiciary Interpreters and Translators as *amicus curiae* urging reversal.

Deanne E. Maynard, *Brian R. Matsui*, and *Marc A. Hearron* filed a brief for the Chicago Area Translators and Interpreters Association et al. as *amici curiae* urging affirmance.

M. Scott Barnard, *Scott T. Williams*, and *Patrick G. O'Brien* filed a brief for Interpreting and Translation Professors as *amici curiae.*

but two weeks later, he informed respondent that he had suffered cuts, bruises, and torn ligaments from the accident. Due to these alleged injuries, he claimed damages for medical expenses and for lost income from contracts he was unable to honor. After discovery concluded, both parties moved for summary judgment. The United States District Court for the Northern Mariana Islands granted respondent's motion on the ground that petitioner offered no evidence that respondent knew of the defective deck or otherwise failed to exercise reasonable care.

In preparing its defense, respondent paid to have various documents translated from Japanese to English. After the District Court granted summary judgment in respondent's favor, respondent submitted a bill for those costs. Over petitioner's objection, the District Court awarded the costs to respondent as "compensation of interpreters" under § 1920(6). Explaining that interpreter services "cannot be separated into 'translation' and 'interpretation,'" App. to Pet. for Cert. 25a, the court held that costs for document translation "fal[l] within the meaning of 'compensation of an interpreter,'" *ibid.* Finding that it was necessary for respondent to have the documents translated in order to depose petitioner, the court concluded that the translation services were properly taxed as costs.

The United States Court of Appeals for the Ninth Circuit affirmed both the District Court's grant of summary judgment and its award of costs. The court rejected petitioner's argument that the cost of document translation services is not recoverable as "compensation of interpreters." The court explained that "the word 'interpreter' can reasonably encompass a 'translator,' both according to the dictionary definition and common usage of these terms, which does not always draw precise distinctions between foreign language interpretations involving live speech versus written documents." 633 F. 3d 1218, 1221 (2011). "More importantly," the court stressed, this construction of the statute "is more

compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party." *Ibid.* The court thus concluded that "the prevailing party should be awarded costs for services required to interpret either live speech or written documents into a familiar language, so long as interpretation of the items is necessary to the litigation." *Id.*, at 1221–1222.

Because there is a split among the Courts of Appeals on this issue,[1] we granted certiorari. 564 U. S. 1066 (2011).

II

A

Although the taxation of costs was not allowed at common law, it was the practice of federal courts in the early years to award costs in the same manner as the courts of the relevant forum State. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247–248 (1975). In 1793, Congress enacted a statute that authorized the awarding of certain costs to prevailing parties based on state law:

> "That there be allowed and taxed in the supreme, circuit and district courts of the United States, in favour of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attornies and counsellors' fees . . . as are allowed in the supreme or superior courts of the respective states." Act of Mar. 1, 1793, ch. 20, § 4, 1 Stat. 333.

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[1] Compare *BDT Products, Inc.* v. *Lexmark Int'l, Inc.*, 405 F. 3d 415, 419 (CA6 2005) (holding that document translation costs are taxable under § 1920(6) because the "definition of interpret expressly includes to 'translate into intelligible or familiar language'" (quoting Webster's Third New International Dictionary 1182 (1981))), with *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F. 3d 719, 727–728 (CA7 2008) (holding that document translation costs are not taxable under § 1920(6) because an interpreter is "normally understood [as] a person who translates living speech from one language to another").

Although twice reenacted, this provision expired in 1799. *Alyeska Pipeline*, *supra*, at 248, n. 19; *Crawford Fitting Co.* v. *J. T. Gibbons, Inc.*, 482 U. S. 437, 439 (1987). Yet even in the absence of express legislative authorization, the practice of referring to state rules for the taxation of costs persisted. See *Alyeska Pipeline*, 421 U. S., at 250.

Not until 1853 did Congress enact legislation specifying the costs allowable in federal court. *Id.*, at 251. The impetus for a uniform federal rule was largely the consequence of two developments. First, a "great diversity in practice among the courts" had emerged. *Ibid.* Second, "losing litigants were being unfairly saddled with exorbitant fees for the victor's attorney." *Ibid.* Against this backdrop, Congress passed the 1853 Fee Act, which we have described as a "far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts." *Id.*, at 251–252. The substance of this Act was transmitted through the Revised Statutes of 1874 and the Judicial Code of 1911 to the Revised Code of 1948, where it was codified, "without any apparent intent to change the controlling rules," as 28 U. S. C. § 1920. 421 U. S., at 255.

Federal Rule of Civil Procedure 54(d) gives courts the discretion to award costs to prevailing parties. That Rule provides in relevant part: "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Rule 54(d)(1). We have held that "§ 1920 defines the term 'costs' as used in Rule 54(d)." *Crawford Fitting*, 482 U. S., at 441. In so doing, we rejected the view that "the discretion granted by Rule 54(d) is a separate source of power to tax as costs expenses not enumerated in § 1920." *Ibid.*

As originally configured, § 1920 contained five categories of taxable costs: (1) "[f]ees of the clerk and marshal"; (2) "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case"; (3) "[f]ees and disbursements for printing and witnesses";

(4) "[f]ees for exemplification and copies of papers necessarily obtained for use in the case"; and (5) "[d]ocket fees under section 1923 of this title." 62 Stat. 955. In 1978, Congress enacted the Court Interpreters Act, which amended § 1920 to add a sixth category: "[c]ompensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U. S. C. § 1920(6); see also § 7, 92 Stat. 2044. We are concerned here with this sixth category, specifically the item of taxable costs identified as "compensation of interpreters."

B

To determine whether the item "compensation of interpreters" includes costs for document translation, we must look to the meaning of "interpreter." That term is not defined in the Court Interpreters Act or in any other relevant statutory provision. When a term goes undefined in a statute, we give the term its ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995). The question here is: What is the ordinary meaning of "interpreter"?

Many dictionaries in use when Congress enacted the Court Interpreters Act in 1978 defined "interpreter" as one who translates spoken, as opposed to written, language. The American Heritage Dictionary, for instance, defined the term as "[o]ne who translates orally from one language into another." American Heritage Dictionary 685 (1978). The Scribner-Bantam English Dictionary defined the related word "interpret" as "to translate orally." Scribner-Bantam English Dictionary 476 (1977). Similarly, the Random House Dictionary defined the intransitive form of "interpret" as "to translate what is *said* in a foreign language." Random House Dictionary of the English Language 744 (1973) (emphasis added). And, notably, the Oxford English Dictionary defined "interpreter" as "[o]ne who translates languages," but then divided that definition into two senses: "a. [a] translator of books or writings," which it designated

as obsolete, and "b. [o]ne who translates the communications of persons speaking different languages; *spec.* one whose office it is to do so orally in the presence of the persons; a dragoman." 5 Oxford English Dictionary 416 (1933); see also Concise Oxford Dictionary of Current English 566 (6th ed. 1976) ("[o]ne who interprets; one whose office it is to translate the words of persons speaking different languages, esp. orally in their presence"); Chambers Twentieth Century Dictionary 686 (1973) ("one who translates orally for the benefit of two or more parties speaking different languages: . . . a translator (*obs.*)").

Pre-1978 legal dictionaries also generally defined the words "interpreter" and "interpret" in terms of oral translation. The then-current edition of Black's Law Dictionary, for example, defined "interpreter" as "[a] person sworn at a trial to interpret the evidence of a foreigner . . . to the court," and it defined "interpret" in relevant part as "to translate orally from one tongue to another." Black's Law Dictionary 954, 953 (rev. 4th ed. 1968); see also W. Anderson, A Dictionary of Law 565 (1888) ("[o]ne who translates the testimony of witnesses speaking a foreign tongue, for the benefit of the court and jury"); 1 B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence 639 (1878) ("one who restates the testimony of a witness testifying in a foreign tongue, to the court and jury, in their language"). But see Ballentine's Law Dictionary 655, 654 (3d ed. 1969) (defining "interpreter" as "[o]ne who interprets, particularly one who interprets words written or spoken in a foreign language," and "interpret" as "to translate from a foreign language").

Against these authorities, respondent relies almost exclusively on Webster's Third New International Dictionary (hereinafter Webster's Third). The version of that dictionary in print when Congress enacted the Court Interpreters Act defined "interpreter" as "one that translates; *esp*: a person who translates orally for parties conversing in different

tongues." Webster's Third 1182 (1976).[2] The sense divider *esp* (for especially) indicates that the most common meaning of the term is one "who translates orally," but that meaning is subsumed within the more general definition "one that translates." See 12,000 Words: A Supplement to Webster's Third 15a (1986) (explaining that *esp* "is used to introduce the most common meaning included in the more general preceding definition"). For respondent, the general definition suffices to establish that the term "interpreter" ordinarily includes persons who translate the written word. Explaining that "the word 'interpreter' can reasonably encompass a 'translator,' " the Court of Appeals reached the same conclusion. 633 F. 3d, at 1221. We disagree.

That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense. See *Mallard* v. *United States Dist. Court for Southern Dist. of Iowa*, 490 U. S. 296, 301 (1989) (relying on the "most common meaning" and the "ordinary and natural signification" of the word "request," even though it may sometimes "double for 'demand' or 'command' "). The fact that the definition of "interpreter" in Webster's Third has a sense divider denoting the most common usage suggests that other usages, although acceptable, might not be common or ordinary. It is telling that all the dictionaries cited above defined "interpreter" at the time of the statute's enactment as including persons who translate orally, but only a handful defined the word broadly enough to encompass

[2] A handful of other contemporaneous dictionaries used a similar formulation. See Funk & Wagnalls New Comprehensive International Dictionary of the English Language 665 (1977) ("[o]ne who interprets or translates; specifically, one who serves as oral translator between people speaking different languages"); 1 World Book Dictionary 1103 (C. Barnhart & R. Barnhart eds. 1977) ("a person whose business is translating, especially orally, from a foreign language"); Cassell's English Dictionary 617 (4th ed. 1969) ("[o]ne who interprets, esp. one employed to translate orally to persons speaking a foreign language").

translators of written material. See *supra*, at 566–568. Although the Oxford English Dictionary, one of the most authoritative on the English language, recognized that "interpreter" *can* mean one who translates writings, it expressly designated that meaning as obsolete. See *supra*, at 566–567. Were the meaning of "interpreter" that respondent advocates truly common or ordinary, we would expect to see more support for that meaning. We certainly would not expect to see it designated as obsolete in the Oxford English Dictionary. Any definition of a word that is absent from many dictionaries and is deemed obsolete in others is hardly a common or ordinary meaning.

Based on our survey of the relevant dictionaries, we conclude that the ordinary or common meaning of "interpreter" does not include those who translate writings. Instead, we find that an interpreter is normally understood as one who translates orally from one language to another. This sense of the word is far more natural. As the Seventh Circuit put it: "Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language 'interpreter' of these works." *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F. 3d 719, 727 (2008).

To be sure, the word "interpreter" can encompass persons who translate documents, but because that is not the ordinary meaning of the word, it does not control unless the context in which the word appears indicates that it does. Nothing in the Court Interpreters Act or in § 1920, however, even hints that Congress intended to go beyond the ordinary meaning of "interpreter" and to embrace the broadest possible meaning that the definition of the word can bear.

If anything, the statutory context suggests the opposite: that the word "interpreter" applies only to those who translate orally. As previously mentioned, Congress enacted § 1920(6) as part of the Court Interpreters Act. The main

provision of that Act is § 2(a), codified in 28 U. S. C. §§ 1827 and 1828. See 92 Stat. 2040–2042. Particularly relevant here is § 1827. As it now reads, that statute provides for the establishment of "a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States." § 1827(a). Subsection (d) directs courts to use an interpreter in any criminal or civil action instituted by the United States if a party or witness "speaks only or primarily a language other than the English language" or "suffers from a hearing impairment" "so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony." § 1827(d)(1).[3] As originally enacted, subsection (k) mandated that the "interpretation provided by certified interpreters . . . shall be in the consecutive mode except that the presiding judicial officer . . . may authorize a simultaneous or summary interpretation." § 1827(k) (1976 ed., Supp. II); see also 92 Stat. 2042. In its current form, subsection (k) provides that interpretation "shall be in the simultaneous mode for any party . . . and in the consecutive mode for witnesses," unless the court directs otherwise. The simultaneous, consecutive, and summary modes are all methods of oral interpretation and have nothing to do with the translation of writings.[4] Taken together, these provisions are a strong

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[3] This provision remains substantially the same as it appeared when first enacted. See 28 U. S. C. § 1827(d)(1) (1976 ed., Supp. II); see also 92 Stat. 2040.

[4] The simultaneous mode requires the interpreter "to interpret and to speak contemporaneously with the individual whose communication is being translated." H. R. Rep. No. 95–1687, p. 8 (1978). The consecutive mode requires the speaker whose communication is being translated to pause so that the interpreter can "convey the testimony given." *Ibid.* And the summary mode "allow[s] the interpreter to condense and distill the speech of the speaker." *Ibid.;* see generally Zazueta, Attorneys Guide to the Use of Court Interpreters, 8 U. C. D. L. Rev. 471, 477–478 (1975).

contextual clue that Congress was dealing only with oral translation in the Court Interpreters Act and that it intended to use the term "interpreter" throughout the Act in its ordinary sense as someone who translates the spoken word. As we have said before, it is a " 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.' " *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 570 (1995) (quoting *Department of Revenue of Ore.* v. *ACF Industries, Inc.*, 510 U. S. 332, 342 (1994)).[5]

The references to technical terminology in the Court Interpreters Act further suggest that Congress used "interpreter" in a technical sense, and it is therefore significant that relevant professional literature draws a line between "interpreters," who "are used for oral conversations," and "translators," who "are used for written communications." Zazueta, *supra* n. 4, at 477; see also M. Frankenthaler, Skills for Bilingual Legal Personnel 67 (1982) ("While the translator deals with the written word, the interpreter is concerned with the spoken language"); Brislin, Introduction, in Translation: Applications and Research 1 (R. Brislin ed. 1976) (explaining that when both terms are used together, translation "refers to the processing [of] written input, and interpretation to the processing of oral input" (emphasis deleted)); J. Herbert, Interpreter's Handbook 1 (2d ed. 1952) ("In the present-day jargon of international organisations, the words translate, translations, translator are used when the immediate result of the work is a written text; and the words inter-

[5] The dissent agrees that context should help guide our analysis, but instead of looking to the Court Interpreters Act, it looks to "the practice of federal courts both before and after § 1920(6)'s enactment." *Post*, at 579 (opinion of GINSBURG, J.). The practice of federal courts *after* the Act's enactment tells us nothing about what Congress intended at the time of enactment. And federal-court practice *before* the Act under other provisions of § 1920 tells us little, if anything, about what Congress intended when it added paragraph (6). We think the statutory context in which the word "interpreter" appears is a more reliable guide to its meaning.

pret, interpreter, interpretation when it is a speech delivered orally"). That Congress specified "interpreters" but not "translators" is yet another signal that it intended to limit § 1920(6) to the costs of oral, instead of written, translation.[6]

In sum, both the ordinary and technical meanings of "interpreter," as well as the statutory context in which the word is found, lead to the conclusion that § 1920(6) does not apply to translators of written materials.[7]

C

No other rule of construction compels us to depart from the ordinary meaning of "interpreter." The Court of Appeals reasoned that a broader meaning is "more compatible with Rule 54 of the Federal Rules of Civil Procedure, which includes a decided preference for the award of costs to the prevailing party." 633 F. 3d, at 1221. But we have never held that Rule 54(d) creates a presumption of statutory construction in favor of the broadest possible reading of the costs enumerated in § 1920. To the contrary, we have made clear that the "discretion granted by Rule 54(d) is not a power to evade" the specific categories of costs set forth by Congress. *Crawford Fitting*, 482 U. S., at 442. "Rather,"

[6] Some provisions within the United States Code use both "interpreter" and "translator" together, thus implying that Congress understands the terms to have the distinct meanings described above. See, *e. g.*, 8 U. S. C. § 1555(b) (providing that appropriations for the Immigration and Naturalization Service "shall be available for payment of . . . interpreters and translators who are not citizens of the United States"); 28 U. S. C. § 530C(b)(1)(I) (providing that Department of Justice funds may be used for "[p]ayment of interpreters and translators who are not citizens of the United States").

[7] Our conclusion is buttressed by respondent's concession at oral argument that there is no provision in the United States Code where it is clear that the word extends to those who translate documents. Tr. of Oral Arg. 39; see also Brief for Petitioner 32 ("And the Code is wholly devoid of any corresponding definition of 'interpreter' extending to the translation of written documents"). As respondent acknowledged, either the word is used in a context that strongly suggests it applies only to oral translation or its meaning is unclear. See Tr. of Oral Arg. 38.

we have said, "it is solely a power to decline to tax, as costs, the items enumerated in § 1920." *Ibid.* Rule 54(d) thus provides no sound basis for casting aside the ordinary meaning of the various items enumerated in the costs statute, including the ordinary meaning of "interpreter."

Our decision is in keeping with the narrow scope of taxable costs. "Although 'costs' has an everyday meaning synonymous with 'expenses,' the concept of taxable costs under Rule 54(d) is more limited and represents those expenses, including, for example, court fees, that a court will assess against a litigant." 10 C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2666, pp. 202–203 (3d ed. 1998) (hereinafter Wright & Miller). Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts. Indeed, "the assessment of costs most often is merely a clerical matter that can be done by the court clerk." *Hairline Creations, Inc.* v. *Kefalas*, 664 F. 2d 652, 656 (CA7 1981). Taxable costs are a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators. It comes as little surprise, therefore, that "costs almost always amount to less than the successful litigant's total expenses in connection with a lawsuit." 10 Wright & Miller § 2666, at 203. Because taxable costs are limited by statute and are modest in scope, we see no compelling reason to stretch the ordinary meaning of the cost items Congress authorized in § 1920.

As for respondent's extratextual arguments, they are more properly directed at Congress. Respondent contends that documentary evidence is no less important than testimonial evidence and that it would be anomalous to require the losing party to cover translation costs for spoken words but not for written words. Brief for Respondent 20. Respondent also observes that some translation tasks are not entirely oral or entirely written. *Id.,* at 20–24. One task, called " 'sight

translation,'" involves the oral translation of a document. *Id.*, at 21. Another task involves the written translation of speech. *Ibid.* And a third task, called "'document comparison,'" involves comparing documents in the source and target language to verify that the two are identical. *Id.*, at 21–22. Respondent argues that a narrow definition cannot account for these variations and that a bright-line definition of "interpreter" as someone who translates spoken and written words would avoid complication and provide a simple, administrable rule for district courts.

Neither of these arguments convinces us that Congress must have intended to dispense with the ordinary meaning of "interpreter" in § 1920(6). First, Congress might have distinguished between oral and written translation out of a concern that requiring losing parties to bear the potentially sizable costs of translating discovery documents, as opposed to the more limited costs of oral testimony, could be too burdensome and possibly unfair, especially for litigants with limited means. Cf. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967) (noting the argument "that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel"). Congress might also have concluded that a document translator is more akin to an expert or consultant retained by a party to decipher documentary evidence—like, for instance, a forensic accountant—than to an interpreter whose real-time oral translation services are necessary for communication between litigants, witnesses, and the court.[8]

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[8] The dissent contends that document translation, no less than oral translation, is essential "to equip the parties to present their case clearly and the court to decide the merits intelligently." *Post*, at 579. But a document translator is no more important than an expert or consultant in making sense of otherwise incomprehensible documentary evidence, yet expenses

Second, respondent has not shown that any of the hybrid translation/interpretation tasks to which it points actually arise with overwhelming frequency or that the problem of drawing the line between taxable and nontaxable costs in such cases will vex the trial courts. It certainly has not shown that any such problems will be more troublesome than the task of sifting through translated discovery documents to ascertain which can be taxed as necessary to the litigation. In any event, the present case does not present a hybrid situation; it involves purely written translation, which falls outside the tasks performed by an "interpreter" as that term is ordinarily understood.

* * *

Because the ordinary meaning of "interpreter" is someone who translates orally from one language to another, we hold that the category "compensation of interpreters" in § 1920(6) does not include costs for document translation. We therefore vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

To be comprehended by the parties, the witnesses, and the court, expression in foreign languages must be translated into English. Congress therefore provided, in 28 U. S. C. § 1920(6), that the prevailing party may recoup compensation paid to "interpreters." The word "interpreters," the Court

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for experts and consultants are generally not taxable as costs. To be sure, forgoing document translation can impair a litigant's case, but document translation is not indispensable, in the way oral translation is, to the parties' ability to communicate with each other, with witnesses, and with the court.

emphasizes, commonly refers to translators of oral speech. *Ante*, at 566–567. But as the Court acknowledges, *ante*, at 567–568, and n. 2, "interpreters" is more than occasionally used to encompass those who translate written speech as well. See Webster's Third New International Dictionary of the English Language 1182 (1976) (hereinafter Webster's) (defining "interpreter" as "one that translates; *esp*: a person who translates orally for parties conversing in different tongues"); Black's Law Dictionary 895 (9th ed. 2009) (defining "interpreter" as a "person who translates, esp. orally, from one language to another"); Ballentine's Law Dictionary 655 (3d ed. 1969) (defining "interpreter" as "[o]ne who interprets, particularly one who interprets words written or spoken in a foreign language").

In short, employing the word "interpreters" to include translators of written as well as oral speech, if not "the most common usage," *ante*, at 568, is at least an "acceptable" usage, *ibid.* Moreover, the word "interpret" is generally understood to mean "to explain or tell the meaning of: translate into intelligible or familiar language or terms," while "translate" commonly means "to turn into one's own or another language." Webster's 1182, 2429. See also Random House Dictionary of the English Language 744, 1505 (1973) (defining the transitive verb "interpret" as, *inter alia*, "to translate," and "translate" as "to turn (something written or spoken) from one language into another").

Notably, several Federal District Court decisions refer to translators of written documents as "interpreters." *E. g.*, *United States* v. *Prado-Cervantez*, No. 11–40044–11, 2011 WL 4691934, *3 (D Kan., Oct. 6, 2011) ("Standby counsel should also be prepared to arrange for interpreters to interpret or translate documents when necessary for defendant."); *Mendoza* v. *Ring*, No. 07–3144, 2008 WL 2959848, *2 (CD Ill., July 30, 2008) ("The interpreter is also directed to translate filings by the plaintiff from Spanish to English. The original and translated versions will be docketed."). So do

a number of state statutes. *E. g.*, Cal. Govt. Code Ann. § 26806(a) (West 2008) ("[T]he clerk of the court may employ as many foreign language interpreters as may be necessary . . . to translate documents intended for filing in any civil or criminal action . . . .").

Most Federal Courts of Appeals confronted with the question have held that costs may be awarded under § 1920(6) for the translation of documents necessary to, or in preparation for, litigation. Compare 633 F. 3d 1218, 1220–1222 (CA9 2011); *BDT Prods., Inc.* v. *Lexmark Int'l, Inc.*, 405 F. 3d 415, 419 (CA6 2005); *Slagenweit* v. *Slagenweit*, 63 F. 3d 719, 721 (CA8 1995) *(per curiam)*; and *Chore-Time Equip., Inc.* v. *Cumberland Corp.*, 713 F. 2d 774, 782 (CA Fed. 1983) (all holding that costs for document translation are covered by § 1920(6)), with *Extra Equipamentos E Exportação Ltda.* v. *Case Corp.*, 541 F. 3d 719, 727–728 (CA7 2008) (costs for document translation are not covered by § 1920(6)). See also *In re Puerto Rico Elec. Power Auth.*, 687 F. 2d 501, 506, 510 (CA1 1982) (recognizing that costs of document translation may be reimbursed, without specifying the relevant subsection of § 1920); *Studiengesellschaft Kohle mbH* v. *Eastman Kodak Co.*, 713 F. 2d 128, 133 (CA5 1983) (allowing document translation costs under § 1920(4)); *Quy* v. *Air Am., Inc.*, 667 F. 2d 1059, 1065 (CADC 1981) (allowing "translation costs" under § 1920(6)).[1]

In practice, federal trial courts have awarded document translation costs in cases spanning several decades. See, *e. g., Raffold Process Corp.* v. *Castanea Paper Co.*, 25 F. Supp. 593, 594 (WD Pa. 1938). Before the Court Interpreters Act added § 1920(6) to the taxation of costs statute in 1978, district courts awarded costs for document translation under § 1920(4), which allowed taxation of "[f]ees for exem-

[1] Translation costs, like other costs recoverable under § 1920, may be "denied or limited" if they "were unreasonably incurred or unnecessary to the case." 10 Moore's Federal Practice § 54.101[1][b], p. 54–158 (3d ed. 2012).

plification and copies of papers," 28 U. S. C. § 1920(4) (1976 ed.), or under § 1920's predecessor, 28 U. S. C. § 830 (1926 ed.). See, *e. g.*, *Bennett Chemical Co.* v. *Atlantic Commodities, Ltd.*, 24 F. R. D. 200, 204 (SDNY 1959) (§ 1920(4)); *Raffold Process Corp.*, 25 F. Supp., at 594 (§ 830). Pre-1978, district courts also awarded costs for oral translation of witness testimony. See, *e. g.*, *Kaiser Industries Corp.* v. *McLouth Steel Corp.*, 50 F. R. D. 5, 11 (ED Mich. 1970). Nothing in the Court Interpreters Act, a measure intended to expand access to interpretation services, indicates a design to eliminate the availability of costs awards for document translation. See S. Rep. No. 95–569, p. 4 (1977) (hereinafter S. Rep.) ("The committee . . . feels the time has come to provide by statute for the provision of and access to qualified certified interpreters, for a broader spectrum of people than the present law allows."). Post-1978, rulings awarding document translation costs under § 1920(6) indicate the courts' understanding both that the term "interpreter" can readily encompass oral and written translation, and that Congress did not otherwise instruct.[2] I agree that context should guide the determina-

[2] Currently, some Federal District Courts make the practice of allowing fees for translation of documents explicit in their local rules. See Rule 54–4.8 (CD Cal. 2012) (allowing "[f]ees for translation of documents . . . reasonably necessary to the preparation of the case"); Rule 54.1(b)(7)(B) (Guam 2011) (same); Rule 54.1(c)(7) (Idaho 2011) (allowing reasonable fee if the "document translated is necessarily filed or admitted in evidence"); Rule 54.4(7) (MD Pa. 2011) (same); Rule 54.1(e)(7) (Ariz. 2012) (same); Rule 54.1(b)(4)(e) (SD Cal. 2012) (same); Rule 54.1(g)(2) (NJ 2011) (same); Rule 54–5(d) (Nev. 2011) (same); Rule 54.2(d) (NM 2012) (allowing translator's fee if the translated document is admitted into evidence); Rule 54.1(c)(4) (SDNY 2012) (allowing reasonable fee if translated document "is used or received in evidence"); Rule 54.1(c)(4) (EDNY 2012) (same). See also Rule 54.03(F)(1)(c) (SC 2012) (allowing costs of certain document translations under § 1920(4)); Rule 54.1(b)(5) (Del. 2011) (same); Rule 54(c)(3)(i) (Conn. 2011) (same); Misc. Order, Allowable Items for Taxation of Costs ¶7 (ND Fla. 2007) (allowing "fee of a competent translator of a non-English document that is filed or admitted into evidence"); Taxation of Costs Guidelines, II(H) (PR 2009) (allowing fees for translation of documents filed

tion whether § 1920(6) is most sensibly read to encompass persons who translate documents. See *ante*, at 569. But the context key for me is the practice of federal courts both before and after § 1920(6)'s enactment.

The purpose of translation, after all, is to make relevant foreign-language communication accessible to the litigants and the court. See S. Rep., at 1 (The Court Interpreters Act is intended "to insure that all participants in our Federal courts can meaningfully take part."). Documentary evidence in a foreign language, no less than oral statements, must be translated to equip the parties to present their case clearly and the court to decide the merits intelligently. See, *e. g.*, *United States* v. *Mosquera*, 816 F. Supp. 168, 175 (EDNY 1993) ("For a non-English speaking [party] to stand equal with others before the court requires translation [of relevant documents]."); *Lockett* v. *Hellenic Sea Transports, Ltd.*, 60 F. R. D. 469, 473 (ED Pa. 1973) ("To be understood by counsel for plaintiffs and defendant, as well as for use at trial, the [ship's] deck log had to be translated [from Greek] into the English language.").[3] And it is not extraordinary that what documents say, more than what witnesses testify, may make or break a case.

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or admitted into evidence), available at http://www.prd.uscourts.gov/courtweb/pdf/taxation_of_costs_guidelines_2007_with_time_computation_amendments.pdf (All Internet materials as visited May 17, 2012, and included in Clerk of Court's case file.); Taxation of Costs (Mass. 2000) (allowing fees "for translation of documents . . . reasonably necessary for trial preparation"), available at http://www.mad.uscourts.gov/resources/pdf/taxation.pdf.

[3] Noteworthy, other paragraphs Congress placed in § 1920 cover written documents. See 28 U. S. C. § 1920(2) (2006 ed., Supp. IV) ("[f]ees for printed or electronically recorded transcripts"); § 1920(3) (2006 ed.) ("[f]ees and disbursements for printing and witnesses"); § 1920(4) (2006 ed., Supp. IV) ("[f]ees for exemplification and the costs of making copies of any [necessary] materials"). Nothing indicates that Congress intended paragraph (6), unlike paragraphs (2)–(4), to apply exclusively to oral communications.

Distinguishing written from oral translation for cost-award purposes, moreover, is an endeavor all the more dubious, for, as the Court acknowledges, *ante*, at 573–574, some translation tasks do not fall neatly into one category or the other. An interpreter, for example, may be called upon to "sight translat[e]" a written document, *i. e.*, to convey a written foreign-language document's content orally in English. R. González, V. Vásquez, & H. Mikkelson, Fundamentals of Court Interpretation: Theory, Policy, and Practice 401 (1991) (hereinafter González). In-court sight translation, Taniguchi concedes, counts as "interpretation," even though it does not involve translating verbal expression. Tr. of Oral Arg. 10. Yet an interpreter's preparation for in-court sight translation by translating a written document in advance, Taniguchi maintains, does not count as "interpretation." *Ibid.* But if the interpreter then reads the prepared written translation aloud in court, that task, in Taniguchi's view, can be charged as "interpretation," *id.*, at 11, even though the reading involves no translation of foreign-language expression—written *or* oral—at all.

Similarly hard to categorize is the common court-interpreter task of listening to a recording in a foreign language, transcribing it, then translating it into English. See González 439. Although this task involves oral foreign-language communication, it does not, Taniguchi contends, qualify as "interpretation," because it involves "the luxury of multiple playbacks of the tape and the leisure to consult extrinsic linguistic sources." Reply Brief 9 (internal quotation marks omitted). But sight translation—which Taniguchi concedes may be charged as "interpretation"—may sometimes involve similarly careful linguistic analysis of a written document in advance of a court proceeding. Davis & Hewitt, Lessons in Administering Justice: What Judges Need To Know About the Requirements, Role, and Professional Responsibilities of the Court Interpreter, 1 Harv. Latino L. Rev. 121, 131 (1994).

Taniguchi warns that translation costs can be exorbitant and burdensome to police. Reply Brief 19–22; Tr. of Oral Arg. 20–21. The Court expresses a similar concern. *Ante*, at 574.[4] Current practice in awarding translation costs, however, has shown that district judges are up to the task of confining awards to translation services necessary to present or defeat a claim. See *Eastman Kodak Co.*, 713 F. 2d, at 133 (District Court should not award document translation costs "carte blanche," but must determine whether such costs were necessarily incurred). See also, *e. g.*, *Conn* v. *Zakharov*, No. 1:09 CV 0760, 2010 WL 2293133, *3 (ND Ohio, June 4, 2010) (denying translation costs where prevailing party did not demonstrate the costs were necessary); *Maker's Mark Distillery, Inc.* v. *Diageo North Am., Inc.*, No. 3:03–CV–93, 2010 WL 2651186, *3 (WD Ky., June 30, 2010) (same); *Competitive Technologies* v. *Fujitsu Ltd.*, No. C–02–1673, 2006 WL 6338914, *11 (ND Cal., Aug. 23, 2006) (same); *Arboireau* v. *Adidas Salomon AG*, No. CV–01–105, 2002 WL 31466564, *6 (D Ore., June 14, 2002) (same); *Oetiker* v. *Jurid Werke, GmbH*, 104 F. R. D. 389, 393 (DC 1982) (same); *Lockett*, 60 F. R. D., at 473 (awarding costs for "necessary" translations); *Kaiser*, 50 F. R. D., at 11–12 (same); *Bennett*, 24 F. R. D., at 204 (same); *Raffold Process Corp.*, 25 F. Supp., at 594 (same). Courts of appeals, in turn, are capable of reviewing such judgments for abuse of discretion.

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[4] The Court also observes that "[t]axable costs are limited to relatively minor, incidental expenses." *Ante*, at 573. The tab for unquestionably allowable costs, however, may run high. See, *e. g.*, *In re Ricoh Co., Patent Litigation*, No. C 03–02289, 2012 WL 1499191, *6 (ND Cal., Apr. 26, 2012) (awarding $440,000 in copying costs); *Jones* v. *Halliburton Co.*, No. 4:07–cv–2719, 2011 WL 4479119, *2 (SD Tex., Sept. 26, 2011) (awarding $57,300 in fees for court-appointed expert). Translation costs, on the other hand, are not inevitably large. See Brief for Respondent 26–27, n. 12 (listing, *inter alia*, 21 translation costs awards of less than $13,000, of which at least 14 were less than $3,000).

In short, § 1920(6)'s prescription on "interpreters" is not so clear as to leave no room for interpretation. Given the purpose served by translation and the practice prevailing in district courts, *supra*, at 577–578, there is no good reason to exclude from taxable costs payments for placing written words within the grasp of parties, jurors, and judges. I would therefore affirm the judgment of the Ninth Circuit.

Syllabus

HOLDER, ATTORNEY GENERAL *v.* MARTINEZ GUTIERREZ

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

No. 10–1542. Argued January 18, 2012—Decided May 21, 2012*

Title 8 U. S. C. § 1229b(a) authorizes the Attorney General to cancel the removal of an alien from the United States who, among other things, has held the status of a lawful permanent resident (LPR) for at least five years, § 1229b(a)(1), and has lived in the United States for at least seven continuous years after a lawful admission, § 1229b(a)(2). These cases concern whether the Board of Immigration Appeals (BIA or Board) should impute a parent's years of continuous residence or LPR status to his or her child. That issue arises because a child may enter the country lawfully, or may gain LPR status, after one of his parents does—meaning that a parent may satisfy § 1229b(a)(1) or § 1229b(a)(2), while his child, considered independently, does not. In *In re Escobar*, 24 I. & N. Dec. 231, the BIA concluded that an alien must meet § 1229b(a)'s requirements on his own. But the Ninth Circuit found the Board's position unreasonable, holding that §§ 1229b(a)(1) and (a)(2) require imputation. See *Mercado-Zazueta* v. *Holder*, 580 F. 3d 1102; *Cuevas-Gaspar* v. *Gonzales*, 430 F. 3d 1013.

Respondent Martinez Gutierrez illegally entered the country with his family in 1989, when he was five years old. Martinez Gutierrez's father was lawfully admitted to the country two years later as an LPR. But Martinez Gutierrez was neither lawfully admitted nor given LPR status until 2003. Two years after that, he was apprehended for smuggling undocumented aliens across the border. Admitting the offense, he sought cancellation of removal. The Immigration Judge concluded that Martinez Gutierrez qualified for relief because of his father's immigration history, even though Martinez Gutierrez could not satisfy § 1229b(a)(1) or § 1229b(a)(2) on his own. Relying on *Escobar*, the BIA reversed. The Ninth Circuit then granted Martinez Gutierrez's petition for review and remanded the case to the Board for reconsideration in light of its contrary decisions.

Respondent Sawyers was lawfully admitted as an LPR in October 1995, when he was 15 years old. At that time, his mother had already

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*Together with No. 10–1543, *Holder, Attorney General* v. *Sawyers*, also on certiorari to the same court.

resided in the country for six consecutive years following a lawful entry. After Sawyers was convicted of a drug offense in August 2002, the Government began removal proceedings. The Immigration Judge found Sawyers ineligible for cancellation of removal because he could not satisfy § 1229b(a)(2). The BIA affirmed, and Sawyers petitioned the Ninth Circuit for review. There, he argued that the Board should have counted his mother's years of residency while he was a minor toward § 1229b(a)(2)'s 7-year continuous-residency requirement. The Court of Appeals granted the petition and remanded the case to the BIA.

Held: The BIA's rejection of imputation is based on a permissible construction of § 1229b(a). Pp. 591–598.

(a) The Board has required each alien seeking cancellation of removal to satisfy § 1229b(a)'s requirements on his own, without relying on a parent's years of continuous residence or immigration status. That position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best. See, *e. g.*, *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844, and n. 11. The BIA's approach satisfies this standard.

The Board's position is consistent with the statute's text. Section 1229b(a) does not mention—much less require—imputation. Instead, it simply calls for "the alien" to meet the prerequisites for cancellation of removal. See §§ 1101(a)(13)(A) and (a)(33). Respondents contend that this language does not foreclose imputation, but even if so, that is not enough to require the Board to adopt that policy. Pp. 591–592.

(b) Neither does the statute's history and context mandate imputation. Section 1229b(a) replaced former § 212(c) of the Immigration and Nationality Act (INA), which allowed the Attorney General to prevent the removal of an alien with LPR status who had maintained a "lawful unrelinquished domicile of seven consecutive years" in this country. Like § 1229b(a), § 212(c) was silent on imputation. But every Court of Appeals that confronted the question concluded that, in determining eligibility for § 212(c) relief, the Board should impute a parent's years of domicile to his or her child. Based on this history, Sawyers contends that Congress would have understood § 1229b(a)'s language to provide for imputation. But in enacting § 1229b(a), Congress eliminated the very term—"domicile"—on which the appeals courts had founded their imputation decisions. And the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change. See *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 349.

Syllabus

Nor do the INA's purposes demand imputation. As respondents correctly observe, many provisions of immigration law advance the goals of promoting family unity and providing relief to aliens with strong ties to this country. But these are not the INA's only goals, and Congress did not pursue them at all costs. For example, aliens convicted of aggravated felonies are ineligible for cancellation of removal, regardless of the strength of their family ties, see § 1229b(a)(3). In addition, as these cases show, not every alien with LPR status can immediately get the same for a spouse or minor child. A silent statute cannot be read as requiring imputation just because that rule would be family-friendly. Pp. 592–594.

(c) Respondents advance two additional arguments for why the Board's position is not entitled to *Chevron* deference. First, they claim that the Board's approach to § 1229b(a) is arbitrary because it is inconsistent with the Board's acceptance of imputation under other, similar provisions that are silent on the matter. See §§ 1182(k) and 1181(b). But the Board's decision in *Escobar* provided a reasoned explanation for these divergent results: The Board imputes matters involving an alien's state of mind, while declining to impute objective conditions or characteristics. See 24 I. & N. Dec., at 233–234, and n. 4. Section 1229b(a) hinges on the objective facts of immigration status and place of residence. See *id.*, at 233. So the Board's approach to § 1229b(a) largely follows from one straightforward distinction.

Second, respondents claim that the BIA adopted its no-imputation rule only because it thought Congress had left it no other choice. But *Escobar* belies this contention. The Board did explain how § 1229b(a)'s text supports its no-imputation policy. But the Board also brought its experience and expertise to bear on the matter: It noted that there was no precedent in its decisions for imputing status or residence, and it argued that allowing imputation under § 1229b(a) would create anomalies in the statutory scheme. *Escobar* thus expressed the BIA's view that statutory text, administrative practice, and regulatory policy all pointed toward disallowing imputation. In making that case, the opinion reads like a multitude of agency interpretations to which this and other courts have routinely deferred. Pp. 594–598.

No. 10–1542, 411 Fed. Appx. 121; No. 10–1543, 399 Fed. Appx. 313, reversed and remanded.

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

Leondra R. Kruger argued the cause for petitioner in both cases. On the briefs were *Solicitor General Verrilli*, *As-*

sistant Attorney General West, *Deputy Solicitor General Kneedler*, *Pratik A. Shah*, *Donald E. Keener*, and *Carol Federighi.*

Stephen B. Kinnaird argued the cause for respondent in No. 10–1542. With him on the briefs were *Igor V. Timofeyev*, *Stephanos Bibas*, and *Michael Franquinha.* *Charles A. Rothfeld* argued the cause for respondent in No. 10–1543. With him on the brief were *Andrew J. Pincus* and *Jeffrey A. Meyer.*†

JUSTICE KAGAN delivered the opinion of the Court.

An immigration statute, 8 U. S. C. § 1229b(a), authorizes the Attorney General to cancel the removal of an alien from the United States so long as the alien satisfies certain criteria. One of those criteria relates to the length of time an alien has lawfully resided in the United States, and another to the length of time he has held permanent resident status here. We consider whether the Board of Immigration Appeals (BIA or Board) could reasonably conclude that an alien living in this country as a child must meet those requirements on his own, without counting a parent's years of residence or immigration status. We hold that the BIA's approach is based on a permissible construction of the statute.

I

A

The immigration laws have long given the Attorney General discretion to permit certain otherwise-removable aliens to remain in the United States. See *Judulang* v. *Holder*, 565 U. S. 42, 59 (2011). The Attorney General formerly exercised this authority by virtue of § 212(c) of the Immigration and Nationality Act (INA), 66 Stat. 187, 8 U. S. C.

†*Jeffrey T. Green*, *Charles Roth*, and *Sarah O'Rourke Schrup* filed a brief for the National Immigration Justice Center as *amicus curiae* urging affirmance in both cases.

§ 1182(c) (1994 ed.), a provision with some lingering relevance here, see *infra*, at 7–9. But in 1996, Congress replaced § 212(c) with § 1229b(a) (2006 ed.). That new section, applicable to the cases before us, provides as follows:

> "**(a) Cancellation of removal for certain permanent residents**
>
> "The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> "(2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> "(3) has not been convicted of any aggravated felony." *Ibid.*

Section 1229b(a) thus specifies the criteria that make an alien eligible to obtain relief from the Attorney General. The first paragraph requires that the alien have held the status of a lawful permanent resident (LPR) for at least five years. And the second adds that the alien must have lived in the United States for at least seven continuous years after a lawful admission, whether as an LPR or in some other immigration status.[1] (The third paragraph is not at issue in these cases.)

The question we consider here is whether, in applying this statutory provision, the BIA should impute a parent's years of continuous residence or LPR status to his or her child. That question arises because a child may enter the country lawfully, or may gain LPR status, *after* one of his parents does. A parent may therefore satisfy the requirements of §§ 1229b(a)(1) and (a)(2), while his or her child, considered

[1] The INA defines "admitted" as referring to "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U. S. C. § 1101(a)(13)(A). The 7-year clock of § 1229b(a)(2) thus begins with an alien's *lawful* entry.

independently, does not. In these circumstances, is the child eligible for cancellation of removal?

The Ninth Circuit, the first court of appeals to confront this issue, held that such an alien could obtain relief. See *Cuevas-Gaspar* v. *Gonzales*, 430 F. 3d 1013 (2005). Enrique Cuevas-Gaspar and his parents came to the United States illegally in 1985, when he was one year old. Cuevas-Gaspar's mother was lawfully admitted to the country in 1990, as an LPR. But Cuevas-Gaspar was lawfully admitted only in 1997, when he too received LPR status. That meant that when Cuevas-Gaspar committed a removable offense in 2002, he could not independently satisfy § 1229b(a)(2)'s requirement of seven consecutive years of residence after a lawful entry.[2] (The parties agreed that he just met § 1229b(a)(1)'s 5-year status requirement.) The Board deemed Cuevas-Gaspar ineligible for relief on that account, but the Ninth Circuit found that position unreasonable. According to the Court of Appeals, the Board should have "imputed" to Cuevas-Gaspar his mother's years of continuous residence during the time he lived with her as an "unemancipated minor." *Id.*, at 1029. That approach, the Ninth Circuit reasoned, followed from both the INA's "priorit[ization]" of familial relations and the Board's "consistent willingness" to make imputations from a parent to a child in many areas of immigration law. *Id.*, at 1026.

The Board responded by reiterating its opposition to imputation under both relevant paragraphs of § 1229b(a). In *In re Escobar*, 24 I. & N. Dec. 231 (2007), the Board consid-

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[2] The 7-year clock stopped running on the date of Cuevas-Gaspar's offense under a statutory provision known as the "stop-time" rule. See § 1229b(d)(1) ("For purposes of this section, any period of continuous residence . . . in the United States shall be deemed to end . . . when the alien is served a notice to appear . . . or . . . when the alien has committed an offense . . . that renders the alien . . . removable from the United States . . . , whichever is earliest").

ered whether a child could rely on a parent's period of LPR status to satisfy § 1229b(a)(1)'s 5-year clock. The Board expressly "disagree[d] with the reasoning" of *Cuevas-Gaspar*, rejecting the Ninth Circuit's understanding of both the statute and the Board's prior policies. 24 I. & N. Dec., at 233–234, and n. 4. Accordingly, the Board announced that it would "decline to extend" *Cuevas-Gaspar* to any case involving § 1229b(a)(1), and that it would ignore the decision even as to § 1229b(a)(2) outside the Ninth Circuit. 24 I. & N. Dec., at 235. A year later, in *Matter of Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the BIA took the final step: It rejected imputation under § 1229b(a)(2) in a case arising in the Ninth Circuit, maintaining that the court should abandon *Cuevas-Gaspar* and defer to the Board's intervening reasoned decision in *Escobar*. See *Ramirez-Vargas*, 24 I. & N. Dec., at 600–601 (citing *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967 (2005)).

The BIA's position on imputation touched off a split in the courts of appeals. The Third and Fifth Circuits both deferred to the BIA's approach as a reasonable construction of § 1229b(a). See *Augustin* v. *Attorney Gen.*, 520 F. 3d 264 (CA3 2008); *Deus* v. *Holder*, 591 F. 3d 807 (CA5 2009). But in *Mercado-Zazueta* v. *Holder*, 580 F. 3d 1102 (2009), the Ninth Circuit doubled down on its contrary view, declaring the BIA's position unreasonable and requiring imputation under both §§ 1229b(a)(1) and (a)(2). See *id.*, at 1103 ("[T]he rationale and holding of *Cuevas-Gaspar* apply equally to the five-year permanent residence and the seven-year continuance residence requirements" of § 1229b(a)).

B

Two cases are before us. In 1989, at the age of five, respondent Carlos Martinez Gutierrez illegally entered the United States with his family. Martinez Gutierrez's father was lawfully admitted to the country two years later as an

LPR. But Martinez Gutierrez himself was neither lawfully admitted nor given LPR status until 2003. Two years after that, Martinez Gutierrez was apprehended for smuggling undocumented aliens across the border. He admitted the offense, and sought cancellation of removal. The Immigration Judge concluded that Martinez Gutierrez qualified for relief because of his father's immigration history, even though Martinez Gutierrez could not satisfy either § 1229b(a)(1) or § 1229b(a)(2) on his own. See App. to Pet. for Cert. in No. 10–1542, pp. 20a–22a (citing *Cuevas-Gaspar*, 430 F. 3d 1013). The BIA reversed, and after entry of a removal order on remand, reaffirmed its disposition in an order relying on *Escobar*, see App. to Pet. for Cert. in No. 10–1542, at 5a–6a. The Ninth Circuit then granted Martinez Gutierrez's petition for review and remanded the case to the Board for reconsideration in light of the court's contrary decisions. See 411 Fed. Appx. 121 (2011).

Respondent Damien Sawyers was lawfully admitted as an LPR in October 1995, when he was 15 years old. At that time, his mother had already resided in the country for six consecutive years following a lawful entry. After Sawyers's conviction of a drug offense in August 2002, the Government initiated removal proceedings. The Immigration Judge found Sawyers ineligible for cancellation of removal because he was a few months shy of the seven years of continuous residence required under § 1229b(a)(2). See App. to Pet. for Cert. in No. 10–1543, p. 13a. (No one doubted that Sawyers had by that time held LPR status for five years, as required under § 1229b(a)(1).) The Board affirmed, relying on its reasoning in *Escobar*. See *In re Sawyers*, No. A44 852 478, 2007 WL 4711443 (Dec. 26, 2007). Sawyers petitioned the Ninth Circuit for review, arguing that the Board should have counted his mother's years of residency while he was a minor toward § 1229b(a)(2)'s 7-year requirement. As in *Gutierrez*, the Court of Appeals granted the petition and remanded the case to the BIA. See 399 Fed. Appx. 313 (2010).

We granted the Government's petitions for certiorari, 564 U. S. 1066 (2011), consolidated the cases, and now reverse the Ninth Circuit's judgments.

II

The Board has required each alien seeking cancellation of removal to satisfy § 1229b(a)'s requirements on his own, without counting a parent's years of continuous residence or LPR status. That position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843–844, and n. 11 (1984); see also *INS* v. *Aguirre-Aguirre*, 526 U. S. 415, 424–425 (1999) (according *Chevron* deference to the Board's interpretations of the INA). We think the BIA's view on imputation meets that standard, and so need not decide if the statute permits any other construction.

The Board's approach is consistent with the statute's text, as even respondents tacitly concede. Section 1229b(a) does not mention imputation, much less require it. The provision calls for "the alien"—not, say, "the alien or one of his parents"—to meet the three prerequisites for cancellation of removal. Similarly, several of § 1229b(a)'s other terms have statutory definitions referring to only a single individual. See, *e. g.*, § 1101(a)(13)(A) ("The terms 'admission' and 'admitted' mean, with respect to *an alien*, the lawful entry of *the alien* into the United States" (emphasis added)); § 1101(a)(33) ("The term 'residence' means the place of general abode; the place of general abode of a person means *his* principal, actual dwelling" (emphasis added)). Respondents contend that none of this language "forecloses" imputation: They argue that if the Board allowed imputation, "[t]he alien" seeking cancellation would "still have to satisfy the provision's durational requirements"—just pursuant to a different computational rule. Brief for Respondent Martinez Gutierrez in No. 10–1542, p. 16 (hereinafter Martinez Gutier-

rez Brief); see Brief for Respondent Sawyers in No. 10–1543, pp. 11, 15 (hereinafter Sawyers Brief). And they claim that the Board's history of permitting imputation under similarly "silent" statutes supports this construction. Martinez Gutierrez Brief 16; see Sawyers Brief 15–16; *infra*, at 594–596. But even if so—even if the Board *could* adopt an imputation rule consistent with the statute's text—that would not avail respondents. Taken alone, the language of § 1229b(a) at least permits the Board to go the other way—to say that "the alien" must meet the statutory conditions independently, without relying on a parent's history.

For this reason, respondents focus on § 1229b(a)'s history and context—particularly, the provision's relationship to the INA's former § 212(c) and its associated imputation rule. Section 212(c)—§ 1229b(a)'s predecessor—generally allowed the Attorney General to prevent the removal of an alien with LPR status who had maintained a "lawful unrelinquished domicile of seven consecutive years" in this country. 8 U. S. C. § 1182(c) (1994 ed.). Like § 1229b(a), § 212(c) was silent on imputation. Yet the Second, Third, and Ninth Circuits (the only appellate courts to consider the question) concluded that, in determining eligibility for relief under § 212(c), the Board should impute a parent's years of domicile to his or her child. See *Rosario* v. *INS*, 962 F. 2d 220 (CA2 1992); *Lepe-Guitron* v. *INS*, 16 F. 3d 1021, 1024–1026 (CA9 1994); *Morel* v. *INS*, 90 F. 3d 833, 840–842 (CA3 1996). Those courts reasoned that at common law, a minor's domicile was "the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile." *Rosario*, 962 F. 2d, at 224; see *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 48 (1989) (defining "domicile" as "physical presence in a place in connection with a certain state of mind concerning one's intent to remain there"). So by the time Congress replaced § 212(c) with § 1229b(a), the BIA often im-

puted a parent's years of domicile to a child in determining eligibility for cancellation of removal. Sawyers argues that against this backdrop, Congress "would have understood the language it chose [in § 1229b(a)] to provide for imputation." Sawyers Brief 10.

But we cannot conclude that Congress ratified an imputation requirement when it passed § 1229b(a). As all parties agree, Congress enacted §§ 1229b(a)(1) and (a)(2) to resolve an unrelated question about § 212(c)'s meaning. See *id.*, at 17; Martinez Gutierrez Brief 28; Brief for Petitioner 25. Courts had differed on whether an alien's "seven consecutive years" of domicile under § 212(c) all had to post-date the alien's obtaining LPR status. See *Cuevas-Gaspar*, 430 F. 3d, at 1027–1028 (canvassing split). Congress addressed that split by creating two distinct durational conditions: the 5-year status requirement of subsection (a)(1), which runs from the time an alien becomes an LPR, and the 7-year continuous-residency requirement of subsection (a)(2), which can include years preceding the acquisition of LPR status. In doing so, Congress eliminated the very term—"domicile"—on which the appeals courts had founded their imputation decisions. See *supra*, at 592. That alteration dooms respondents' position, because the doctrine of congressional ratification applies only when Congress reenacts a statute without relevant change. See *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 349 (2005).[3] So the

[3] Sawyers contends that § 1229b(a)(2)'s replacement term—"resided continuously"—is a "term of art" in the immigration context which incorporates "an intent component" and so means the same thing as "domiciled." Sawyers Brief 25–26 (emphasis deleted). Thus, Sawyers argues, we should read § 1229b(a) as reenacting § 212(c) without meaningful change. See *id.*, at 25. But even assuming that Congress could ratify judicial decisions based on the term "domicile" through a new statute using a synonym for that term, we do not think "resided continuously" qualifies. The INA defines "residence" as a person's "principal, actual dwelling place in fact, *without regard to intent*," 8 U. S. C. § 1101(a)(33) (emphasis added), and

statutory history here provides no basis for holding that the BIA flouted a congressional command in adopting its no-imputation policy.

Nor do the INA's purposes demand imputation here, as both respondents claim. According to Martinez Gutierrez, the BIA's approach contradicts that statute's objectives of "providing relief to aliens with strong ties to the United States" and "promoting family unity." Martinez Gutierrez Brief 40, 44; see Sawyers Brief 37. We agree—indeed, we have stated—that the goals respondents identify underlie or inform many provisions of immigration law. See *Fiallo* v. *Bell*, 430 U. S. 787, 795, n. 6 (1977); *INS* v. *Errico*, 385 U. S. 214, 220 (1966). But they are not the INA's only goals, and Congress did not pursue them to the *n*th degree. To take one example, § 1229b(a)'s third paragraph makes aliens convicted of aggravated felonies ineligible for cancellation of removal, regardless of the strength of their family ties. See § 1229b(a)(3). And more generally—as these very cases show—not every alien who obtains LPR status can immediately get the same for her spouse or minor children. See Brief for Petitioner 31–32, and n. 9 (providing program-specific examples). We cannot read a silent statute as requiring (not merely allowing) imputation just because that rule would be family-friendly.

Respondents' stronger arguments take a different tack—that we should refuse to defer to the Board's decision even assuming Congress placed the question of imputation in its hands. Respondents offer two main reasons. First, they contend that the Board's approach to § 1229b(a) cannot be squared with its acceptance of imputation under other, similar statutory provisions. This "wil[d]" and "'[u]nexplained inconsistency,'" Sawyers asserts, is the very "paradigm of arbitrary agency action." Sawyers Brief 13, 41 (emphasis

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we find nothing to suggest that Congress added an intent element, inconsistent with that definition, by requiring that the residence have been maintained "continuously for 7 years."

deleted); see Martinez Gutierrez Brief 52–54. Second, they argue that the Board did not appreciate its own discretion over whether to allow imputation. The Board, they say, thought Congress had forbidden imputation, and so did not bring its "'experience and expertise to bear'" on the issue. *Id.*, at 31 (quoting *PDK Labs. Inc.* v. *DEA*, 362 F. 3d 786, 797 (CADC 2004)); see Sawyers Brief 38–39. These arguments are not insubstantial, but in the end neither persuades us to deny the Board the usual deference we accord to agency interpretations.

Start with the claim of inconsistency. The BIA has indeed imputed parental attributes to children under other INA provisions that do not mention the matter. Section 1182(k), for example, enables the Attorney General to let certain inadmissible aliens into the country if he finds "that inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure." Like § 1229b(a), that provision refers to a single person ("the immigrant") and says nothing about imputation. But the BIA has consistently imputed a parent's knowledge of inadmissibility (or lack thereof) to a child. See, *e. g.*, *Senica* v. *INS*, 16 F. 3d 1013, 1015 (CA9 1994) ("Therefore, the BIA reasoned, the children were not entitled to relief under [§ 1182(k)] because [their mother's] knowledge was imputed to them"); *In re Mushtaq*, No. A43 968 082, 2007 WL 4707539 (BIA, Dec. 10, 2007) *(per curiam)*; *In re Ahmed*, No. A41 982 631, 2006 WL 448156 (BIA, Jan. 17, 2006) *(per curiam)*.

Similarly, the Board imputes a parent's abandonment (or non-abandonment) of LPR status to her child when determining whether that child can reenter the country as a "returning resident immigran[t]" under § 1181(b). See *Matter of Zamora*, 17 I. & N. Dec. 395, 396 (1980) (holding that a "voluntary and intended abandonment by the mother is imputed" to an unemancipated minor child for purposes of applying § 1181(b)); *Matter of Huang*, 19 I. & N. Dec. 749,

755–756 (1988) (concluding that a mother and her children abandoned their LPR status based solely on the mother's intent); *In re Ali*, No. A44 143 723, 2006 WL 3088820 (BIA, Sept. 11, 2006) (holding that a child could not have abandoned his LPR status if his mother had not abandoned hers). And once again, that is so even though neither § 1181(b) nor any other statutory provision says that the BIA should look to the parent in assessing the child's eligibility for reentry.

But *Escobar* provided a reasoned explanation for these divergent results: The Board imputes matters involving an alien's state of mind, while declining to impute objective conditions or characteristics. See 24 I. & N. Dec., at 233–234, and n. 4. On one side of the line, knowledge of inadmissibility is all and only about a mental state. See, *e. g.*, *Senica*, 16 F. 3d, at 1015; *In re Ahmed*, 2006 WL 448156. Likewise, abandonment of status turns on an alien's "intention of . . . returning to the United States" to live as a permanent resident, *Zamora*, 17 I. & N. Dec., at 396; the Board thus explained that imputing abandonment is "consistent with the . . . longstanding policy that a child cannot form the intent necessary to establish his or her own domicile," *Escobar*, 24 I. & N. Dec., at 234, n. 4. And as that analogy recalls, the 7-year domicile requirement of the former § 212(c) also involved intent and so lent itself to imputation. See *Rosario*, 962 F. 2d, at 224; *supra*, at 592. But the 5- and 7-year clocks of § 1229b(a) fall on the other side of the line, because they hinge not on any state of mind but on the objective facts of immigration status and place of residence. See *Escobar*, 24 I. & N. Dec., at 233 ("[W]e find that residence is different from domicile because it 'contains no element of subjective intent'" (quoting *Cuevas-Gaspar*, 430 F. 3d, at 1031 (Fernandez, J., dissenting))). The BIA's varied rulings on imputation thus largely follow from one straightforward distinction.[4]

[4] Respondents aver that the BIA deviates from this principle in imputing to a child his parent's "'firm resettlement'" in another country, which renders an alien ineligible for asylum without regard to intent. See Saw-

Similarly, *Escobar* belies respondents' claim that the BIA adopted its no-imputation rule only because it thought Congress had left it no other choice. The Board, to be sure, did not highlight the statute's gaps or ambiguity; rather, it read § 1229b(a)'s text to support its conclusion that each alien must personally meet that section's durational requirements. See 24 I. & N. Dec., at 235. But the Board also explained that "there [was] no precedent" in its decisions for imputing status or residence, and distinguished those statutory terms, on the ground just explained, from domicile or abandonment of LPR status. *Id.*, at 234; see *id.*, at 233–234, and n. 4. And the Board argued that allowing imputation under § 1229b(a) would create anomalies in administration of the statutory scheme by permitting even those who had not obtained LPR status—or could not do so because of a criminal history—to become eligible for cancellation of removal. See *id.*, at 234–235, and n. 5. The Board therefore saw neither a "logical" nor a "legal" basis for adopting a policy of imputation. *Id.*, at 233. We see nothing in this decision to suggest that the Board thought its hands tied, or that it might have reached a different result if assured it could do so. To the contrary, the decision expressed the BIA's view, based on its experience implementing the INA, that statutory text, administrative practice, and regulatory policy all pointed in one direction: toward disallowing imputation. In making that case, the decision reads like a multitude of agency interpretations—not the best example, but far from the worst—

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yers Brief 39; Martinez Gutierrez Brief 52. But the Government denies that it has a "settled imputation rule" in that context. Reply Brief for Petitioner 13. And the sources on which respondents rely are slender reeds: a 40-year-old ruling by a regional commissioner (not the Board itself) that considered the conduct of both the parents and the child, see *Matter of Ng*, 12 I. & N. Dec. 411 (1967), and a Ninth Circuit decision imputing a parent's resettlement even though the Board had focused only on the child's actions, see *Vang* v. *INS*, 146 F. 3d 1114, 1117 (1998). Based on these scant decisions, we cannot conclude that the Board has any policy on imputing resettlement, let alone one inconsistent with *Escobar*.

to which we and other courts have routinely deferred. We see no reason not to do so here.

Because the Board's rejection of imputation under § 1229b(a) is "based on a permissible construction of the statute," *Chevron*, 467 U. S., at 843, we reverse the Ninth Circuit's judgments and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BLUEFORD *v.* ARKANSAS

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

No. 10–1320. Argued February 22, 2012—Decided May 24, 2012

The State of Arkansas charged petitioner Alex Blueford with capital murder for the death of a 1-year-old child. That charge included the lesser offenses of first-degree murder, manslaughter, and negligent homicide. Before the start of deliberations, the trial court instructed the jury to consider the offenses as follows: "If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide." The court also presented the jury with a set of verdict forms, which allowed the jury either to convict Blueford of one of the charged offenses, or to acquit him of all of them. Acquitting on some but not others was not an option.

After deliberating for a few hours, the jury reported that it could not reach a verdict. The court inquired about the jury's progress on each offense. The foreperson disclosed that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. The court told the jury to continue to deliberate. The jury did so but still could not reach a verdict, and the court declared a mistrial. When the State subsequently sought to retry Blueford, he moved to dismiss the capital and first-degree murder charges on double jeopardy grounds. The trial court denied the motion, and the Supreme Court of Arkansas affirmed on interlocutory appeal.

Held: The Double Jeopardy Clause does not bar retrying Blueford on charges of capital murder and first-degree murder. Pp. 605–610.

(a) The jury did not acquit Blueford of capital or first-degree murder. Blueford contends that the foreperson's report that the jury was unanimous against guilt on the murder offenses represented a resolution of some or all of the elements of those offenses in his favor. But the report was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded. The jurors in fact went back to the jury room to deliberate further, and nothing in the court's instructions prohibited them from reconsidering their votes on capital and first-degree

Syllabus

murder as deliberations continued. The foreperson's report prior to the end of deliberations therefore lacked the finality necessary to amount to an acquittal on those offenses. That same lack of finality undermines Blueford's reliance on *Green* v. *United States*, 355 U. S. 184, and *Price* v. *Georgia*, 398 U. S. 323. In both of those cases, the verdict of the jury was a final decision; here, the report of the foreperson was not. Pp. 605–608.

(b) The trial court's declaration of a mistrial was not improper. A trial can be discontinued without barring a subsequent one for the same offense when "particular circumstances manifest a necessity" to declare a mistrial. *Wade* v. *Hunter*, 336 U. S. 684, 690. Blueford contends that there was no necessity for a mistrial on capital and first-degree murder, given the foreperson's report that the jury had voted unanimously against guilt on those charges. According to Blueford, the court at that time should have taken some action, whether through new partial verdict forms or other means, to allow the jury to give effect to those votes, and then considered a mistrial only as to the remaining charges. Blueford acknowledges, however, that the trial court's reason for declaring a mistrial here—that the jury was unable to reach a verdict—has long been considered the "classic basis" establishing necessity for doing so. *Arizona* v. *Washington*, 434 U. S. 497, 509. And this Court has never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse let alone to consider giving the jury new options for a verdict. See *Renico* v. *Lett*, 559 U. S. 766, 775. As permitted under Arkansas law, the jury's options in this case were limited to two: either convict on one of the offenses, or acquit on all. The trial court did not abuse its discretion by refusing to add another option—that of acquitting on some offenses but not others. Pp. 609–610.

2011 Ark. 8, 370 S. W. 3d 496, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which GINSBURG and KAGAN, JJ., joined, *post*, p. 610.

Clifford M. Sloan argued the cause for petitioner. With him on the briefs were *Geoffrey M. Wyatt*, *David W. Foster*, *William R. Simpson, Jr.*, *Sharon Kiel*, and *Clint Miller*.

Dustin McDaniel, Attorney General of Arkansas, argued the cause for respondent. With him on the brief were *David R. Raupp*, Senior Assistant Attorney General, *Eileen*

W. Harrison, *Lauren Elizabeth Heil*, and *Valerie Glover Fortner*, Assistant Attorneys General, and *Dan Schweitzer.**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Double Jeopardy Clause protects against being tried twice for the same offense. The Clause does not, however, bar a second trial if the first ended in a mistrial. Before the jury concluded deliberations in this case, it reported that it was unanimous against guilt on charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. The court told the jury to continue to deliberate. The jury did so but still could not reach a verdict, and the court declared a mistrial. All agree that the defendant may be retried on charges of manslaughter and negligent homicide. The question is whether he may also be retried on charges of capital and first-degree murder.

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*Briefs of *amici curiae* urging reversal were filed for the Constitutional Accountability Center by *Douglas T. Kendall*, *Elizabeth B. Wydra*, and *David H. Gans;* for Criminal Law Professors by *Lisa S. Blatt* and *Charles G. Curtis, Jr.;* and for the National Association of Criminal Defense Lawyers by *Christopher M. Egleson* and *Jeffrey T. Green.*

A brief of *amici curiae* urging affirmance was filed for the State of Michigan et al. by *Bill Schuette*, Attorney General of Michigan, *John J. Bursch*, Solicitor General, and *B. Eric Restuccia*, Deputy Solicitor General, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Fepulea'i Arthur Ripley, Jr.*, of American Samoa, *Tom Horne* of Arizona, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *James D. "Buddy" Caldwell* of Louisiana, *Lori Swanson* of Minnesota, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Mark Shurtleff* of Utah, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming.

I

One-year-old Matthew McFadden, Jr., suffered a severe head injury on November 28, 2007, while home with his mother's boyfriend, Alex Blueford. Despite treatment at a hospital, McFadden died a few days later.

The State of Arkansas charged Blueford with capital murder, but waived the death penalty. The State's theory at trial was that Blueford had injured McFadden intentionally, causing the boy's death "[u]nder circumstances manifesting extreme indifference to the value of human life." Ark. Code Ann. §5–10–101(a)(9)(A) (Supp. 2011). The defense, in contrast, portrayed the death as the result of Blueford accidentally knocking McFadden onto the ground.

The trial court instructed the jury that the charge of capital murder included three lesser offenses: first-degree murder, manslaughter, and negligent homicide. In addition to describing these offenses, the court addressed the order in which the jury was to consider them: "If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide." App. 51–52.

The prosecution commented on these instructions in its closing argument. It told the jury, for example, that "before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder." *Id.*, at 55. The prosecution explained that this was "not a situation where you just lay everything out here and say, well, we have four choices. Which one does it fit the most?" *Id.*, at 59. Rather, the prosecution emphasized, "unless all 12 of you agree that this man's actions were not

consistent with capital murder, then and only then would you go down to murder in the first degree." *Ibid.*

After the parties concluded their arguments, the court presented the jury with a set of five verdict forms, each representing a possible verdict. There were four separate forms allowing the jury to convict on each of the charged offenses: capital murder, first-degree murder, manslaughter, and negligent homicide. A fifth form allowed the jury to return a verdict of acquittal, if the jury found Blueford not guilty of any offense. There was no form allowing the jury to acquit on some offenses but not others. As stated in the court's instructions, the jury could either "find the defendant guilty of one of these offenses" or "acquit him outright." *Id.*, at 51. Any verdict—whether to convict on one or to acquit on all—had to be unanimous.

A few hours after beginning its deliberations, the jury sent the court a note asking "what happens if we cannot agree on a charge at all." *Id.*, at 62. The court called the jury back into the courtroom and issued a so-called "*Allen* instruction," emphasizing the importance of reaching a verdict. See *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896). The jury then deliberated for a half hour more before sending out a second note, stating that it "cannot agree on any one charge in this case." App. 64. When the court summoned the jury again, the jury foreperson reported that the jury was "hopelessly" deadlocked. *Ibid.* The court asked the foreperson to disclose the jury's votes on each offense:

> "THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.
>
> "JUROR NUMBER ONE: That was unanimous against that. No.
>
> "THE COURT: Okay, on murder in the first degree?
>
> "JUROR NUMBER ONE: That was unanimous against that.

"THE COURT: Okay. Manslaughter?

"JUROR NUMBER ONE: Nine for, three against.

"THE COURT: Okay. And negligent homicide?

"JUROR NUMBER ONE: We did not vote on that, sir.

"THE COURT: Did not vote on that.

"JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time." *Id.*, at 64–65.

Following this exchange, the court gave another *Allen* instruction and sent the jurors back to the jury room. After deliberations resumed, Blueford's counsel asked the court to submit new verdict forms to the jurors, to be completed "for those counts that they have reached a verdict on." *Id.*, at 67. The prosecution objected on the grounds that the jury was "still deliberating" and that a verdict of acquittal had to be "all or nothing." *Id.*, at 68. The court denied Blueford's request. To allow for a partial verdict, the court explained, would be "like changing horses in the middle of the stream," given that the jury had already received instructions and verdict forms. *Ibid.* The court informed counsel that it would declare a mistrial "if the jury doesn't make a decision." *Id.*, at 69.

When the jury returned a half hour later, the foreperson stated that they had not reached a verdict. The court declared a mistrial and discharged the jury.

The State subsequently sought to retry Blueford. He moved to dismiss the capital and first-degree murder charges on double jeopardy grounds, citing the foreperson's report that the jurors had voted unanimously against guilt on those offenses. The trial court denied the motion, and the Supreme Court of Arkansas affirmed on interlocutory appeal. According to the State Supreme Court, the foreperson's report had no effect on the State's ability to retry Blueford, because the foreperson "was not making a formal announce-

ment of acquittal" when she disclosed the jury's votes. 2011 Ark. 8, p. 9, 370 S. W. 3d 496, 501. This was not a case, the court observed, "where a formal verdict was announced or entered of record." *Ibid.* The court added that the trial court did not err in denying Blueford's request for new verdict forms that would have allowed the jury to render a partial verdict on the charges of capital and first-degree murder.

Blueford sought review in this Court, and we granted certiorari. 565 U. S. 941 (2011).

II

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U. S. Const., Amdt. 5. The Clause "guarantees that the State shall not be permitted to make repeated attempts to convict the accused, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 569 (1977) (internal quotation marks omitted).

Blueford contends that the foreperson's report means that he cannot be tried again on charges of capital and first-degree murder. According to Blueford, the Double Jeopardy Clause prohibits a second trial on those charges, for two reasons.

A

Blueford's primary submission is that he cannot be retried for capital and first-degree murder because the jury actually acquitted him of those offenses. See *Green* v. *United States*, 355 U. S. 184, 188 (1957). The Arkansas Supreme Court noted—and Blueford acknowledges—that no formal judgment of acquittal was entered in his case. But none was necessary, Blueford maintains, because an acquittal is a matter of substance, not form. Quoting from our decision in

Martin Linen, *supra*, at 571, Blueford contends that despite the absence of a formal verdict, a jury's announcement constitutes an acquittal if it "'actually represents a resolution . . . of some or all of the factual elements of the offense charged.'" Brief for Petitioner 21. Here, according to Blueford, the foreperson's announcement of the jury's unanimous votes on capital and first-degree murder represented just that: a resolution of some or all of the elements of those offenses in Blueford's favor.

We disagree. The foreperson's report was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury's deliberations had not yet concluded. The jurors in fact went back to the jury room to deliberate further, even after the foreperson had delivered her report. When they emerged a half hour later, the foreperson stated only that they were unable to reach a verdict. She gave no indication whether it was still the case that all 12 jurors believed Blueford was not guilty of capital or first-degree murder, that 9 of them believed he was guilty of manslaughter, or that a vote had not been taken on negligent homicide. The fact that deliberations continued after the report deprives that report of the finality necessary to constitute an acquittal on the murder offenses.

Blueford maintains, however, that any possibility that the jurors revisited the murder offenses was foreclosed by the instructions given to the jury. Those instructions, he contends, not only required the jury to consider the offenses in order, from greater to lesser, but also prevented it from transitioning from one offense to the next without unanimously—and definitively—resolving the greater offense in his favor. "A jury is presumed to follow its instructions." *Weeks* v. *Angelone*, 528 U. S. 225, 234 (2000). So, Blueford says, the foreperson's report that the jury was deadlocked on manslaughter necessarily establishes that the jury had acquitted Blueford of the greater offenses of capital and first-degree murder.

But even if we assume that the instructions required a unanimous vote before the jury could consider a lesser offense—as the State assumes for purposes of this case, see Brief for Respondent 25, n. 3—nothing in the instructions prohibited the jury from reconsidering such a vote. The instructions said simply, "If you have a reasonable doubt of the defendant's guilt on the charge of [the greater offense], you will [then] consider the charge of [the lesser offense]." App. 51–52. The jurors were never told that once they had a reasonable doubt, they could not rethink the issue. The jury was free to reconsider a greater offense, even after considering a lesser one.[1]

A simple example illustrates the point. A jury enters the jury room, having just been given these instructions. The foreperson decides that it would make sense to determine the extent of the jurors' agreement before discussions begin. Accordingly, she conducts a vote on capital murder, and everyone votes against guilt. She does the same for first-degree murder, and again, everyone votes against guilt. She then calls for a vote on manslaughter, and there is disagreement. Only then do the jurors engage in a discussion about the circumstances of the crime. While considering the arguments of the other jurors on how the death was caused, one of the jurors starts rethinking his own stance on a greater offense. After reflecting on the evidence, he comes to believe that the defendant did knowingly cause the death—satisfying the definition of first-degree murder. At

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[1] In reaching a contrary conclusion, *post*, at 615 (opinion of SOTOMAYOR, J.), the dissent construes the jury instructions to "require a jury to *complete* its deliberations on a greater offense before it may consider a lesser," *post*, at 612 (emphasis added). But no such requirement can be found in the text of the instructions themselves. And the dissent's attempt to glean such a requirement from the Arkansas Supreme Court's decision in *Hughes* v. *State*, 347 Ark. 696, 66 S. W. 3d 645 (2002), is unavailing, for that decision nowhere addresses the issue here—whether a jury can reconsider a greater offense after considering a lesser one.

that point, nothing in the instructions prohibits the jury from doing what juries often do: revisit a prior vote. "The very object of the jury system," after all, "is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen*, 164 U. S., at 501. A single juror's change of mind is all it takes to require the jury to reconsider a greater offense.

It was therefore possible for Blueford's jury to revisit the offenses of capital and first-degree murder, notwithstanding its earlier votes. And because of that possibility, the foreperson's report prior to the end of deliberations lacked the finality necessary to amount to an acquittal on those offenses, quite apart from any requirement that a formal verdict be returned or judgment entered.

That same lack of finality undermines Blueford's reliance on *Green* v. *United States*, 355 U. S. 184 (1957), and *Price* v. *Georgia*, 398 U. S. 323 (1970). In those cases, we held that the Double Jeopardy Clause is violated when a defendant, tried for a greater offense and convicted of a lesser included offense, is later retried for the greater offense. See *Green*, *supra*, at 190; *Price*, *supra*, at 329. Blueford argues that the only fact distinguishing his case from *Green* and *Price* is that his case involves a deadlock on the lesser included offense, as opposed to a conviction. In his view, that distinction only favors him, because the Double Jeopardy Clause should, if anything, afford greater protection to a defendant who is *not* found guilty of the lesser included offense.

Blueford's argument assumes, however, that the votes reported by the foreperson did not change, even though the jury deliberated further after that report. That assumption is unjustified, because the reported votes were, for the reasons noted, not final. Blueford thus overlooks the real distinction between the cases: In *Green* and *Price*, the verdict of the jury was a final decision; here, the report of the foreperson was not.

B

Blueford maintains that even if the jury did not acquit him of capital and first-degree murder, a second trial on those offenses would nonetheless violate the Double Jeopardy Clause, because the trial court's declaration of a mistrial was improper. Blueford acknowledges that a trial can be discontinued without barring a subsequent one for the same offense when "particular circumstances manifest a necessity" to declare a mistrial. *Wade* v. *Hunter*, 336 U. S. 684, 690 (1949); see also *United States* v. *Perez*, 9 Wheat. 579, 580 (1824). He also acknowledges that the trial court's reason for declaring a mistrial here—that the jury was unable to reach a verdict—has long been considered the "classic basis" establishing such a necessity. *Arizona* v. *Washington*, 434 U. S. 497, 509 (1978). Blueford therefore accepts that a second trial on manslaughter and negligent homicide would pose no double jeopardy problem. He contends, however, that there was no necessity for a mistrial on capital and first-degree murder, given the foreperson's report that the jury had voted unanimously against guilt on those charges. According to Blueford, the court at that time should have taken "some action," whether through partial verdict forms or other means, to allow the jury to give effect to those votes, and then considered a mistrial only as to the remaining charges. Reply Brief 11, n. 8.

We reject that suggestion. We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict. See *Renico* v. *Lett*, 559 U. S. 766, 775 (2010).[2] As per-

[2] Finding our reliance on *Renico* "perplexing," the dissent reads that decision to have "little to say about a trial judge's responsibilities, or this Court's, on direct review." *Post*, at 620–621, n. 4. But *Renico*'s discussion of the applicable legal principles concerns just that, and the dissent in any event does not dispute that we have never required a trial court to consider any particular means of breaking a jury impasse.

mitted under Arkansas law, the jury's options in this case were limited to two: either convict on one of the offenses, or acquit on all. The instructions explained those options in plain terms, and the verdict forms likewise contemplated no other outcome. There were separate forms to convict on each of the possible offenses, but there was only one form to acquit, and it was to acquit on all of them. When the foreperson disclosed the jury's votes on capital and first-degree murder, the trial court did not abuse its discretion by refusing to add another option—that of acquitting on some offenses but not others. That, however, is precisely the relief Blueford seeks—relief the Double Jeopardy Clause does not afford him.

* * *

The jury in this case did not convict Blueford of any offense, but it did not acquit him of any either. When the jury was unable to return a verdict, the trial court properly declared a mistrial and discharged the jury. As a consequence, the Double Jeopardy Clause does not stand in the way of a second trial on the same offenses.

The judgment of the Supreme Court of Arkansas is

Affirmed.

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

The Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." *Arizona* v. *Washington*, 434 U. S. 497, 503 (1978). To implement this rule, our cases have articulated two principles. First, an acquittal occurs if a jury's decision, "whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States* v. *Martin Linen Supply Co.*, 430 U. S. 564, 571 (1977). Second, a trial judge may not defeat a defendant's entitlement to "the verdict of a tribunal he might believe to be favorably disposed

to his fate" by declaring a mistrial before deliberations end, absent a defendant's consent or a "'manifest necessity'" to do so. *United States* v. *Jorn*, 400 U. S. 470, 486, 481 (1971) (plurality opinion) (quoting *United States* v. *Perez*, 9 Wheat. 579, 580 (1824)).

Today's decision misapplies these longstanding principles. The Court holds that petitioner Alex Blueford was not acquitted of capital or first-degree murder, even though the forewoman of the Arkansas jury empaneled to try him announced in open court that the jury was "unanimous against" convicting Blueford of those crimes. App. 64–65. Nor, the Court concludes, did the Double Jeopardy Clause oblige the trial judge to take any action to give effect to the jury's unambiguous decision before declaring a mistrial as to those offenses. The Court thus grants the State what the Constitution withholds: "the proverbial 'second bite at the apple.'" *Burks* v. *United States*, 437 U. S. 1, 17 (1978).

I respectfully dissent.

I

A

The bar on retrials following acquittals is "the most fundamental rule in the history of double jeopardy jurisprudence." *Martin Linen*, 430 U. S., at 571; see, *e. g.*, *United States* v. *Ball*, 163 U. S. 662, 671 (1896); 4 W. Blackstone, Commentaries on the Laws of England 329 (1769). This prohibition stops the State, "with all its resources and power," from mounting abusive, harassing reprosecutions, *Green* v. *United States*, 355 U. S. 184, 187 (1957), which subject a defendant to "embarrassment, expense, anxiety, and insecurity, and the possibility that he may be found guilty even though innocent," *United States* v. *DiFrancesco*, 449 U. S. 117, 136 (1980).

In ascertaining whether an acquittal has occurred, "form is not to be exalted over substance." *Sanabria* v. *United States*, 437 U. S. 54, 66 (1978). Rather, we ask whether the

factfinder has made "a substantive determination that the prosecution has failed to carry its burden." *Smith* v. *Massachusetts*, 543 U. S. 462, 468 (2005). Jurisdictions have different procedures respecting the announcement of verdicts and the entry of judgments, but that diversity has no constitutional significance. Jeopardy terminates upon a determination, however characterized, that the "evidence is insufficient" to prove a defendant's "factual guilt." *Smalis* v. *Pennsylvania*, 476 U. S. 140, 144 (1986). Thus, we have treated as acquittals a trial judge's directed verdict of not guilty, *Smith*, 543 U. S., at 468; an appellate reversal of a conviction for insufficiency of the evidence, *Burks*, 437 U. S., at 10; and, most pertinent here, a jury's announcement of a not guilty verdict that was "not followed by any judgment," *Ball*, 163 U. S., at 671.

A straightforward application of that principle suffices to decide this case. Arkansas is a classic "acquittal-first" or "hard-transition" jurisdiction. See generally *People* v. *Richardson*, 184 P. 3d 755, 764, n. 7 (Colo. 2008). Arkansas' model jury instructions require a jury to complete its deliberations on a greater offense before it may consider a lesser. 1 Ark. Model Jury Instr., Crim., No. 302 (2d ed. 1994). As a matter of Arkansas law, "[b]efore it may consider any lesser-included offense, the jury must first determine that the proof is insufficient to convict on the greater offense. Thus, the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense." *Hughes* v. *State*, 347 Ark. 696, 706–707, 66 S. W. 3d 645, 651 (2002).[1]

Here, the trial judge instructed Blueford's jury to consider the offenses in order, from the charged offense of capital murder to the lesser included offenses of first-degree murder, manslaughter, and negligent homicide. The judge told the

[1] The State has taken the same position. See Brief for Appellee in *Boyd* v. *State*, No. CR 06–973 (Ark.), p. 13 ("[U]nanimity is the essence of a jury verdict as it pertains to acquitting a defendant of the charged offense and the subsequent consideration of lesser-included offenses").

jury to proceed past capital murder only upon a unanimous finding of a "reasonable doubt" as to that offense—that is, upon an acquittal. See *In re Winship*, 397 U. S. 358, 363 (1970). The State's closing arguments repeated this directive: "[B]efore you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder." App. 55. And the forewoman's colloquy with the judge leaves no doubt that the jury understood the instructions to mandate unanimous acquittal on a greater offense as a prerequisite to consideration of a lesser: The forewoman reported that the jury had not voted on negligent homicide because the jurors "couldn't get past the manslaughter" count on which they were deadlocked. *Id.*, at 65.

In this context, the forewoman's announcement in open court that the jury was "unanimous against" conviction on capital and first-degree murder, *id.*, at 64–65, was an acquittal for double jeopardy purposes.[2] Per Arkansas law, the

[2] The jury's acquittals on the murder counts were unsurprising in light of the deficiencies in the State's case. For example, Dr. Adam Craig—the medical examiner who autopsied the victim, Matthew McFadden, Jr., and whose testimony was essential to the State's theory of the crime—was not board certified in anatomical pathology, having failed the certification examination five times. Dr. Craig took only 2 slides of Matthew's brain, not the 10 to 20 called for by prevailing professional standards. He dismissed Blueford's explanation for Matthew's death—that Blueford accidentally knocked Matthew to the floor—on the basis of an outdated paper on child head injuries, acknowledging that he was only "vaguely aware" of a more recent, seminal paper that supported Blueford's account. Record 390; see Goldsmith & Plunkett, A Biomechanical Analysis of the Causes of Traumatic Brain Injury in Infants and Children, 25 Am. J. Forensic Med. & Pathology 89 (2004). Blueford's expert pathologist, Dr. Robert Bux, testified that Dr. Craig's autopsy was inadequate to establish whether Matthew's death was accidental or intentional. And Blueford's expert pediatrician, Dr. John Galaznik, testified that the State's theory—that Blueford slammed Matthew into a mattress on the floor—was "not a likely cause" of the boy's injuries when assessed in view of current medical literature. Record 766. Even the trial judge observed that the State's proof was "circumstantial at best," and that this was "probably . . . a lesser included offense case." *Id.*, at 610.

jury's determination of reasonable doubt as to those offenses was an acquittal "in essence." *Hughes*, 347 Ark., at 707, 66 S. W. 3d, at 651. By deciding that the State "had failed to come forward with sufficient proof," the jury resolved the charges of capital and first-degree murder adversely to the State. *Burks*, 437 U. S., at 10. That acquittal cannot be reconsidered without putting Blueford twice in jeopardy.

Green and *Price* v. *Georgia*, 398 U. S. 323 (1970), bolster that conclusion. In *Green*, the jury convicted the defendant on the lesser included offense of second-degree murder without returning a verdict on the charged offense of first-degree murder. This Court concluded that this result was an "implicit acquittal" on the greater offense of first-degree murder, barring retrial. 355 U. S., at 190. The defendant "was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter." *Ibid.;* see also *Price*, 398 U. S., at 329 ("[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge" (footnote omitted)). Notably, *Green* acknowledged that its finding of an "implicit acquittal" was an "assumption," because the jury had made no express statement with respect to the greater offense. 355 U. S., at 190–191.

Blueford's position is even stronger because his jury was not silent on the murder counts, but announced that it was "unanimous against" conviction. And the trial judge specifically instructed the jury to consider manslaughter only after acquitting Blueford of the murder counts. Courts in several acquittal-first jurisdictions have held that a jury's deadlock on a lesser included offense justifies the assumption that the jury acquitted on any greater offenses. See *State* v. *Tate*, 256 Conn. 262, 283–285, 773 A. 2d 308, 323–324 (2001);

Stone v. *Superior Ct. of San Diego Cty.*, 31 Cal. 3d 503, 511–512, n. 5, 646 P. 2d 809, 815, n. 5 (1982). That assumption is not even necessary here because the jury unmistakably announced acquittal.

B

The majority holds that the forewoman's announcement was not an acquittal because it "was not a final resolution of anything." *Ante*, at 606. In the majority's view, the jury might have revisited its decisions on the murder counts during the 31 minutes of deliberations that followed the forewoman's announcement. We cannot know whether the jury did so, the majority reasons, because the jury was discharged without confirming that it remained "unanimous against" convicting Blueford of capital and first-degree murder. *Ante*, at 606–608.[3]

Putting to one side the lack of record evidence to support this speculation—by far the more plausible inference is that the jurors spent those 31 minutes attempting to resolve their deadlock on manslaughter—I do not agree that the jury was free to reconsider its decisions when its deliberations resumed. "A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final." *Bullington* v. *Missouri*, 451 U. S. 430, 445 (1981). The jury heard instructions and argument that it was required unanimously to acquit on capital and first-degree murder before it could reach man-

[3] This Court granted certiorari to decide "[w]hether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense." Pet. for Cert. i. The majority resolves the question presented by determining that the forewoman's announcements were not final, such that Blueford's jury did not necessarily deadlock on the lesser included offense of manslaughter. See *ante*, at 609, n. 2. In light of that determination, I do not read today's opinion to express any view with respect to the requirements of the Double Jeopardy Clause where a jury *does* deadlock on a lesser included offense. Cf., *e. g.*, *State* v. *Tate*, 256 Conn. 262, 284–285, 773 A. 2d 308, 323–324 (2001); *Whiteaker* v. *State*, 808 P. 2d 270, 274 (Alaska App. 1991).

slaughter. And as the forewoman's colloquy makes plain, the jury followed those instructions scrupulously. There is no reason to believe that the jury's vote was anything other than a verdict in substance—that is, a "final collective decision . . . reached after full deliberation, consideration, and compromise among the individual jurors." *Harrison* v. *Gillespie*, 640 F. 3d 888, 906 (CA9 2011) (en banc). And when that decision was announced in open court, it became entitled to full double jeopardy protection. See, *e. g.*, *Commonwealth* v. *Roth*, 437 Mass. 777, 796, 776 N. E. 2d 437, 450–451 (2002) (declining to give effect to "'"the verdict received from the lips of the foreman in open court"'" would "elevate form over substance"); *Stone*, 31 Cal. 3d, at 511, 646 P. 2d, at 814–815 ("[I]n determining what verdict, if any, a jury intended to return, the oral declaration of the jurors endorsing the result is the true return of the verdict" (internal quotation marks omitted)); see also, *e. g.*, *Dixon* v. *State*, 29 Ark. 165, 171 (1874) (technical defect in verdict "is of no consequence whatever, for the verdict need not be in writing, but may be announced by the foreman of the jury orally"); *State* v. *Mills*, 19 Ark. 476 (1858) ("The verdict was of no validity until delivered, by the jury, in Court").

The majority's example of a jury that takes a preliminary vote on greater offenses, advances to the consideration of a lesser, and then returns to a greater, is inapposite. See *ante*, at 607–608. In the majority's example, the jury has not announced its vote in open court. Moreover, the instructions in this case did not contemplate that the jury's deliberations could take the course that the majority imagines. Arkansas' model instruction requires acquittal as a prerequisite to consideration of a lesser offense, and the Double Jeopardy Clause entitles an acquittal to finality. Indeed, the purpose of an acquittal-first instruction is to ensure careful and conclusive deliberation on a greater offense. See *United States* v. *Tsanas*, 572 F. 2d 340, 346 (CA2 1978) (Friendly, J.) (acquittal-first instruction avoids "the danger

that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser"). True, Arkansas' instruction does not expressly forbid reconsideration, but it does not expressly permit reconsideration either. In any event, nothing indicates that the jury's announced decisions were tentative, compromises, or mere steps en route to a final verdict, and the Double Jeopardy Clause demands that ambiguity be resolved in favor of the defendant. See *Downum* v. *United States*, 372 U. S. 734, 738 (1963).

The fact that the jury was not given the express option of acquitting on individual offenses is irrelevant. See *ante*, at 603, 609–610. Arkansas law ascribes no significance to the presence of such options on a verdict form. See *Rowland* v. *State*, 263 Ark. 77, 85, 562 S. W. 2d 590, 594 (1978) ("The jury may prepare and present its own form of verdict"). The lack of a state procedural vehicle for the entry of a judgment of acquittal does not prevent the recognition of an acquittal for constitutional purposes. See *Hudson* v. *Louisiana*, 450 U. S. 40, 41, n. 1 (1981).

Finally, the majority's distinction of *Green* and *Price* is unavailing. The majority observes that *Green* and *Price*, unlike this case, involved final decisions. *Ante*, at 608. As I have explained, I view the forewoman's announcements of acquittal in this case as similarly final. In any event, *Green* clarified that the defendant's "claim of former jeopardy" was "not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder." 355 U. S., at 190, n. 11; accord, *id.*, at 194, n. 14. That is, the jury's silence on the greater offense spoke with sufficient clarity to justify the assumption of acquittal and to invoke the Double Jeopardy Clause. *Id.*, at 191; see also *Price*, 398 U. S., at 329. In light of the forewoman's announcement, this is an *a fortiori* case.

In short, the Double Jeopardy Clause demands an inquiry into the substance of the jury's actions. Blueford's jury had

the option to convict him of capital and first-degree murder, but expressly declined to do so. That ought to be the end of the matter.

II

A

Even if the majority were correct that the jury might have reconsidered an acquitted count—a doubtful assumption for the reasons just explained—that would not defeat Blueford's double jeopardy claim. It "has been long established as an integral part of double jeopardy jurisprudence" that "a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal." *Crist* v. *Bretz*, 437 U. S. 28, 34 (1978). This rule evolved in response to the "'abhorrent'" practice under the Stuart monarchs of terminating prosecutions, and thereby evading the bar on retrials, when it appeared that the Crown's proof might be insufficient. *Washington*, 434 U. S., at 507–508; see, *e. g.*, *Ireland's Case*, 7 How. St. Tr. 79, 120 (1678). Accordingly, retrial is barred if a jury is discharged before returning a verdict unless the defendant consents or there is a "manifest necessity" for the discharge. *Perez*, 9 Wheat., at 580; see also *King* v. *Perkins*, 90 Eng. Rep. 1122 (K. B. 1698).

In *Perez*, this Court explained that "manifest necessity" is a high bar: "[T]he power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." 9 Wheat., at 580. Since *Perez*, this Court has not relaxed the showing required. See, *e. g.*, *Washington*, 434 U. S., at 506 (requiring a "'high degree'" of necessity); *Downum*, 372 U. S., at 736 ("imperious necessity"); see also, *e. g.*, *United States* v. *Coolidge*, 25 F. Cas. 622, 623 (No. 14,858) (CC Mass. 1815) (Story, J.) ("extraordinary and striking circumstances"). Before declaring a mistrial, therefore, a trial judge must weigh heavily a "defendant's valued right to have his trial completed by a particular tribunal." *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). And in

light of the historical abuses against which the Double Jeopardy Clause guards, a trial judge must tread with special care where a mistrial would "help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused." *Gori* v. *United States*, 367 U. S. 364, 369 (1961); see *Green*, 355 U. S., at 188.

A jury's genuine inability to reach a verdict constitutes manifest necessity. But in an acquittal-first jurisdiction, a jury that advances to the consideration of a lesser included offense has not demonstrated an inability to decide a defendant's guilt or innocence on a greater—it has acquitted on the greater. Under *Green*, that is unquestionably true if the jury convicts on the lesser. See *id.*, at 189. It would be anomalous if the Double Jeopardy Clause offered less protection to a defendant whose jury has deadlocked on the lesser and thus convicted of nothing at all. See *Stone*, 31 Cal. 3d, at 511–512, n. 5, 646 P. 2d, at 815, n. 5.

I would therefore hold that the Double Jeopardy Clause requires a trial judge, in an acquittal-first jurisdiction, to honor a defendant's request for a partial verdict before declaring a mistrial on the ground of jury deadlock. Courts in acquittal-first jurisdictions have so held. See, *e. g.*, *Tate*, 256 Conn., at 285–287, 773 A. 2d, at 324–325; *Whiteaker* v. *State*, 808 P. 2d 270, 274 (Alaska App. 1991); *Stone*, 31 Cal. 3d, at 519, 646 P. 2d, at 820; *State* v. *Pugliese*, 120 N. H. 728, 730, 422 A. 2d 1319, 1321 (1980) *(per curiam); State* v. *Castrillo*, 90 N. M. 608, 611, 566 P. 2d 1146, 1149 (1977); see also N. Y. Crim. Proc. Law Ann. §310.70 (West 2002). Requiring a partial verdict in an acquittal-first jurisdiction ensures that the jurisdiction takes the bitter with the sweet. In general, an acquittal-first instruction increases the likelihood of conviction on a greater offense. See *People* v. *Boettcher*, 69 N. Y. 2d 174, 182, 505 N. E. 2d 594, 597 (1987). True, such an instruction may also result in deadlock on a greater, preventing a State "from obtaining a conviction on the lesser

charge that would otherwise have been forthcoming and thus require the expense of a retrial." *Tsanas*, 572 F. 2d, at 346. But a State willing to incur that expense loses nothing by overcharging in an acquittal-first regime. At worst, the State enjoys a second opportunity to convict, "with the possibility that the earlier 'trial run' will strengthen the prosecution's case." *Crist*, 437 U. S., at 52 (Powell, J., dissenting). If a State wants the benefits of requiring a jury to acquit before compromising, it should not be permitted to deprive a defendant of the corresponding benefits of having been acquitted. The Double Jeopardy Clause expressly prohibits that outcome.

The majority observes that we "have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict." *Ante*, at 609 (citing *Renico* v. *Lett*, 559 U. S. 766, 775 (2010)). That hands-off approach dilutes *Perez* beyond recognition. This Court has never excused a trial judge from exercising "scrupulous" care before discharging a jury. *Jorn*, 400 U. S., at 485 (plurality opinion). Rather, we have insisted that a trial judge may not act "irrationally," "irresponsibly," or "precipitately." *Washington*, 434 U. S., at 514–515. Nor have we retreated from the rule that "reviewing courts have an obligation to satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial." *Id.*, at 514 (quoting *Perez*, 9 Wheat., at 580).[4]

[4] The majority's reliance on *Renico*, a habeas corpus case decided under the deferential standard of review prescribed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is perplexing. As *Renico* made clear, the question there was "not whether the trial judge should have declared a mistrial. It is not even whether it was an abuse of discretion for her to have done so—the applicable standard on direct review. The question under AEDPA is instead whether the determination of the Michigan Supreme Court that there was no abuse of discretion was 'an unreasonable application of . . . clearly established Federal law.'" 559 U. S., at 772–773 (quoting 28 U. S. C. § 2254(d)(1)); accord, 559 U. S., at 778,

B

Even if the Double Jeopardy Clause did not compel that broader rule, the facts of this case confirm that there was no necessity, let alone manifest necessity, for a mistrial. There was no reason for the judge not to have asked the jury, prior to discharge, whether it remained "unanimous against" conviction on capital and first-degree murder. There would have been no intrusion on the jury's deliberative process. The judge was not required to issue new instructions or verdict forms, allow new arguments, direct further deliberations, or take any other action that might have threatened to coerce the jury. Merely repeating his earlier question would have sufficed. Because the judge failed to take even this modest step—or indeed, to explore any alternatives to a mistrial, or even to make an on-the-record finding of manifest necessity—I conclude that there was an abuse of discretion. See, *e. g.*, *Jorn*, 400 U. S., at 486 (plurality opinion); see also *Washington*, 434 U. S., at 525 (Marshall, J., dissenting) (manifest necessity requires showing "that there were no meaningful and practical alternatives to a mistrial, or that the trial court scrupulously considered available alternatives and found all wanting but a termination of the proceedings").

Indeed, the only reason I can divine for the judge's failure to take this modest step is his misperception of Arkansas law with respect to the transitional instruction. After the colloquy with the forewoman, the judge commented at sidebar that the jurors "haven't even taken a vote on [negligent homicide]. . . . I don't think they've completed their deliberation. . . . I mean, under any reasonable circumstances, they would at least take a vote on negligent homicide." App. 65–66. And after the jury retired for the last half hour of deliberations, the judge said, "I don't think they have an under-

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n. 3. *Renico* thus has little to say about a trial judge's responsibilities, or this Court's, on direct review. Cf. *Cullen* v. *Pinholster*, 563 U. S. 170, 202–203 (2011).

standing of really that they don't have to get past every charge unanimously before they can move to the next charge." *Id.*, at 69. That misstated Arkansas law as well as the judge's own instructions. The jury was required to reach a unanimous decision on a greater offense before considering a lesser. See *supra*, at 612. In discharging the jury, the judge said, "Madam Foreman, there seems to be a lot of confusion on the part . . . of the jury about some of the instructions. And because of the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial." App. 69–70.

If, as these comments suggest, the judge wrongly believed that the jury was not required to reach unanimity on a greater offense before considering a lesser, then he accorded insufficient finality and weight to the forewoman's earlier announcement of acquittal on capital and first-degree murder. That mistake of law negates the deference due the judge's decision to declare a mistrial. The judge explained that the jury was being discharged in part based on its "confusion" with respect to the instructions, when in fact, the confusion was the judge's. *Ibid.;* see, *e. g., Washington*, 434 U. S., at 510, n. 28 ("If the record reveals that the trial judge has failed to exercise the 'sound discretion' entrusted to him, the reason for . . . deference by an appellate court disappears"); *Illinois* v. *Somerville*, 410 U. S. 458, 469 (1973) (critiquing "erratic" mistrial inquiry); *Gori*, 367 U. S., at 371, n. 3 (Douglas, J., dissenting) (noting that "[i]n state cases, a second prosecution has been barred where the jury was discharged through the trial judge's misconstruction of the law," and collecting cases). And a trial court "by definition abuses its discretion when it makes an error of law." *Koon* v. *United States*, 518 U. S. 81, 100 (1996).

* * *

At its core, the Double Jeopardy Clause reflects the wisdom of the founding generation, familiar to "'every person

acquainted with the history of governments,'" that "'state trials have been employed as a formidable engine in the hands of a dominant administration. . . . To prevent this mischief the ancient common law . . . provided that one acquittal or conviction should satisfy the law.'" *Ex parte Lange*, 18 Wall. 163, 171 (1874) (quoting *Commonwealth* v. *Olds*, 15 Ky. 137, 139 (1824)). The Double Jeopardy Clause was enacted "'[t]o perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours.'" 18 Wall., at 171. This case demonstrates that the threat to individual freedom from reprosecutions that favor States and unfairly rescue them from weak cases has not waned with time. Only this Court's vigilance has.

I respectfully dissent.

Syllabus

FREEMAN ET AL. *v.* QUICKEN LOANS, INC.

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

No. 10–1042. Argued February 21, 2012—Decided May 24, 2012

The Real Estate Settlement Procedures Act of 1974 (RESPA) provides, as relevant here, that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." 12 U. S. C. § 2607(b). Petitioners, three couples who obtained mortgage loans from respondent, filed separate state-court actions, alleging that respondent had violated § 2607(b) by charging them fees for which no services were provided in return. After the cases were removed to federal court and consolidated, respondent sought summary judgment, arguing that petitioners' claims were not cognizable under § 2607(b) because the allegedly unearned fees were not split with another party. The District Court agreed; and because petitioners had not alleged any splitting of fees, it granted respondent summary judgment. The Fifth Circuit affirmed.

Held: In order to establish a violation of § 2607(b), a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons. Pp. 628–638.

(a) Section 2607(b) unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee. Pp. 628–635.

(1) Section 2607(b) clearly describes two distinct exchanges. First, a "charge" is "made" to or "received" from a consumer by a settlement-service provider. That provider then "give[s]," and another person "accept[s]," a "portion, split, or percentage" of the charge. Congress's use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction and the fee-sharing one would be pointless if, as petitioners contend, the two transactions could be collapsed into one. Their reading—that a settlement-service provider can "make" a charge and then "accept" the portion of the charge consisting of 100 percent—does not avoid collapsing the sequential relationship of the two stages and would destroy the tandem character of activities that the text envisions at stage two (*i. e.*, a giving and accepting). And if the consumer were the person who "give[s]" a "portion,

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split, or percentage" of the charge to the provider who "accept[s]" it, consumers would become lawbreakers themselves. Pp. 628–633.

(2) The normal usage of the terms "portion," "split," and "percentage"—which, when referring to a portion or percentage of a whole, usually mean less than 100 percent—reinforces the conclusion that § 2607(b) does not apply where a settlement-service provider retains the entirety of a fee received from a consumer. The meaning is also confirmed by the "commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U. S. 285, 294. This connotation is not undermined by the canon against surplusage. "Portion," "split," and "percentage" may all mean the same thing, but the canon merely favors that interpretation which avoids surplusage, see *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 106–107, and petitioners' interpretation no more achieves that end than the Court's does. Pp. 633–635.

(b) Petitioners' arguments in favor of their contrary interpretation are unpersuasive. Section 2607(b), as interpreted here, is not rendered surplusage by § 2607(a)'s express prohibition of kickbacks, for each subsection reaches conduct that the other does not. RESPA's general purpose—to protect consumers from "certain abusive practices," § 2601(a)—also provides no warrant for expanding § 2607(b)'s prohibition beyond the field to which it is unambiguously limited: the splitting of fees paid for settlement services. And giving § 2607(b) its natural meaning would not lead to absurd results. Pp. 635–638.

626 F. 3d 799, affirmed.

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

Kevin K. Russell argued the cause for petitioners. With him on the briefs were *Thomas C. Goldstein*, *Amy Howe*, *Patrick W. Pendley*, *Stanley P. Baudin*, *André P. LaPlace*, *Pamela S. Karlan*, and *Jeffrey L. Fisher*.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, *Michael Jay Singer*, *Christine N. Kohl*, *David M. Gossett*, and *Deepak Gupta*.

Thomas M. Hefferon argued the cause for respondent. With him on the brief were *William F. Sheehan*, *Matthew*

S. Sheldon, *Jeffrey B. Morganroth*, *Kevin P. Martin*, *Michael H. Rubin*, and *Eric J. Simonson.**

JUSTICE SCALIA delivered the opinion of the Court.

A provision of the Real Estate Settlement Procedures Act (RESPA), codified at 12 U. S. C. §2607(b), prohibits giving and accepting "any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed." We consider whether, to establish a violation of §2607(b),[1] a plaintiff must demonstrate that a charge was divided between two or more persons.

I

Enacted in 1974, RESPA regulates the market for real estate "settlement services," a term defined by statute to

*A brief of *amici curiae* urging reversal was filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *David S. Chaney*, Chief Assistant Attorney General, *Frances T. Grunder* and *Julie Weng-Gutierrez*, Senior Assistant Attorneys General, *Karin S. Schwartz*, Supervising Deputy Attorney General, and *Gregory D. Brown*, Deputy Attorney General, and by the Attorneys General for their respective jurisdictions as follows: *John J. Burns* of Alaska, *Thomas C. Horne* of Arizona, *George Jepsen* of Connecticut, *Irvin B. Nathan* of the District of Columbia, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *William J. Schneider* of Maine, *Steve Bullock* of Montana, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *Michael DeWine* of Ohio, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Gregory A. Phillips* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for the American Bankers Association et al. by *Deanne E. Maynard* and *Brian R. Matsui;* for the American Escrow Association et al. by *Jay N. Varon* and *Michael D. Leffel;* and for the National Association of Realtors by *David C. Frederick*, *Brendan J. Crimmins*, *Laurene K. Janik*, and *Ralph W. Holmen.*

[1] This and all subsequent section references pertain to Title 12 unless otherwise specified.

include "any service provided in connection with a real estate settlement," such as "title searches, . . . title insurance, services rendered by an attorney, the preparation of documents, property surveys, the rendering of credit reports or appraisals, . . . services rendered by a real estate agent or broker, the origination of a federally related mortgage loan[2] . . . , and the handling of the processing, and closing or settlement." § 2602(3). Among RESPA's consumer-protection provisions is § 2607, which directly furthers Congress's stated goal of "eliminat[ing] . . . kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services," § 2601(b)(2). Section 2607(a) provides:

> "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person."

The neighboring provision, subsection (b), adds the following:

> "No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed."

These substantive provisions are enforceable through, *inter alia*, actions for damages brought by consumers of settlement services against "[a]ny person or persons who violate the prohibitions or limitations" of § 2607, with recovery set at an amount equal to three times the charge paid by the plaintiff for the settlement service at issue. § 2607(d)(2).

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[2] The statutory definition of "federally related mortgage loan" is set forth in § 2602(1).

Petitioners in this case are three married couples who obtained mortgage loans from respondent Quicken Loans, Inc. In 2008, they filed separate actions in Louisiana state court, alleging, as pertinent here, that respondent had violated § 2607(b) by charging them fees for which no services were provided. In particular, the Freemans and the Bennetts allege that they were charged loan discount fees of $980 and $1,100, respectively, but that respondent did not give them lower interest rates in return. The Smiths' allegations focus on a $575 loan "processing fee" and a "loan origination" fee of more than $5,100.[3]

Respondent removed petitioners' lawsuits to federal court, where the cases were consolidated. Respondent thereafter moved for summary judgment on the ground that petitioners' claims are not cognizable under § 2607(b) because the allegedly unearned fees were not split with another party. The District Court agreed; and because petitioners did not allege any splitting of fees it granted summary judgment in favor of respondent.

A divided panel of the United States Court of Appeals for the Fifth Circuit affirmed. 626 F. 3d 799 (2010). We granted certiorari. 565 U. S. 941 (2011).

II

The question in this case pertains to the scope of § 2607(b), which as we have said provides that "[n]o person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real

[3] Respondent maintains that at least the "loan origination" fee charged to the Smiths was in fact a mislabeled loan discount fee, like the allegedly unearned fees charged to the Freemans and the Bennetts. Respondent contends that loan discount fees fall outside the scope of § 2607(b) because they are not fees for settlement services, but rather, as the Eleventh Circuit has held, are part of the pricing of a loan. See *Wooten* v. *Quicken Loans, Inc.*, 626 F. 3d 1187 (2010). Petitioners dispute this point on the merits and further argue that respondent forfeited the contention in the lower courts. We express no view on this issue.

estate settlement service . . . other than for services actually performed." The dispute between the parties boils down to whether this provision prohibits the collection of an unearned charge by a single settlement-service provider—what we might call an undivided unearned fee—or whether it covers only transactions in which a provider shares a part of a settlement-service charge with one or more other persons who did nothing to earn that part.

Petitioners' argument that the former interpretation should prevail finds support in a 2001 policy statement issued by the Department of Housing and Urban Development (HUD), the agency that was until recently authorized by Congress to "prescribe such rules and regulations" and "to make such interpretations" as "may be necessary to achieve the purposes of [RESPA]," § 2617(a).[4] That policy statement says that § 2607(b) "prohibit[s] any person from giving or accepting any unearned fees, i. e., charges or payments for real estate settlement services other than for goods or facilities provided or services performed." 66 Fed. Reg. 53057 (2001). It "specifically interprets [§ 2607(b)] as not being limited to situations where at least two persons split or share an unearned fee." *Ibid.* More broadly, the policy statement construes § 2607(b) as authority for regulation of the charges paid by consumers for the provision of settlements. It says that "a settlement service provider may not mark-up the cost of another provider's services without providing additional settlement services; such payment must be for services that are actual, necessary and distinct." *Id.*, at

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[4] On July 21, 2011, HUD's consumer-protection functions under RESPA were transferred to the Bureau of Consumer Financial Protection. See Dodd-Frank Wall Street Reform and Consumer Protection Act, §§ 1061(b)(7) and (d), 1062, 1098, 1100H, 124 Stat. 2038, 2039–2040, 2103–2104, 2113. That day, the Bureau issued a notice stating that it would enforce HUD's RESPA regulations and that, pending further Bureau action, it would apply HUD's previously issued official policy statements regarding RESPA. 76 Fed. Reg. 43570–43571.

53059. Moreover, in addition to facing liability when it collects a fee that is entirely unearned, a provider may also "be liable under [§ 2607(b)] when it charges a fee that exceeds the reasonable value of goods, facilities, or services provided," *ibid.*, on the theory that the excess over reasonable value constitutes a "portion" of the charge "other than for services actually performed," § 2607(b).

The last mentioned point, however, is manifestly inconsistent with the statute HUD purported to construe. When Congress enacted RESPA in 1974, it included a directive that HUD make a report to Congress within five years regarding the need for further legislation in the area. See § 2612(a) (1976 ed.). Among the topics required to be included in the report were "recommendations on whether Federal regulation of the charges for real estate settlement services in federally related mortgage transactions is necessary and desirable," and, if so, recommendations with regard to what reforms should be adopted. § 2612(b)(2). The directive for recommendations regarding the desirability of price regulation would make no sense if Congress had already resolved the issue—if § 2607(b) already carried with it authority for HUD to proscribe the collection of unreasonably high fees for settlement services, *i. e.*, to engage in price regulation.

No doubt recognizing as much, petitioners do not fully adopt HUD's construction of § 2607(b). Noting that even those Courts of Appeals which have found § 2607(b) not to be limited to fee-splitting situations have held that the statute does not reach unreasonably high fees, see *Kruse* v. *Wells Fargo Home Mortgage, Inc.*, 383 F. 3d 49, 56 (CA2 2004); *Santiago* v. *GMAC Mortgage Group, Inc.*, 417 F. 3d 384, 387 (CA3 2005); *Friedman* v. *Market Street Mortgage Corp.*, 520 F. 3d 1289, 1297 (CA11 2008), petitioners acknowledge that the statute does not cover overcharges. They nonetheless embrace HUD's construction of § 2607(b) insofar as it holds that a provider violates the statute by retaining a fee after providing no services at all in return. In short, petitioners

contend that, by allegedly charging each of them an unearned fee, respondent "accept[ed]" a "portion, split, or percentage" of a settlement-service charge (*i. e.*, 100 percent of the charge) "other than for services actually performed." § 2607(b) (2006 ed.).

The parties vigorously dispute whether the position set forth in HUD's 2001 policy statement should be accorded deference under the framework announced by this Court in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). We need not resolve that dispute—or address whether, if *Chevron* deference would otherwise apply, it is eliminated by the policy statement's palpable overreach with regard to price controls. For we conclude that even the more limited position espoused by the policy statement and urged by petitioners "goes beyond the meaning that the statute can bear," *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 229 (1994). In our view, § 2607(b) unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee.[5]

By providing that no person "shall give" or "shall accept" a "portion, split, or percentage" of a "charge" that has been "made or received," "other than for services actually performed," § 2607(b) clearly describes two distinct exchanges. First, a "charge" is "made" to or "received" from a consumer by a settlement-service provider. That provider then "give[s]," and another person "accept[s]," a "portion, split, or percentage" of the charge. Congress's use of different sets of verbs, with distinct tenses, to distinguish between the consumer-provider transaction (the "charge" that is "made

[5] Petitioners also contend that the position set forth in the 2001 policy statement is consistent with a HUD regulation, 24 CFR § 3500.14(c) (2011), and with prior administrative guidance. In light of our conclusion that § 2607(b) unambiguously forecloses petitioners' position, we have no need to address this issue.

or received") and the fee-sharing transaction (the "portion, split, or percentage" that is "give[n]" or "accept[ed]") would be pointless if, as petitioners contend, the two transactions could be collapsed into one.

Petitioners try to merge the two stages by arguing that a settlement-service provider can "make" a charge (stage one) and then "accept" (stage two) the portion of the charge consisting of 100 percent. See Reply Brief 6. But then is not the provider also "receiv[ing]" the charge at the same time he is "accept[ing]" the portion of it? And who "give[s]" the portion of the charge consisting of 100 percent? The same provider who "accept[s]" it? This reading does not avoid collapsing the sequential relationship of the two stages, and it would simply destroy the tandem character of activities that the text envisions at stage two (*i. e.*, a giving and accepting).

Petitioners seek to avoid this consequence, at stage two at least, by saying that the *consumer* is the person who "give[s]" a "portion, split, or percentage" of the charge to the provider who "accept[s]" it. See Brief for Petitioners 21; Reply Brief 5. But since under this statute it is (so to speak) as accursed to give as to receive, this would make lawbreakers of consumers—the very class for whose benefit § 2607(b) was enacted, see § 2601. It is no answer to say that a consumer would not face damages liability because a violator is liable only "to the person or persons charged for the settlement service," § 2607(d)(2), and it would not make sense to render a consumer liable to himself. It is the *logical consequence* that a consumer would be liable to himself, not the specter of actual damages liability, which provides strong indication that something in petitioners' interpretation is amiss.

At any rate, § 2607(b) is also enforceable through criminal prosecutions, § 2607(d)(1), and actions for injunctive relief brought by federal and state regulators, § 2607(d)(4) (2006 ed., Supp. IV). HUD's 2001 policy statement asserts that

"HUD is, of course, unlikely to direct any enforcement actions against consumers for the payment of unearned fees," 66 Fed. Reg. 53059, n. 6, but that assurance is cold comfort. Moreover, even assuming (as seems realistic) that the Justice Department would be similarly reluctant to prosecute consumers for criminal violations of § 2607(b), "prosecutorial discretion is not a reason for courts to give improbable breadth to criminal statutes." *Abuelhawa* v. *United States*, 556 U. S. 816, 823, n. 3 (2009).

Nor is the problem of consumer criminal liability solved by petitioners' suggestion that an unstated *mens rea* requirement be read into the criminal enforcement provision, § 2607(d)(1) (2006 ed.), see, *e. g.*, *Staples* v. *United States*, 511 U. S. 600, 605 (1994). If that would excuse only those consumers who are unaware that they are paying for unearned services, some consumers would remain criminally liable—those who know that the fee is unearned but decide to pay it anyway, perhaps because the provider's proposal is still the best deal. And if it would immunize *all* consumers, the statute's criminalization of the entire "giving" portion of consumer-provider transactions would make little sense. We find it virtually unthinkable that Congress would leave it to imputed *mens rea* to preserve from criminal liability some or all of the class RESPA was designed to protect—and entirely unthinkable that Congress would have created that strange disposition through language as obscure as that relied upon here.

The phrase "portion, split, or percentage" reinforces the conclusion that § 2607(b) does not cover a situation in which a settlement-service provider retains the entirety of a fee received from a consumer. It is certainly true that "portion" or "percentage" *can* be used to include the entirety, or 100 percent. See, *e. g.*, 18 U. S. C. § 648 ("portion"); 5 U. S. C. § 8348(g) (2006 ed., Supp. IV) ("percentag[e]"); 5 U. S. C. § 8351(b)(2)(B) (2006 ed.) (same); 12 U. S. C. § 1467a(m)(7)(B)(ii)(II) (same). But that is not the normal meaning of

"portion" when one speaks of "giv[ing]" or "accept[ing]" a portion of the whole, as dictionary definitions uniformly show.[6] Aesop's fable would be just as wryly humorous if the lion's claim to the entirety of the kill he hunted in partnership with less ferocious animals had been translated into English as the "lion's portion" instead of the lion's share. As for "percentage," that word *can* include 100 percent—or even 300 percent—when it refers to merely a ratable measure ("unemployment claims were up 300 percent").[7] But, like "portion," it normally means less than all when referring to a "percentage" of a specific whole ("he demanded a percentage of the profits").[8] And it is normal usage that, in the absence of contrary indication, governs our interpretation of texts. *Crawford* v. *Metropolitan Government of Nashville and Davidson Cty.*, 555 U. S. 271, 276 (2009); *Asgrow Seed Co.* v. *Winterboer*, 513 U. S. 179, 187 (1995).

In the present statute, that meaning is confirmed by the "commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring

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[6] See, *e. g.,* Webster's New International Dictionary 1924 (2d ed. 1954) (hereinafter Webster's) (defs. 1, 4: defining "portion" as "[a]n allotted part; a share; a parcel; a division in a distribution[;] . . . [a] part of a whole"); 12 Oxford English Dictionary 154–155 (2d ed. 1989) (hereinafter OED) (defs. 1a, 5: defining "portion" as "[t]he part (of anything) allotted or belonging to one person; a share[;] . . . [a] part of any whole"); American Heritage Dictionary 1373 (5th ed. 2011) (def. 1: defining "portion" as "[a] section or quantity within a larger thing; a part of a whole").

[7] See, *e. g.,* Webster's 1815 (def. 1: defining "percentage" as "[a] certain rate per cent"); 11 OED 521 (def. a: defining "percentage" as "[a] rate or proportion per cent").

[8] See, *e. g.,* Webster's 1815 (def. 1: defining "percentage" as "a part or proportion of a whole expressed as so much or many per hundred"); 11 OED 521 (def. a: defining "percentage" as "a quantity or amount reckoned as so much in the hundred, i. e. as so many hundredth parts of another, esp. of the whole of which it is a part; hence *loosely,* a part or portion considered in its quantitative relation to the whole"); American Heritage Dictionary, *supra,* at 1307 (def. 2: defining "percentage" as "[a] proportion or share in relation to a whole; a part").

words with which it is associated." *United States* v. *Williams*, 553 U. S. 285, 294 (2008). For "portion" and "percentage" do not stand in isolation, but are part of a phrase in which they are joined together by the intervening word "split"—which, as petitioners acknowledge, Brief for Petitioners 19, cannot possibly mean the entirety. We think it clear that, in employing the phrase "portion, split, or percentage," Congress sought to invoke the words' common "core of meaning," *Graham County Soil and Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U. S. 280, 289, n. 7 (2010), which is to say, a part of a whole. That is so even though the phrase is preceded by "any"—a word that, we have observed, has an "'expansive meaning,'" *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 131 (2002). Expansive, yes; transformative, no. It can broaden to the maximum, but never change in the least, the clear meaning of the phrase selected by Congress here.

Contrary to petitioners' contention, the natural connotation of "portion, split, or percentage" is not undermined in this context by our "general 'reluctan[ce] to treat statutory terms as surplusage.'" *Board of Trustees of Leland Stanford Junior Univ.* v. *Roche Molecular Systems, Inc.*, 563 U. S. 776, 788 (2011) (quoting *Duncan* v. *Walker*, 533 U. S. 167, 174 (2001)). Petitioners rightly point out that under our interpretation "portion," "split," and "percentage" all mean the same thing—a perhaps regrettable but not uncommon sort of lawyerly iteration ("give, grant, bargain, sell, and convey"). But the canon against surplusage merely favors that interpretation which *avoids* surplusage, see *Microsoft Corp.* v. *i4i Ltd. Partnership*, 564 U. S. 91, 106–107 (2011)—and petitioners' interpretation no more achieves that end than ours does. It is impossible to imagine a "portion" (even a portion consisting of the entirety) or a "split" that is not also a "percentage."

Petitioners invoke the presumption against surplusage a second time, urging that if § 2607(b) is not construed to reach

undivided unearned fees, it would be rendered "largely surplusage" in light of § 2607(a)'s express prohibition of kickbacks. Brief for Petitioners 24. Not so. Section 2607(a) prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding . . . that business incident to or a part of a real estate settlement service . . . shall be referred to any person." That prohibition is at once broader than § 2607(b)'s (because it applies to the transfer of any "thing of value," rather than to the dividing of a "charge" paid by a consumer) and narrower (because it requires an "agreement or understanding" to refer business). Thus, a settlement-service provider who agrees to exchange valuable tickets to a sporting event in return for a referral of business would violate § 2607(a), but not § 2607(b). So too a provider who agrees to pay a monetary referral fee that is not tied in any respect to a charge paid by a particular consumer—for instance, a "retainer" agreement pursuant to which the provider pays a monthly lump sum in exchange for the recipient's agreement to refer any business that comes his way. By contrast, a settlement-service provider who gives a portion of a charge to another person who has not rendered any services in return would violate § 2607(b), even if an express referral arrangement does not exist or cannot be shown. In short, each subsection reaches conduct that the other does not; there is no need to adopt petitioners' improbable reading of § 2607(b) to avoid rendering any portion of § 2607 superfluous.

It follows that petitioners can derive no support from § 2607's caption: "Prohibition against kickbacks and unearned fees." Subsection (a) prohibits certain kickbacks (those agreed to in exchange for referrals) and subsection (b) prohibits certain unearned fees (those paid from a part of the charge to the customer).[9]

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[9] The United States, as *amicus curiae*, raises an additional argument from the statutory context: that coverage of undivided unearned fees in § 2607(b) can be inferred from the text of § 2607(d), which sets out penalties

Petitioners also appeal to statutory purpose, arguing that a prohibition against the charging of undivided unearned fees would fit comfortably with RESPA's stated goal of "insur[ing] that consumers . . . are protected from unnecessarily high settlement charges caused by certain abusive practices," § 2601(a). It bears noting that RESPA's declaration of purpose is by its terms limited to "*certain* abusive practices"—making the statute an even worse candidate than most for the expansion of limited text by the positing of an unlimited purpose. RESPA's particular language ultimately serves to drive home a broader point: "[N]o legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U. S. 522, 525–526 (1987) *(per curiam)*, and "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means," *Director, Office of Workers' Compensation Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 136 (1995). Vague notions of statutory purpose provide no warrant for expanding § 2607(b)'s prohibition beyond the field to which it is unambiguously limited: the splitting of fees paid for settlement services.

Nor is there any merit to petitioners' related contention that § 2607(b) should not be given its natural meaning because doing so leads to the allegedly absurd result of permit-

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for the "*person* or persons" who violate § 2607(a) or § 2607(b). § 2607(d)(1), (2), and (3) (emphasis added). But Congress's use of the singular "person" does not remotely establish that § 2607(b) can be violated by a single culpable actor who accepts an unearned charge from a consumer. In fact, any such inference is negated by the history of § 2607. When RESPA was first enacted, § 2607(d) separately provided for damages liability of "any person or persons who violate the provisions of subsection (a)" and of "any person or persons who violate the provisions of subsection (b)." § 2607(d)(2) (1976 ed.). Because § 2607(a), with its reference to an "agreement or understanding," has always required two culpable parties for a violation, Congress's use of the phrase "any person or persons" in connection with that subsection demonstrates that the phrase does not have the significance attributed to it by the United States.

ting a provider to charge and keep the entirety of a $1,000 unearned fee, while imposing liability if the provider shares even a nickel of a $10 charge with someone else. That result does not strike us as particularly anomalous. Congress may well have concluded that existing remedies, such as state-law fraud actions, were sufficient to deal with the problem of entirely fictitious fees, whereas legislative action was required to deal with the problems posed by kickbacks and fee splitting.

In any event, petitioners' reading of the statute leads to an "absurdity" of its own: Because § 2607(b) manifestly cannot be understood to prohibit unreasonably high fees, see *supra*, at 630, a service provider could avoid liability by providing just a dollar's worth of services in exchange for the $1,000 fee. Acknowledging that § 2607(b)'s coverage is limited to fee-splitting transactions at least has the virtue of making it a coherent response to that particular problem, rather than an incoherent response to the broader problem of unreasonably high fees.

* * *

In order to establish a violation of § 2607(b), a plaintiff must demonstrate that a charge for settlement services was divided between two or more persons. Because petitioners do not contend that respondent split the challenged charges with anyone else, summary judgment was properly granted in favor of respondent. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Syllabus

RADLAX GATEWAY HOTEL, LLC, ET AL. *v.* AMALGAMATED BANK

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

No. 11–166. Argued April 23, 2012—Decided May 29, 2012

To finance the purchase of a commercial property and associated renovation and construction costs, petitioners (debtors) obtained a secured loan from an investment fund, for which respondent (Bank) serves as trustee. The debtors ultimately became insolvent, and sought relief under Chapter 11 of the Bankruptcy Code. Pursuant to 11 U. S. C. § 1129(b)(2)(A), the debtors sought to confirm a "cramdown" bankruptcy plan over the Bank's objection. That plan proposed selling substantially all of the debtors' property at an auction, and using the sale proceeds to repay the Bank. Under the debtors' proposed auction procedures, the Bank would not be permitted to bid for the property using the debt it is owed to offset the purchase price, a practice known as "credit-bidding." The Bankruptcy Court denied the debtors' request, concluding that the auction procedures did not comply with § 1129(b)(2)(A)'s requirements for cramdown plans. The Seventh Circuit affirmed, holding that § 1129(b)(2)(A) does not permit debtors to sell an encumbered asset free and clear of a lien without permitting the lienholder to credit-bid.

Held: The debtors may not obtain confirmation of a Chapter 11 cramdown plan that provides for the sale of collateral free and clear of the Bank's lien, but does not permit the Bank to credit-bid at the sale. Pp. 643–649.

(a) A Chapter 11 plan proposed over the objection of a "class of secured claims" must meet one of three requirements in order to be deemed "fair and equitable," and therefore confirmable. The secured creditor may retain its lien on the property and receive deferred cash payments, § 1129(b)(2)(A)(i); the debtors may sell the property free and clear of the lien, "subject to section 363(k)"—which permits the creditor to credit-bid at the sale—and provide the creditor with a lien on the sale proceeds, § 1129(b)(2)(A)(ii); or the plan may provide the secured creditor with the "indubitable equivalent" of its claim, § 1129(b)(2)(A)(iii).

Here, the debtors proposed to sell their property free and clear of the Bank's liens and repay the Bank with the sale proceeds, as contemplated by clause (ii). Because the debtors' auction procedures do not permit the Bank to credit-bid, however, the proposed sale cannot satisfy the requirements of clause (ii). The debtors claim their plan can instead

satisfy clause (iii) by providing the Bank with the "indubitable equivalent" of its secured claim, in the form of cash generated by the auction.

The debtors' reading of § 1129(b)(2)(A), under which clause (iii) permits precisely what clause (ii) proscribes, is hyperliteral and contrary to common sense. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384. Here, where general and specific authorizations exist side by side, the general/specific canon avoids rendering superfluous a specific provision that is swallowed by the general one. See *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208. As applied to § 1129(b)(2)(A), the canon provides that the "general language" of clause (iii), "although broad enough to include it, will not be held to apply to a matter specifically dealt with" in clause (ii). 285 U. S., at 208. Although the canon can be overcome by other textual indications of statutory meaning, the debtors point to none here. Pp. 643–647.

(b) None of the debtors' objections to this approach is valid. Pp. 647–649.

651 F. 3d 642, affirmed.

SCALIA, J., delivered the opinion of the Court, in which all other Members joined, except KENNEDY, J., who took no part in the decision of the case.

David M. Neff argued the cause for petitioners. With him on the briefs were *Brian A. Audette* and *Eric E. Walker.*

Deanne E. Maynard argued the cause for respondent. With her on the brief were *Brian R. Matsui*, *Marc A. Hearron*, *Adam A. Lewis*, and *Norman S. Rosenbaum.*

Sarah E. Harrington argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Deputy Solicitor General Stewart*, and *Robert M. Loeb.**

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*Briefs of *amici curiae* urging affirmance were filed for Bankruptcy Scholars by *Adam K. Mortara;* for the Loan Syndications and Trading Association et al. by *Seth P. Waxman*, *Craig Goldblatt*, *Danielle Spinelli*, *Eric F. Citron*, *Elliot Ganz*, *Jonathan N. Helfat*, *Daniel Wallen*, *Richard M. Kohn*, *Jeffrey R. Fine*, *Christopher D. Kratovil*, and *Scott Sinder;* for Richard Aaron et al. by *Richard Lieb;* and for G. Eric Brunstad, Jr., by *Mr. Brunstad, pro se*, *Collin O'Connor Udell*, and *Matthew J. Delude.*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether a Chapter 11 bankruptcy plan may be confirmed over the objection of a secured creditor pursuant to 11 U. S. C. § 1129(b)(2)(A) if the plan provides for the sale of collateral free and clear of the creditor's lien, but does not permit the creditor to "credit-bid" at the sale.

I

In 2007, petitioners RadLAX Gateway Hotel, LLC, and RadLAX Gateway Deck, LLC (hereinafter debtors), purchased the Radisson Hotel at Los Angeles International Airport, together with an adjacent lot on which the debtors planned to build a parking structure. To finance the purchase, the renovation of the hotel, and construction of the parking structure, the debtors obtained a $142 million loan from Longview Ultra Construction Loan Investment Fund, for which respondent Amalgamated Bank (hereinafter creditor or Bank) serves as trustee. The lenders obtained a blanket lien on all of the debtors' assets to secure the loan.

Completing the parking structure proved more expensive than anticipated, and within two years the debtors had run out of funds and were forced to halt construction. By August 2009, they owed more than $120 million on the loan, with over $1 million in interest accruing every month and no prospect for obtaining additional funds to complete the project. Both debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

A Chapter 11 bankruptcy is implemented according to a "plan," typically proposed by the debtor, which divides claims against the debtor into separate "classes" and specifies the treatment each class will receive. See 11 U. S. C. § 1123. Generally, a bankruptcy court may confirm a Chapter 11 plan only if each class of creditors affected by the plan consents. See § 1129(a)(8). Section 1129(b) creates an exception to that general rule, permitting confirmation of nonconsensual plans—commonly known as "cramdown"

plans—if "the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." Section 1129(b)(2)(A), which we review in further depth below, establishes criteria for determining whether a cramdown plan is "fair and equitable" with respect to secured claims like the Bank's.

In 2010, the RadLAX debtors submitted a Chapter 11 plan to the United States Bankruptcy Court for the Northern District of Illinois. The plan proposed to dissolve the debtors and to sell substantially all of their assets pursuant to procedures set out in a contemporaneously filed "Sale and Bid Procedures Motion." Specifically, the debtors sought to auction their assets to the highest bidder, with the initial bid submitted by a "stalking horse"—a potential purchaser who was willing to make an advance bid of $47.5 million.[1] The sale proceeds would be used to fund the plan, primarily by repaying the Bank. Of course the Bank itself might wish to obtain the property if the alternative would be receiving auction proceeds that fall short of the property's full value. Under the debtors' proposed auction procedures, however, the Bank would not be permitted to bid for the property using the debt it is owed to offset the purchase price, a practice known as "credit-bidding." Instead, the Bank would be forced to bid cash. Correctly anticipating that the Bank would object to this arrangement, the debtors sought to confirm their plan under the cramdown provisions of § 1129(b)(2)(A).

The Bankruptcy Court denied the debtors' Sale and Bid Procedures Motion, concluding that the proposed auction procedures did not comply with § 1129(b)(2)(A)'s requirements for cramdown plans. *In re River Road Hotel Partners, LLC*, Case No. 09 B 30029 (ND Ill., Oct. 5, 2010), App.

[1] In a later proposal, the stalking-horse bid increased to $55 million. The precise amount of the bid is not relevant here.

to Pet. for Cert. 40a. The Bankruptcy Court certified an appeal directly to the United States Court of Appeals for the Seventh Circuit. That court accepted the certification and affirmed, holding that § 1129(b)(2)(A) does not permit debtors to sell an encumbered asset free and clear of a lien without permitting the lienholder to credit-bid. *River Road Hotel Partners, LLC, et al.* v. *Amalgamated Bank*, 651 F. 3d 642 (2011). We granted certiorari. 565 U. S. 1092 (2011).

II

A

A Chapter 11 plan confirmed over the objection of a "class of secured claims" must meet one of three requirements in order to be deemed "fair and equitable" with respect to the nonconsenting creditor's claim. The plan must provide:

> "(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;
>
> "(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> "(iii) for the realization by such holders of the indubitable equivalent of such claims." 11 U. S. C. § 1129(b)(2)(A).

Under clause (i), the secured creditor retains its lien on the property and receives deferred cash payments. Under

clause (ii), the property is sold free and clear of the lien, "subject to section 363(k)," and the creditor receives a lien on the proceeds of the sale. Section 363(k), in turn, provides that "unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property"—*i. e.*, the creditor may credit-bid at the sale, up to the amount of its claim.[2] Finally, under clause (iii), the plan provides the secured creditor with the "indubitable equivalent" of its claim.

The debtors in this case have proposed to sell their property free and clear of the Bank's liens, and to repay the Bank using the sale proceeds—precisely, it would seem, the disposition contemplated by clause (ii). Yet since the debtors' proposed auction procedures do not permit the Bank to credit-bid, the proposed sale cannot satisfy the requirements of clause (ii).[3] Recognizing this problem, the debtors instead seek plan confirmation pursuant to clause (iii), which—unlike clause (ii)—does not expressly foreclose the possibility of a sale without credit-bidding. According to the debtors, their plan can satisfy clause (iii) by ultimately providing the Bank with the "indubitable equivalent" of its secured claim, in the form of cash generated by the auction.

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[2] The ability to credit-bid helps to protect a creditor against the risk that its collateral will be sold at a depressed price. It enables the creditor to purchase the collateral for what it considers the fair market price (up to the amount of its security interest) without committing additional cash to protect the loan. That right is particularly important for the Federal Government, which is frequently a secured creditor in bankruptcy and which often lacks appropriations authority to throw good money after bad in a cash-only bankruptcy auction.

[3] Title 11 U. S. C. § 363(k)—and by extension clause (ii)—provides an exception to the credit-bidding requirement if "the court for cause orders otherwise." The Bankruptcy Court found that there was no "cause" to deny credit-bidding in this case, and the debtors have not appealed that disposition.

We find the debtors' reading of § 1129(b)(2)(A)—under which clause (iii) permits precisely what clause (ii) proscribes—to be hyperliteral and contrary to common sense. A well established canon of statutory interpretation succinctly captures the problem: "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 384 (1992). That is particularly true where, as in § 1129(b)(2)(A), "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *Varity Corp.* v. *Howe*, 516 U. S. 489, 519 (1996) (THOMAS, J., dissenting); see also *HCSC-Laundry* v. *United States*, 450 U. S. 1, 6 (1981) *(per curiam)* (the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]").

The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one. See, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). But the canon has full application as well to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side by side. There the canon avoids not contradiction but the superfluity of a specific provision that is swallowed by the general one, "violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208 (1932). The terms of the specific authorization must be complied with. For example, in the last cited case a provision of the Bankruptcy Act prescribed in great detail the procedures governing the arrest and detention of bankrupts about to leave the district in order to avoid examination. The Court held that those prescriptions could not be avoided by relying upon a general provision of the Act au-

thorizing bankruptcy courts to "'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of [the] Act.'" *Id.*, at 206 (quoting Bankruptcy Act of 1898, §2(15), 30 Stat. 546). The Court said that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment." 285 U. S., at 208. We recently quoted that language approvingly in *Bloate* v. *United States*, 559 U. S. 196, 207 (2010). Or as we said in a much earlier case:

> "It is an old and familiar rule that, where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include." *United States* v. *Chase*, 135 U. S. 255, 260 (1890) (citations and internal quotation marks omitted).

Here, clause (ii) is a detailed provision that spells out the requirements for selling collateral free of liens, while clause (iii) is a broadly worded provision that says nothing about such a sale. The general/specific canon explains that the "general language" of clause (iii), "although broad enough to include it, will not be held to apply to a matter specifically dealt with" in clause (ii). *D. Ginsberg & Sons, Inc.*, *supra*, at 208.

Of course the general/specific canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the

other direction. The debtors point to no such indication here. One can conceive of a statutory scheme in which the specific provision embraced within a general one is not superfluous, because it creates a so-called safe harbor. The debtors effectively contend that that is the case here—clause (iii) ("indubitable equivalent") being the general rule, and clauses (i) and (ii) setting forth procedures that will always, *ipso facto*, establish an "indubitable equivalent," with no need for judicial evaluation. But the structure here would be a surpassingly strange manner of accomplishing that result—which would normally be achieved by setting forth the "indubitable equivalent" rule first (rather than last), and establishing the two safe harbors as provisos to that rule. The structure here suggests, to the contrary, that (i) is the rule for plans under which the creditor's lien remains on the property, (ii) is the rule for plans under which the property is sold free and clear of the creditor's lien, and (iii) is a residual provision covering dispositions under all other plans—for example, one under which the creditor receives the property itself, the "indubitable equivalent" of its secured claim. Thus, debtors may not sell their property free of liens under § 1129(b)(2)(A) without allowing lienholders to credit-bid, as required by clause (ii).

B

None of the debtors' objections to this approach is valid.

The debtors' principal textual argument is that § 1129(b)(2)(A) "unambiguously provides three distinct options for confirming a Chapter 11 plan over the objection of a secured creditor." Brief for Petitioners 15 (capitalization and bold typeface removed). With that much we agree; the three clauses of § 1129(b)(2)(A) are connected by the disjunctive "or." The debtors contend that our interpretation of § 1129(b)(2)(A) "transforms 'or' into 'and.'" Reply Brief for Petitioners 3. But that is not so. The question here is not whether debtors must comply with more than one clause, but rather which one of the three they must satisfy. Debtors

seeking to sell their property free of liens under § 1129(b)(2)(A) must satisfy the requirements of clause (ii), not the requirements of *both* clauses (ii) and (iii).

The debtors make several arguments against applying the general/specific canon. They contend that clause (ii) is no more specific than clause (iii), because the former provides a procedural protection to secured creditors (credit-bidding) while the latter provides a substantive protection (indubitable equivalence). As a result, they say, clause (ii) is not "a limiting subset" of clause (iii), which (according to their view) application of the general/specific canon requires. Brief for Petitioners 30–31; Reply Brief for Petitioners 5–6. To begin with, we know of no authority for the proposition that the canon is confined to situations in which the entirety of the specific provision is a "subset" of the general one. When the conduct at issue falls within the scope of *both* provisions, the specific presumptively governs, whether or not the specific provision also applies to some conduct that falls outside the general. In any case, we think clause (ii) is entirely a subset. Clause (iii) applies to *all* cramdown plans, which include all of the plans within the more narrow category described in clause (ii).[4] That its requirements are "substantive" whereas clause (ii)'s are "procedural" is quite beside the point. What counts for application of the general/specific canon is not the *nature* of the provisions' prescriptions but their *scope*.

Finally, the debtors contend that the Court of Appeals conflated approval of bid procedures with plan confirmation. Brief for Petitioners 39. They claim the right to pursue their auction now, leaving it for the Bankruptcy Judge to determine, at the confirmation stage, whether the resulting

[4] We are speaking here about whether clause (ii) is a subset for purposes of determining whether the canon applies. As we have described earlier, *after* applying the canon—*ex post*, so to speak—it ceases to be a subset, governing a situation to which clause (iii) will no longer be deemed applicable.

plan (funded by auction proceeds) provides the Bank with the "indubitable equivalent" of its secured claim. Under our interpretation of § 1129(b)(2)(A), however, that approach is simply a nonstarter. As a matter of law, no bid procedures like the ones proposed here *could* satisfy the requirements of § 1129(b)(2)(A), and the distinction between approval of bid procedures and plan confirmation is therefore irrelevant.

III

The parties debate at some length the purposes of the Bankruptcy Code, pre-Code practices, and the merits of credit-bidding. To varying extents, some of those debates also occupied the attention of the Courts of Appeals that considered the question presented here. See, *e. g.*, *In re Philadelphia Newspapers, LLC*, 599 F. 3d 298, 314–317 (CA3 2010); *id.*, at 331–337 (Ambro, J., dissenting). But nothing in the generalized statutory purpose of protecting secured creditors can overcome the specific manner of that protection which the text of § 1129(b)(2)(A) contains. As for pre-Code practices, they can be relevant to the interpretation of an ambiguous text, but we find no textual ambiguity here. And the pros and cons of credit-bidding are for the consideration of Congress, not the courts.

The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction. See *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240–241 (1989). Under that approach, this is an easy case. Because the RadLAX debtors may not obtain confirmation of a Chapter 11 cramdown plan that provides for the sale of collateral free and clear of the Bank's lien, but does not permit the Bank to credit-bid at the sale, we affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE KENNEDY took no part in the decision of this case.

Syllabus

COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. *v.* JOHNSON

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

No. 11–1053. Decided May 29, 2012

Respondent Johnson was convicted by a Pennsylvania jury as an accomplice and co-conspirator to murder. After unsuccessfully pressing an insufficiency-of-evidence claim on direct appeal and in state postconviction proceedings, Johnson sought federal habeas relief pursuant to 28 U. S. C. § 2254. The District Court denied Johnson's claims, but the Third Circuit reversed and ordered his conviction overturned, holding that the evidence at trial was insufficient to support his conviction under *Jackson* v. *Virginia*, 443 U. S. 307.

Held: The Third Circuit did not afford due deference to the role of the jury and the Pennsylvania courts in sustaining Johnson's due process challenge. In federal habeas proceedings, *Jackson* claims are subject to two layers of judicial deference: First, on direct appeal, a reviewing court may set aside the jury's verdict on insufficiency grounds "only if no rational trier of fact could have agreed with the jury," *Cavazos* v. *Smith*, 565 U. S. 1, 2; and second, on habeas review, a federal court may overturn the state court's decision "only if [it] was 'objectively unreasonable,'" *ibid.* *Jackson* leaves juries with broad discretion in deciding what inferences to draw from the evidence presented at trial, and the deferential federal standard does not permit the Third Circuit's fine-grained fact parsing. Here, the trial testimony convinced the jury that Johnson knew that his co-conspirator was armed and intended to kill the victim and that Johnson helped to usher the victim into an alley to meet his fate. The only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality. The state court of last review did not think so, and that determination in turn is entitled to considerable deference under 28 U. S. C. § 2254(d). Once due respect is afforded to the role of the jury and the state courts, the evidence at Johnson's trial was not nearly sparse enough to sustain a due process challenge under *Jackson*.

Certiorari granted; 446 Fed. Appx. 531, reversed and remanded.

PER CURIAM.

Respondent Lorenzo Johnson was convicted as an accomplice and co-conspirator in the murder of Taraja Williams, who was killed by a shotgun blast to the chest in the early morning hours of December 15, 1995, in Harrisburg, Pennsylvania. After his conviction was affirmed in state court, Johnson exhausted his state remedies and sought a writ of habeas corpus in Federal District Court pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U. S. C. § 2254. The District Court denied habeas relief but the U. S. Court of Appeals for the Third Circuit reversed, holding that the evidence at trial was insufficient to support Johnson's conviction under the standard set forth in *Jackson* v. *Virginia*, 443 U. S. 307 (1979).

We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos* v. *Smith*, 565 U. S. 1, 2 (2011) *(per curiam)*. And second, on habeas review, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico* v. *Lett*, 559 U. S. 766, 773 (2010)).

Because the Court of Appeals failed to afford due respect to the role of the jury and the state courts of Pennsylvania, we now grant certiorari and reverse the judgment below.

* * *

The parties agree that Williams was shot and killed by Corey Walker, who was subsequently convicted of first-degree murder. Johnson was with Walker on the night of the crime, and the two were tried jointly. Johnson was charged as an accomplice and co-conspirator. See 18 Pa. Cons. Stat. §2502 (2008) (defining first-degree murder as "willful, deliberate and premeditated" killing); §306(c) (imposing accomplice liability for anyone who, "with the intent of promoting or facilitating the commission of the offense . . . aids or agrees or attempts to aid such other person in planning or committing it"); *Commonwealth* v. *Montalvo*, 598 Pa. 263, 274, 956 A. 2d 926, 932 (2008) (criminal conspiracy liability for anyone who takes an overt act in furtherance of a crime he has agreed to abet or commit).

At trial, the Commonwealth called Victoria Doubs, who testified that she, Johnson, and Walker were "close friends" who "ran the streets together." Tr. 213. On the morning of December 14, the three of them awoke at the same residence, bought marijuana, and then went to a Kentucky Fried Chicken restaurant, where they encountered Williams. Walker announced that he was going to "holler at" Williams about a debt Williams owed. *Id.*, at 217. According to Doubs, Walker and Williams "were talking about the money that [Williams] had owed us," with Walker "asking [Williams], confronting him, about his money and what's up with the money and why is it taking you so long to give us the money." *Id.*, at 217–218. Williams was "cussing [Walker] out, telling him he'd give it to him when he felt like it and he ain't scared of [Walker]." *Id.*, at 218. A fight ensued, which ended when Williams beat Walker with a broomstick in front of the crowd of people that had gathered.

After the fight, Doubs testified, Walker "was mad, because he got beat by a crackhead. . . . He was saying, yo, that crackhead beat me. I'm going to kill that crackhead. I'm going to kill that kid. . . . He was hot. He was heated." *Id.*, at 220–221. Johnson was present when Walker made these

statements. Later that afternoon, Doubs recounted the beating to others, who laughed at Walker. Walker "repeated it for a while that I'm going to kill that kid. That kid must think I'm some type of joke. I'm going to kill that kid. Who he think he is[?]" *Id.*, at 222. Once again, Johnson was present for these statements.

Another witness was Carla Brown, a friend of the victim, who testified that she was at the Midnight Special Bar on the night of December 14–15, where she saw Walker, Johnson, and Williams engaged in a heated argument. Although she could not hear what they were saying, she could tell they were arguing because they were making "a lot of arm movements." *Id.*, at 104. The bouncer soon told them to leave, and Brown followed them into the street because she "wanted to know what was going on." *Ibid.* Brown observed the three men walking in a single-file line, with Walker in front, Williams in the middle, and Johnson in the back. Walker was wearing a long leather coat, walking as if he had something concealed underneath it. Brown followed the three men to an alleyway, at which point Williams recognized Brown and told her to "go ahead" and pass. *Id.*, at 107. Walker then entered the alleyway, followed by Williams, while Johnson remained standing at the entrance. As Brown walked past the alley, she heard a loud "boom," causing her to run away. *Id.*, at 143. On cross-examination, Brown stated: "[T]hey walked [Williams] in that alley. He stood inside the alley. He walked him in the alley. I heard a boom." *Ibid.*

The Commonwealth also called Aaron Dews, who testified that he was in a building bordering the alleyway at 12:45 a.m. on the morning of December 15. He heard a loud boom that caused him to look out into the alley from his second-story window, where he saw two silhouettes fleeing.

After Dews the Commonwealth called Brian Ramsey, who had been selling cocaine on a nearby street corner at the time of the murder. He testified that he saw Williams walk-

ing toward an alleyway with two males and a female, and he heard a loud boom shortly after Williams entered the alley. When pressed on cross-examination, he stated: "I would say that [Williams] was forced in that alley." *Id.*, at 189.

The jury also heard testimony from police who searched the alley shortly after the murder and found a shotgun with the barrel missing. A medical examiner who examined Williams' body testified that the cause of death was a shotgun wound to the chest.

After the jury convicted Johnson, he filed a post-trial motion arguing that the evidence was insufficient to support his conviction. The court denied his motion, and the Pennsylvania Superior Court affirmed the conviction on direct appeal. See *Commonwealth* v. *Johnson*, 726 A. 2d 1079 (1998). After the Pennsylvania Supreme Court denied his petition for review, Johnson unsuccessfully sought state postconviction relief. He then filed a habeas petition in Federal District Court, which denied his claims. See *Johnson* v. *Mechling*, 541 F. Supp. 2d 651 (MD Pa. 2008). Finally, Johnson appealed to the Third Circuit, which reversed the District Court and ordered his conviction overturned.

Under *Jackson*, evidence is sufficient to support a conviction if, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U. S., at 319.

In light of the testimony at Johnson's trial, the Court of Appeals acknowledged that "[a] trier of fact could reasonably infer . . . that Johnson and Walker shared a common intent to confront, threaten or harass Williams." *Johnson* v. *Mechling*, 446 Fed. Appx. 531, 540 (CA3 2011). As for the notion that "Johnson shared Walker's intent to kill Williams," however, the court concluded that was "mere speculation" that no rational factfinder could accept as true. *Ibid.* The court stated that "a reasonable inference is one where the fact inferred is 'more likely than not to flow from the proved fact

on which it is made to depend.'" *Id.*, at 539–540 (quoting *Commonwealth* v. *McFarland*, 452 Pa. 435, 439, 308 A. 2d 592, 594 (1973)). In order for a jury's inferences to be permissible, the court reasoned, they must "'flow from facts and circumstances proven in the record'" that are "'of such volume and quality as to overcome the presumption of innocence.'" 446 Fed. Appx., at 539 (quoting *Commonwealth* v. *Bostick*, 958 A. 2d 543, 560 (Pa. Super. 2008)).

At the outset, we note that it was error for the Court of Appeals to look to Pennsylvania law in determining what distinguishes a reasoned inference from "mere speculation." Under *Jackson*, federal courts must look to state law for "the substantive elements of the criminal offense," 443 U. S., at 324, n. 16, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law.

Under the deferential federal standard, the approach taken by the Court of Appeals was flawed because it unduly impinged on the jury's role as factfinder. *Jackson* leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors "draw reasonable inferences from basic facts to ultimate facts." *Id.*, at 319. This deferential standard does not permit the type of fine-grained factual parsing in which the Court of Appeals engaged. For example, in addressing Brown and Ramsey's testimony that Williams was "walked" and "forced" into the alleyway, the court objected that the witnesses did not describe any "physical action" supporting the conclusion that force was used. 446 Fed. Appx., at 541. Absent some specific testimony that "Johnson actively pushed, shoved, ordered or otherwise forced the victim into the alley, or prevented him from leaving it," *ibid.*, the court could see no reasonable basis for the jury's conclusion that Johnson had a specific intent to help kill Williams.

That analysis is flawed for two reasons. First, the coercive nature of Johnson and Walker's behavior could be in-

ferred from other circumstances not involving the direct use of force: Walker was noticeably concealing a weapon, and he had been heatedly threatening to kill Williams after a violent confrontation earlier in the day. Johnson and Walker kept Williams between them in a single-file line on the way to the alley, where Johnson stood at the entrance while the other two entered, suggesting that Johnson may have been prepared to prevent Williams from fleeing. And second, even if Williams was not coerced into the alley, the jury still could have concluded that Johnson helped lead or lure him there to facilitate the murder.

Taken in the light most favorable to the prosecution, the trial testimony revealed that Johnson and Walker "ran the streets together," and had attempted to collect a debt from Williams earlier on the day of the murder. Williams resisted the collection, managing to humiliate Walker in the process by giving him a public thrashing with a broomstick. This enraged Walker to the point that he repeatedly declared over the course of the day in Johnson's presence that he intended to kill Williams. Then, while Walker was noticeably concealing a bulky object under his trenchcoat, Johnson helped escort Williams into an alley, where Johnson stood at the entryway while Walker pulled out a shotgun and shot Williams in the chest.

On the basis of these facts, a rational jury could infer that Johnson knew that Walker was armed with a shotgun; knew that he intended to kill Williams; and helped usher Williams into the alleyway to meet his fate. The jury in this case was convinced, and the only question under *Jackson* is whether that finding was so insupportable as to fall below the threshold of bare rationality. The state court of last review did not think so, and that determination in turn is entitled to considerable deference under AEDPA, 28 U. S. C. § 2254(d).

Affording due respect to the role of the jury and the state courts, we conclude that the evidence at Johnson's trial was

not nearly sparse enough to sustain a due process challenge under *Jackson*. The evidence was sufficient to convict Johnson as an accomplice and a co-conspirator in the murder of Taraja Williams. The Commonwealth's petition for certiorari and the motion to proceed *in forma pauperis* are granted, the judgment of the Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

REICHLE ET AL. *v.* HOWARDS

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

No. 11–262. Argued March 21, 2012—Decided June 4, 2012

Petitioners Reichle and Doyle were members of a Secret Service detail protecting Vice President Richard Cheney while he greeted members of the public at a shopping mall. Agent Doyle overheard respondent Howards, who was speaking into his cell phone, state that he "was going to ask [the Vice President] how many kids he's killed today." Doyle and other agents observed Howards enter the line to meet the Vice President, tell the Vice President that his "policies in Iraq are disgusting," and touch the Vice President's shoulder as the Vice President was leaving. After being briefed by Doyle, Agent Reichle interviewed and then arrested Howards, who was charged with harassment. After that charge was dismissed, Howards brought an action against petitioners and others under 42 U. S. C. § 1983 and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388. Howards claimed that he was arrested and searched without probable cause, in violation of the Fourth Amendment, and that the arrest violated the First Amendment because it was made in retaliation for Howards' criticism of the Vice President. Petitioners moved for summary judgment on the ground that they were entitled to qualified immunity, but the Federal District Court denied the motion. On appeal, the Tenth Circuit reversed the immunity ruling with respect to the Fourth Amendment claim because petitioners had probable cause to arrest Howards, but the court affirmed with regard to the First Amendment claim. In doing so, the court rejected petitioners' argument that, under *Hartman* v. *Moore*, 547 U. S. 250, probable cause to arrest defeats a First Amendment retaliatory arrest claim. It concluded instead that *Hartman* applied only to retaliatory prosecution claims and thus did not upset prior Tenth Circuit precedent holding that a retaliatory arrest violates the First Amendment even if supported by probable cause.

Held: Petitioners are entitled to qualified immunity because, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Pp. 664–670.

(a) Courts may grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law. *Pearson* v. *Callahan*, 555 U. S. 223, 236. To be clearly established, a right must

be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 741. Pp. 664–665.

(b) The "clearly established" standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest. P. 665.

(c) At that time, *Hartman*'s impact on the Tenth Circuit's precedent was far from clear. Although *Hartman*'s facts involved only a retaliatory prosecution, reasonable law enforcement officers could have questioned whether its rule also applied to arrests. First, *Hartman* was decided against a legal backdrop that treated retaliatory arrest claims and retaliatory prosecution claims similarly. It resolved a Circuit split concerning the impact of probable cause on retaliatory prosecution claims, but some of the conflicting cases involved both retaliatory prosecution and retaliatory arrest claims and made no distinction between the two when considering the relevance of probable cause. Second, a reasonable official could have interpreted *Hartman*'s rationale to apply to retaliatory arrests. Like in retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually all retaliatory arrest cases, and the causal link between the defendant's alleged retaliatory animus and the plaintiff's injury may be tenuous. Finally, decisions from other Circuits in the wake of *Hartman* support the conclusion that, for qualified immunity purposes, it was at least arguable at the time of Howards' arrest that *Hartman* extended to retaliatory arrests. Pp. 665–670.

634 F. 3d 1131, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, ALITO, and SOTOMAYOR, JJ., joined. GINSBURG, J., filed an opinion concurring in the judgment, in which BREYER, J., joined, *post*, p. 670. KAGAN, J., took no part in the consideration or decision of the case.

Sean R. Gallagher argued the cause for petitioners. With him on the briefs were *Bennett L. Cohen*, *William E. Quirk*, *H. Christopher Bartolomucci*, *Viet D. Dinh*, and *Brian J. Field*.

Deputy Solicitor General Srinivasan argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant*

Attorney General West, Deputy Assistant Attorney General Brinkmann, Eric J. Feigin, Barbara L. Herwig, and *Teal Luthy Miller.*

David A. Lane argued the cause for respondent. With him on the brief was *Lauren L. Fontana.**

JUSTICE THOMAS delivered the opinion of the Court.

This case requires us to decide whether two federal law enforcement agents are immune from suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime.

I

On June 16, 2006, Vice President Richard Cheney visited a shopping mall in Beaver Creek, Colorado. A Secret Service protective detail accompanied the Vice President. Petitioners Gus Reichle and Dan Doyle were members of that detail.

Respondent Steven Howards was also at the mall. He was engaged in a cell phone conversation when he noticed the Vice President greeting members of the public. Agent Doyle overheard Howards say, during this conversation, "'I'm going to ask [the Vice President] how many kids he's killed today.'" Brief for Petitioners 4. Agent Doyle told two other agents what he had heard, and the three of them began monitoring Howards more closely.

Agent Doyle watched Howards enter the line to meet the Vice President. When Howards approached the Vice Presi-

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*Briefs of *amici curiae* urging reversal were filed for the FBI Agents Association et al. by *J. Brett Busby, E. Dee Martin,* and *Joshua C. Zive;* and for the International City/County Management Association et al. by *Lisa E. Soronen.*

John W. Whitehead filed a brief for The Rutherford Institute as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the American Civil Liberties Union et al. by *Christopher A. Hansen* and *Steven R. Shapiro;* and for William G. Moore, Jr., by *Paul M. Pohl* and *Christian G. Vergonis.*

dent, he told him that his "'policies in Iraq are disgusting.'" *Ibid.* The Vice President simply thanked Howards and moved along, but Howards touched the Vice President's shoulder as the Vice President departed.[1] Howards then walked away.

Several agents observed Howards' encounter with the Vice President. The agents determined that Agent Reichle, who coordinated the protective intelligence team responsible for interviewing individuals suspected of violating the law, should question Howards. Agent Reichle had not personally heard Howards' comments or seen his contact with the Vice President, but Agent Doyle briefed Agent Reichle on what had happened.

Agent Reichle approached Howards, presented his badge and identified himself, and asked to speak with him. Howards refused and attempted to walk away. At that point, Agent Reichle stepped in front of Howards and asked if he had assaulted the Vice President. Pointing his finger at Agent Reichle, Howards denied assaulting the Vice President and told Agent Reichle, "if you don't want other people sharing their opinions, you should have him [the Vice President] avoid public places." *Howards* v. *McLaughlin*, 634 F. 3d 1131, 1137 (CA10 2011) (internal quotation marks omitted). During this exchange, Agent Reichle also asked Howards whether he had touched the Vice President. Howards falsely denied doing so. After confirming that Agent Doyle had indeed seen Howards touch the Vice President, Reichle arrested Howards.

The Secret Service transferred Howards to the custody of the local sheriff's department. Howards was charged by local officials with harassment in violation of state law. The charge was eventually dismissed.

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[1] The parties dispute the manner of the touch. Howards described it as an openhanded pat, while several Secret Service agents described it as a forceful push. This dispute does not affect our analysis.

II

Howards brought this action in the United States District Court for the District of Colorado under Rev. Stat. § 1979, 42 U. S. C. § 1983, and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971).[2] Howards alleged that he was arrested and searched without probable cause, in violation of the Fourth Amendment. Howards also alleged that he was arrested in retaliation for criticizing the Vice President, in violation of the First Amendment.

Petitioners Reichle and Doyle moved for summary judgment on the ground that they were entitled to qualified immunity. The District Court denied the motion. See App. to Pet. for Cert. 46–61. On interlocutory appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. 634 F. 3d 1131.

The Court of Appeals held that petitioners enjoyed qualified immunity with respect to Howards' Fourth Amendment claim. The court concluded that petitioners had probable cause to arrest Howards for making a materially false statement to a federal official in violation of 18 U. S. C. § 1001 because he falsely denied touching the Vice President. 634 F. 3d, at 1142. Thus, the court concluded that neither Howards' arrest nor search incident to the arrest violated the Fourth Amendment.[3] *Id.*, at 1142–1143.

However, the Court of Appeals denied petitioners qualified immunity from Howards' First Amendment claim. The court first determined that Howards had established a material factual dispute regarding whether petitioners were substantially motivated by Howards' speech when they arrested

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[2] Howards named several Secret Service agents as defendants, but only Agents Reichle and Doyle are petitioners here. We address only those parts of the lower courts' decisions that involve petitioners Reichle and Doyle.

[3] Howards does not challenge the Court of Appeals' probable-cause determination.

him. *Id.*, at 1144–1145. The court then rejected petitioners' argument that, under this Court's decision in *Hartman* v. *Moore*, 547 U. S. 250 (2006), probable cause to arrest defeats a First Amendment claim of retaliatory arrest. The court concluded that *Hartman* established such a rule only for retaliatory prosecution claims and, therefore, did not upset prior Tenth Circuit precedent clearly establishing that a retaliatory *arrest* violates the First Amendment even if supported by probable cause. 634 F. 3d, at 1148.

Judge Paul Kelly dissented from the court's denial of qualified immunity. He would have held that when Howards was arrested, it was not clearly established that an arrest supported by probable cause could violate the First Amendment. In Judge Kelly's view, *Hartman* called into serious question the Tenth Circuit's prior precedent on retaliatory arrests. 634 F. 3d, at 1151. He noted that other Circuits had applied *Hartman* to retaliatory arrests and that there was a "strong argument" in favor of doing so. 634 F. 3d, at 1151–1152.

We granted certiorari on two questions: whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest, and whether clearly established law at the time of Howards' arrest so held. See 565 U. S. 1078 (2011). If the answer to either question is "no," then the agents are entitled to qualified immunity. We elect to address only the second question. We conclude that, at the time of Howards' arrest, it was not clearly established that an arrest supported by probable cause could violate the First Amendment. We, therefore, reverse the judgment of the Court of Appeals denying petitioners qualified immunity.[4]

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[4] This Court has recognized an implied cause of action for damages against federal officials for Fourth Amendment violations. See *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). We have never held that *Bivens* extends to First Amendment claims. See *Ashcroft* v. *Iqbal*, 556 U. S. 662, 675 (2009) (assuming without deciding that a

III

Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. See *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 735 (2011). In *Pearson* v. *Callahan*, 555 U. S. 223, 236 (2009), we held that courts may grant qualified immunity on the ground that a purported right was not "clearly established" by prior case law, without resolving the often more difficult question whether the purported right exists at all. *Id.*, at 227. This approach comports with our usual reluctance to decide constitutional questions unnecessarily. *Id.*, at 241; see also *Camreta* v. *Greene*, 563 U. S. 692, 705–706 (2011); *al-Kidd*, 563 U. S., at 735.

To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Id.*, at 741 (quoting *Anderson* v. *Creighton*, 483 U. S. 635, 640 (1987)). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, *supra*, at 741. This "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Anderson*, *supra*, at 639 (quoting *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984)).

The "clearly established" standard is not satisfied here. This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by

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First Amendment free exercise claim is actionable under *Bivens*); *Bush* v. *Lucas*, 462 U. S. 367, 368 (1983) (refusing to extend *Bivens* to a First Amendment speech claim involving federal employment). We need not (and do not) decide here whether *Bivens* extends to First Amendment retaliatory arrest claims.

probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest.

A

Howards contends that our cases have "'settled'" the rule that, "'as a general matter[,] the First Amendment prohibits government officials from subjecting an individual to retaliatory actions'" for his speech. See Brief for Respondent 39 (quoting *Hartman*, *supra*, at 256). But we have previously explained that the right allegedly violated must be established, "'not as a broad general proposition,'" *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) *(per curiam)*, but in a "particularized" sense so that the "contours" of the right are clear to a reasonable official, *Anderson*, *supra*, at 640. Here, the right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause. This Court has never held that there is such a right.[5]

B

We next consider Tenth Circuit precedent. Assuming, *arguendo*, that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the cir-

[5] The Court of Appeals' reliance on *Whren* v. *United States*, 517 U. S. 806 (1996), was misplaced. There, we held that a traffic stop supported by probable cause did not violate the Fourth Amendment regardless of the officer's actual motivations, but we explained that the Equal Protection Clause would prohibit an officer from selectively enforcing the traffic laws based on race. *Id.*, at 813. Citing *Whren*, the Court of Appeals noted that "[i]t is well established that an act which is lawful under the Fourth Amendment may still violate other provisions of the Constitution." *Howards* v. *McLaughlin*, 634 F. 3d 1131, 1149, n. 15 (CA10 2011). But, again, we do not define clearly established law at such a "high level of generality." *Ashcroft* v. *al-Kidd*, 563 U. S. 731, 742 (2011). *Whren*'s discussion of the Fourteenth Amendment does not indicate, much less "clearly establish," that an arrest supported by probable cause could nonetheless violate the First Amendment.

cumstances of this case, the Tenth Circuit's cases do not satisfy the "clearly established" standard here.

Relying on *DeLoach* v. *Bevers*, 922 F. 2d 618 (1990), and *Poole* v. *County of Otero*, 271 F. 3d 955 (2001), the Court of Appeals concluded that, at the time of Howards' arrest, its precedent had clearly established the unlawfulness of an arrest in retaliation for the exercise of First Amendment rights, irrespective of probable cause. In *DeLoach*, a case involving both a retaliatory arrest and a retaliatory prosecution, the court held that "[a]n act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper." 922 F. 2d, at 620 (internal quotation marks omitted). In *Poole*, a subsequent retaliatory prosecution case, the court relied on *DeLoach* for the proposition that a plaintiff's illegal conduct is "not relevant to his First Amendment claim." 271 F. 3d, at 961.

The Court of Appeals acknowledged that *Poole* was abrogated by this Court's subsequent decision in *Hartman* v. *Moore*, 547 U. S. 250, which held that a plaintiff cannot state a claim of retaliatory prosecution in violation of the First Amendment if the charges were supported by probable cause. But the Court of Appeals determined that *Hartman*'s no-probable-cause requirement did not extend to claims of retaliatory arrest and therefore did not disturb its prior precedent in *DeLoach*. Accordingly, the court concluded, "when Mr. Howards was arrested it was clearly established that an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is supported by probable cause." 634 F. 3d, at 1148.

We disagree. At the time of Howards' arrest, *Hartman*'s impact on the Tenth Circuit's precedent governing retaliatory arrests was far from clear. Although the facts of *Hartman* involved only a retaliatory prosecution, reasonable officers could have questioned whether the rule of *Hartman* also applied to arrests.

Hartman was decided against a legal backdrop that treated retaliatory arrest and prosecution claims similarly. *Hartman* resolved a split among the Courts of Appeals about the relevance of probable cause in retaliatory prosecution suits, but some of the conflicting Court of Appeals cases involved both an arrest and a prosecution that were alleged to be retaliation for the exercise of First Amendment rights. See 547 U. S., at 255–256, 259, n. 6 (citing *Mozzochi* v. *Borden*, 959 F. 2d 1174 (CA2 1992); *Singer* v. *Fulton Cty. Sheriff*, 63 F. 3d 110 (CA2 1995); *Keenan* v. *Tejeda*, 290 F. 3d 252 (CA5 2002); *Wood* v. *Kesler*, 323 F. 3d 872 (CA11 2003)). Those cases made no distinction between claims of retaliatory arrest and claims of retaliatory prosecution when considering the relevance of probable cause. See *Mozzochi*, *supra*, at 1179–1180; *Singer*, *supra*, at 120; *Keenan*, *supra*, at 260; *Wood*, *supra*, at 883. Indeed, the close relationship between retaliatory arrest and prosecution claims is well demonstrated by the Tenth Circuit's own decision in *DeLoach*. *DeLoach*, too, involved allegations of both retaliatory arrest and retaliatory prosecution, and the Tenth Circuit analyzed the two claims as one. 922 F. 2d, at 620–621.

A reasonable official also could have interpreted *Hartman*'s rationale to apply to retaliatory arrests. *Hartman* first observed that, in retaliatory prosecution cases, evidence showing whether there was probable cause for the charges would always be "available and apt to prove or disprove retaliatory causation." 547 U. S., at 261. In this Court's view, the presence of probable cause, while not a "guarantee" that retaliatory motive did not cause the prosecution, still precluded any prima facie inference that retaliatory motive was the but-for cause of the plaintiff's injury. *Id.*, at 265. This was especially true because, as *Hartman* next emphasized, retaliatory prosecution claims involve particularly attenuated causation between the defendant's alleged retaliatory animus and the plaintiff's injury. *Id.*, at 259–261. In

a retaliatory prosecution case, the key defendant is typically not the prosecutor who made the charging decision that injured the plaintiff, because prosecutors enjoy absolute immunity for their decisions to prosecute. Rather, the key defendant is the person who allegedly prompted the prosecutor's decision. Thus, the intervening decision of the third-party prosecutor widens the causal gap between the defendant's animus and the plaintiff's injury. *Id.*, at 261–263.

Like retaliatory prosecution cases, evidence of the presence or absence of probable cause for the arrest will be available in virtually every retaliatory arrest case. Such evidence could be thought similarly fatal to a plaintiff's claim that animus caused his arrest, given that retaliatory arrest cases also present a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury. An officer might bear animus toward the content of a suspect's speech. But the officer may decide to arrest the suspect because his speech provides evidence of a crime or suggests a potential threat. See, *e. g.*, *Wayte* v. *United States*, 470 U. S. 598, 612–613 (1985) (noting that letters of protest written to the Selective Service, in which the author expressed disagreement with the draft, "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense" of willful failure to register for the draft). Like retaliatory prosecution cases, then, the connection between alleged animus and injury may be weakened in the arrest context by a police officer's wholly legitimate consideration of speech.

To be sure, we do not suggest that *Hartman*'s rule in fact extends to arrests. Nor do we suggest that every aspect of *Hartman*'s rationale could apply to retaliatory arrests. *Hartman* concluded that the causal connection in retaliatory prosecution cases is attenuated because those cases necessarily involve the animus of one person and the injurious action of another, 547 U. S., at 262, but in many retaliatory arrest

cases, it is the officer bearing the alleged animus who makes the injurious arrest. Moreover, *Hartman* noted that, in retaliatory prosecution cases, the causal connection between the defendant's animus and the prosecutor's decision is further weakened by the "presumption of regularity accorded to prosecutorial decisionmaking." *Id.*, at 263. That presumption does not apply here. Nonetheless, the fact remains that, for qualified immunity purposes, at the time of Howards' arrest it was at least arguable that *Hartman*'s rule extended to retaliatory arrests.[6]

Decisions from other Federal Courts of Appeals in the wake of *Hartman* support this assessment. Shortly before Howards' arrest, the Sixth Circuit held that *Hartman* required a plaintiff alleging a retaliatory arrest to show that the defendant officer lacked probable cause. See *Barnes* v. *Wright*, 449 F. 3d 709, 720 (2006) (reasoning that the *Hartman* "rule sweeps broadly"). That court's treatment of *Hartman* confirms that the inapplicability of *Hartman* to arrests would not have been clear to a reasonable officer when Howards was arrested. Moreover, since Howards' arrest, additional Courts of Appeals have concluded that *Hartman*'s no-probable-cause requirement extends to retaliatory arrests. See, *e. g.*, *McCabe* v. *Parker*, 608 F. 3d 1068, 1075 (CA8 2010); *Phillips* v. *Irvin*, 222 Fed. Appx. 928, 929 (CA11 2007) *(per curiam)*. As we have previously observed, "[i]f

[6] Howards argues that petitioners violated his clearly established First Amendment right even if *Hartman*'s rule applies equally to retaliatory arrests. According to Howards, *Hartman* did not hold that a prosecution violates the First Amendment only when it is unsupported by probable cause. Rather, Howards argues, *Hartman* made probable cause relevant only to a plaintiff's ability to recover damages for a First Amendment violation. See Brief for Respondent 37–41. We need not resolve whether *Hartman* is best read as defining the scope of the First Amendment right or as simply establishing a prerequisite for recovery. Nor need we decide whether that distinction matters. It suffices, for qualified immunity purposes, that the answer would not have been clear to a reasonable official when Howards was arrested.

judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson* v. *Layne*, 526 U. S. 603, 618 (1999).[7]

* * *

Hartman injected uncertainty into the law governing retaliatory arrests, particularly in light of *Hartman*'s rationale and the close relationship between retaliatory arrest and prosecution claims. This uncertainty was only confirmed by subsequent appellate decisions that disagreed over whether the reasoning in *Hartman* applied similarly to retaliatory arrests. Accordingly, when Howards was arrested it was not clearly established that an arrest supported by probable cause could give rise to a First Amendment violation. Petitioners Reichle and Doyle are thus entitled to qualified immunity.

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

It is so ordered.

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

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in the judgment.

Were defendants ordinary law enforcement officers, I would hold that *Hartman* v. *Moore*, 547 U. S. 250 (2006), does not support their entitlement to qualified immunity. *Hartman* involved a charge of retaliatory *prosecution*. As the Court explains, the defendant in such a case cannot be

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[7] Indeed, the Tenth Circuit itself has applied *Hartman* outside the context of retaliatory prosecution. See *McBeth* v. *Himes*, 598 F. 3d 708, 719 (2010) (requiring the absence of probable cause in the context of a claim alleging that government officials suspended a business license in retaliation for the exercise of First Amendment rights).

the prosecutor who made the decision to pursue charges. See *ante*, at 667–668; *Hartman*, 547 U. S., at 262 (noting that prosecutors are "absolutely immune from liability for the decision to prosecute"). Rather, the defendant will be another government official who, motivated by retaliatory animus, convinced the prosecutor to act. See *ibid.*; *ante*, at 667–668. Thus, the "causal connection [a plaintiff must establish in a retaliatory-prosecution case] is not merely between the retaliatory animus of one person and that person's own injurious action, but between the retaliatory animus of one person and the action of another." *Hartman*, 547 U. S., at 262. This "distinct problem of causation" justified the absence-of-probable-cause requirement we recognized in *Hartman*. *Id.*, at 263 (Proof of an absence of probable cause to prosecute is needed "to bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action."). See also *id.*, at 259 ("[T]he need to prove a chain of causation from animus to injury, *with details specific to retaliatory-prosecution cases*, . . . provides the strongest justification for the no-probable-cause requirement." (emphasis added)).

A similar causation problem will not arise in the typical retaliatory-arrest case. Unlike prosecutors, arresting officers are not wholly immune from suit. As a result, a plaintiff can sue the arresting officer directly and need only show that the officer (not some other official) acted with a retaliatory motive. Because, in the usual retaliatory-arrest case, there is no gap to bridge between one government official's animus and a second government official's action, *Hartman*'s no-probable-cause requirement is inapplicable.

Nevertheless, I concur in the Court's judgment. Officers assigned to protect public officials must make singularly swift, on the spot, decisions whether the safety of the person they are guarding is in jeopardy. In performing that protective function, they rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge. Whatever the views of Secret Service Agents

Reichle and Doyle on the administration's policies in Iraq, they were dutybound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security. Retaliatory animus cannot be inferred from the assessment they made in that regard. If rational, that assessment should not expose them to claims for civil damages. Cf. 18 U. S. C. § 3056(d) (knowingly and willfully resisting federal law enforcement agent engaged in protective function is punishable by fine (up to $1,000) and imprisonment (up to one year)); § 1751(e) (assaulting President or Vice President is a crime punishable by fine and imprisonment up to ten years).

Syllabus

ARMOUR ET AL. *v.* CITY OF INDIANAPOLIS, INDIANA, ET AL.

CERTIORARI TO THE SUPREME COURT OF INDIANA

No. 11–161. Argued February 29, 2012—Decided June 4, 2012

For decades, Indianapolis (City) funded sewer projects using Indiana's Barrett Law, which permitted cities to apportion a public improvement project's costs equally among all abutting lots. Under that system, a city would create an initial assessment, dividing the total estimated cost by the number of lots and making any necessary adjustments. Upon a project's completion, the city would issue a final lot-by-lot assessment. Lot owners could elect to pay the assessment in a lump sum or over time in installments.

After the City completed the Brisbane/Manning Sanitary Sewers Project, it sent affected homeowners formal notice of their payment obligations. Of the 180 affected homeowners, 38 elected to pay the lump sum. The following year, the City abandoned Barrett Law financing and adopted the Septic Tank Elimination Program (STEP), which financed projects in part through bonds, thereby lowering individual owner's sewer-connection costs. In implementing STEP, the City's Board of Public Works enacted a resolution forgiving all assessment amounts still owed pursuant to Barrett Law financing. Homeowners who had paid the Brisbane/Manning Project lump sum received no refund, while homeowners who had elected to pay in installments were under no obligation to make further payments.

The 38 homeowners who paid the lump sum asked the City for a refund, but the City denied the request. Thirty-one of these homeowners brought suit in Indiana state court claiming, in relevant part, that the City's refusal violated the Federal Equal Protection Clause. The trial court granted summary judgment to the homeowners, and the State Court of Appeals affirmed. The Indiana Supreme Court reversed, holding that the City's distinction between those who had already paid and those who had not was rationally related to its legitimate interests in reducing administrative costs, providing financial hardship relief to homeowners, transitioning from the Barrett Law system to STEP, and preserving its limited resources.

Held: The City had a rational basis for its distinction and thus did not violate the Equal Protection Clause. Pp. 680–688.

(a) The City's classification does not involve a fundamental right or suspect classification. See *Heller* v. *Doe*, 509 U. S. 312, 319–320. Its

subject matter is local, economic, social, and commercial. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152. It is a tax classification. See *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 547. And no one claims that the City has discriminated against out-of-state commerce or new residents. Cf. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612. Hence, the City's distinction does not violate the Equal Protection Clause as long as "there is any reasonably conceivable state of facts that could provide a rational basis for the classification," *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313, and the "'burden is on the one attacking the [classification] to negative every conceivable basis which might support it,'" *Heller, supra*, at 320. Pp. 680–681.

(b) Administrative concerns can ordinarily justify a tax-related distinction, see, *e. g.*, *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511–512, and the City's decision to stop collecting outstanding Barrett Law debts finds rational support in the City's administrative concerns. After the City switched to the STEP system, any decision to continue Barrett Law debt collection could have proved complex and expensive. It would have meant maintaining an administrative system for years to come to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as $25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal action. The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding further administrative costs, namely, the cost of processing refunds. And limiting refunds only to Brisbane/Manning homeowners would have led to complaints of unfairness, while expanding refunds to the apparently thousands of other Barrett Law project homeowners would have involved an even greater administrative burden. Finally, the rationality of the distinction draws support from the fact that the line that the City drew—distinguishing past payments from future obligations—is well known to the law. See, *e. g.*, 26 U. S. C. § 108(a)(1)(E). Pp. 682–684.

(c) Petitioners' contrary arguments are unpersuasive. Whether financial hardship is a factor supporting rationality need not be considered here, since the City's administrative concerns are sufficient to show a rational basis for its distinction. Petitioners propose other forgiveness systems that they argue are superior to the City's system, but the Constitution only requires that the line actually drawn by the City be rational. Petitioners further argue that administrative considerations alone should not justify a tax distinction lest a city justify an unfair system through insubstantial administrative considerations. Here it

was rational for the City to draw a line that avoided the administrative burden of both collecting and paying out small sums for years to come. Petitioners have not shown that the administrative concerns are too insubstantial to justify the classification. Finally, petitioners argue that precedent makes it more difficult for the City to show a rational basis, but the cases to which they refer involve discrimination based on residence or length of residence. The one exception, *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336, is distinguishable. Pp. 684–688.

946 N. E. 2d 553, affirmed.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which SCALIA and ALITO, JJ., joined, *post*, p. 688.

Mark T. Stancil argued the cause for petitioners. With him on the briefs were *Roy T. Englert, Jr.*, *Daniel N. Lerman*, *Ronald J. Waicukauski*, *Carol Nemeth Joven*, and *R. Davy Eaglesfield III*.

Paul D. Clement argued the cause for respondents. With him on the brief were *George W. Hicks, Jr.*, *Jeffrey M. Harris*, and *Justin F. Roebel*.*

JUSTICE BREYER delivered the opinion of the Court.

For many years, an Indiana statute, the "Barrett Law," authorized Indiana's cities to impose upon benefited lot own-

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*Briefs of *amici curiae* urging reversal were filed for the Institute for Justice by *William H. Mellor*, *Robert J. McNamara*, *Clark M. Neily III*, and *Jeff Rowes;* for the National Association of Home Builders by *Ari Pollack*, *Michael Callahan*, *Erik G. Moskowitz*, *Thomas J. Ward*, *Christopher M. Whitcomb*, and *Amy C. Chai;* and for the National Taxpayers Union by *Shay Dvoretzky*.

Briefs of *amici curiae* urging affirmance were filed for the International City/County Management Association et al. by *Jon Laramore*, *A. Scott Chinn*, and *Lisa E. Soronen;* and for the International Municipal Lawyers Association by *Quin M. Sorenson*, *Lowell J. Schiller*, and *Charles W. Thompson, Jr.*

Joseph D. Henchman filed a brief for the Tax Foundation as *amicus curiae*.

ers the cost of sewer improvement projects. The Barrett Law also permitted those lot owners to pay either immediately in the form of a lump sum or over time in installments. In 2005, the city of Indianapolis (Indianapolis or City) adopted a new assessment and payment method, the "STEP" plan, and it forgave any Barrett Law installments that lot owners had not yet paid.

A group of lot owners who had already paid their entire Barrett Law assessment in a lump sum believe that the City should have provided them with equivalent refunds. And we must decide whether the City's refusal to do so unconstitutionally discriminates against them in violation of the Equal Protection Clause, Amdt. 14, § 1. We hold that the City had a rational basis for distinguishing between those lot owners who had already paid their share of project costs and those who had not. And we conclude that there is no equal protection violation.

I

A

Beginning in 1889, Indiana's Barrett Law permitted cities to pay for public improvements, such as sewage projects, by "apportion[ing]" the costs of a project "equally among all abutting lands or lots." Ind. Code § 36–9–39–15(b)(3) (2011); see *Town Council of New Harmony* v. *Parker*, 726 N. E. 2d 1217, 1227, n. 13 (Ind. 2000) (project's beneficiaries pay its costs). When a city built a Barrett Law project, the city's public works board would create an initial lot-owner assessment by "dividing the estimated total cost of the sewage works by the total number of lots." § 36–9–39–16(a). It might then adjust an individual assessment downward if the lot would benefit less than would others. § 36–9–39–17(b). Upon completion of the project, the board would issue a final lot-by-lot assessment.

The Barrett Law permitted lot owners to pay the assessment either in a single lump sum or over time in installment

payments (with interest). The City would collect installment payments "in the same manner as other taxes." § 36–9–37–6. The Barrett Law authorized 10-, 20-, or 30-year installment plans. § 36–9–37–8.5(a). Until fully paid, an assessment would constitute a lien against the property, permitting the city to initiate foreclosure proceedings in case of a default. §§ 36–9–37–9(b), –22.

For several decades, Indianapolis used the Barrett Law system to fund sewer projects. See, *e. g., Conley* v. *Brummit*, 92 Ind. App. 620, 621, 176 N. E. 880, 881 (1931) (in banc). But in 2005, the City adopted a new system, called the Septic Tank Elimination Program (STEP), which financed projects in part through bonds, thereby lowering individual lot owners' sewer-connection costs. By that time, the City had constructed more than 40 Barrett Law projects. App. to Pet. for Cert. 5a. We are told that installment-paying lot owners still owed money in respect to 24 of those projects. See Reply Brief for Petitioners 16–17, n. 3 (citing City's Response to Plaintiff's Brief on Damages, Record in *Cox* v. *Indianapolis*, No. 1:09–cv–0435 (SD Ind.), Doc. 98–1 (Exh. A)). In respect to 21 of the 24, some installment payments had not yet fallen due; in respect to the other 3, those who owed money were in default. Reply Brief for Petitioners 17, n. 3.

B

This case concerns one of the 24 still-open Barrett Law projects, namely, the Brisbane/Manning Sanitary Sewers Project. The Brisbane/Manning Project began in 2001. It connected about 180 homes to the City's sewage system. Construction was completed in 2003. The Indianapolis Board of Public Works (Board) held an assessment hearing in June 2004. And in July 2004, the Board sent the 180 affected homeowners a formal notice of their payment obligations.

The notice made clear that each homeowner could pay the entire assessment—$9,278 per property—in a lump sum or

in installments, which would include interest at a 3.5% annual rate. Under an installment plan, payments would amount to $77.27 per month for 10 years; $38.66 per month for 20 years; or $25.77 per month for 30 years. In the event, 38 homeowners chose to pay up front; 47 chose the 10-year plan; 27 chose the 20-year plan; and 68 chose the 30-year plan. And in the first year each homeowner paid the amount due ($9,278 upfront; $927.80 under the 10-year plan; $463.90 under the 20-year plan, or $309.27 under the 30-year plan). App. to Pet. for Cert. 48a.

The next year, however, the City decided to abandon the Barrett Law method of financing. It thought that the Barrett Law's lot-by-lot payments had become too burdensome for many homeowners to pay, discouraging changes from less healthy septic tanks to healthier sewer systems. See *id.*, at 4a–5a. (For example, homes helped by the Brisbane/Manning Project, at a cost of more than $9,000 each, were then valued at $120,000 to $270,000. App. 67.) The City's new STEP method of financing would charge each connecting lot owner a flat $2,500 fee and make up the difference by floating bonds eventually paid for by all lot owners citywide. See App. to Pet. for Cert. 5a, n. 5.

On October 31, 2005, the City enacted an ordinance implementing its decision. In December, the Board enacted a further resolution, Resolution 101, which, as part of the transition, would "forgive *all assessment amounts* . . . established pursuant to the Barrett Law Funding for Municipal Sewer programs *due and owing* from the date of November 1, 2005 forward." App. 72 (emphasis added). In its preamble, the resolution said that the Barrett Law "may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems"; it pointed out that the City was transitioning to the new STEP method of financing; and it said that the STEP method was based upon a financial model that had "considered the current assessments being made by participants in

active Barrett Law projects" as well as future projects. *Id.*, at 71–72. The upshot was that those who still owed Barrett Law assessments would not have to make further payments but those who had already paid their assessments would not receive refunds. This meant that homeowners who had paid the full $9,278 Brisbane/Manning Project assessment in a lump sum the preceding year would receive no refund, while homeowners who had elected to pay the assessment in installments, and had paid a total of $309.27, $463.90, or $927.80, would be under no obligation to make further payments.

In February 2006, the 38 homeowners who had paid the full Brisbane/Manning Project assessment asked the City for a partial refund (in an amount equal to the smallest forgiven Brisbane/Manning installment debt, apparently $8,062). The City denied the request in part because "[r]efunding payments made in your project area, or any portion of the payments, would establish a precedent of unfair and inequitable treatment to all other property owners who have also paid Barrett Law assessments . . . and while [the November 1, 2005, cutoff date] might seem arbitrary to you, it is essential for the City to establish this date and move forward with the new funding approach." *Id.*, at 50–51.

C

Thirty-one of the thirty-eight Brisbane/Manning Project lump-sum homeowners brought this lawsuit in Indiana state court seeking a refund of about $8,000 each. They claimed in relevant part that the City's refusal to provide them with refunds at the same time that the City forgave the outstanding project debts of other Brisbane/Manning homeowners violated the Federal Constitution's Equal Protection Clause, Amdt. 14, § 1; see also Rev. Stat. § 1979, 42 U. S. C. § 1983. The trial court granted summary judgment in their favor. The State Court of Appeals affirmed that judgment. 918 N. E. 2d 401 (2009). But the Indiana

Supreme Court reversed. 946 N. E. 2d 553 (2011). In its view, the City's distinction between those who had already paid their Barrett Law assessments and those who had not was "rationally related to its legitimate interests in reducing its administrative costs, providing relief for property owners experiencing financial hardship, establishing a clear transition from [the] Barrett Law to STEP, and preserving its limited resources." App. to Pet. for Cert. 19a. We granted certiorari to consider the equal protection question. And we now affirm the Indiana Supreme Court.

II

A

As long as the City's distinction has a rational basis, that distinction does not violate the Equal Protection Clause. This Court has long held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller* v. *Doe*, 509 U. S. 312, 319–320 (1993); cf. *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 165–166 (1897). We have made clear in analogous contexts that, where "ordinary commercial transactions" are at issue, rational basis review requires deference to reasonable underlying legislative judgments. *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938) (due process); see also *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976) *(per curiam)* (equal protection). And we have repeatedly pointed out that "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 547 (1983); see also *Fitzgerald* v. *Racing Assn. of Central Iowa*, 539 U. S. 103, 107–108 (2003); *Nordlinger* v. *Hahn*, 505 U. S. 1, 11 (1992); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973); *Madden* v. *Kentucky*, 309 U. S. 83, 87–88 (1940);

Citizens' Telephone Co. of Grand Rapids v. *Fuller*, 229 U. S. 322, 329 (1913).

Indianapolis' classification involves neither a "fundamental right" nor a "suspect" classification. Its subject matter is local, economic, social, and commercial. It is a tax classification. And no one here claims that Indianapolis has discriminated against out-of-state commerce or new residents. Cf. *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (1985); *Williams* v. *Vermont*, 472 U. S. 14 (1985); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869 (1985); *Zobel* v. *Williams*, 457 U. S. 55 (1982). Hence, this case falls directly within the scope of our precedents holding such a law constitutionally valid if "there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger*, *supra*, at 11 (citations omitted). And it falls within the scope of our precedents holding that there is such a plausible reason if "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Communications, Inc.*, 508 U. S. 307, 313 (1993); see also *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).

Moreover, analogous precedent warns us that we are not to "pronounc[e]" this classification "unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *Carolene Products Co.*, *supra*, at 152 (due process claim). Further, because the classification is presumed constitutional, the "'burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller*, *supra*, at 320 (quoting *Lehnhausen*, *supra*, at 364).

B

In our view, Indianapolis' classification has a rational basis. Ordinarily, administrative considerations can justify a tax-related distinction. See, *e. g.*, *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511–512 (1937) (tax exemption for businesses with fewer than eight employees rational in light of the "[a]dministrative convenience and expense" involved); see also *Lehnhausen*, *supra*, at 365 (comparing administrative cost of taxing corporations versus individuals); *Madden*, *supra*, at 90 (comparing administrative cost of taxing deposits in local banks versus those elsewhere). And the City's decision to stop collecting outstanding Barrett Law debts finds rational support in related administrative concerns.

The City had decided to switch to the STEP system. After that change, to continue Barrett Law unpaid-debt collection could have proved complex and expensive. It would have meant maintaining an administrative system that for years to come would have had to collect debts arising out of 20-plus different construction projects built over the course of a decade, involving monthly payments as low as $25 per household, with the possible need to maintain credibility by tracking down defaulting debtors and bringing legal action. The City, for example, would have had to maintain its Barrett Law operation within the City Controller's Office, keep files on old, small, installment-plan debts, and (a City official says) possibly spend hundreds of thousands of dollars keeping computerized debt-tracking systems current. See Brief for International City/County Management Association et al. as *Amici Curiae* 13, n. 12 (citing Affidavit of Charles White ¶13, Record in *Cox*, Doc. No. 57–3). Unlike the collection system prior to abandonment, the City would not have added any new Barrett Law installment-plan debtors. And that fact means that it would have had to spread the fixed administrative costs of collection over an ever-declining number of debtors, thereby continuously increasing the per-debtor cost of collection.

Consistent with these facts, the director of the City's Department of Public Works later explained that the City decided to forgive outstanding debt in part because "[t]he administrative costs to service and process remaining balances on Barrett Law accounts long past the transition to the STEP program would not benefit the taxpayers" and would defeat the purpose of the transition. App. 76. The four other members of the Board have said the same. See Affidavit of Gregory Taylor ¶6, Record in *Cox*, Doc. No. 57–5; Affidavit of Kipper Tew ¶6, *ibid.*, Doc. No. 57–6; Affidavit of Susan Schalk ¶6, *ibid.*, Doc. No. 57–7; Affidavit of Roger Brown ¶6, *ibid.*, Doc. No. 57–8.

The rationality of the City's distinction draws further support from the nature of the line-drawing choices that confronted it. To have added refunds to forgiveness would have meant adding yet further administrative costs, namely, the cost of processing refunds. At the same time, to have tried to limit the City's costs and lost revenues by limiting forgiveness (or refund) rules to Brisbane/Manning homeowners alone would have led those involved in other Barrett Law projects to have justifiably complained about unfairness. Yet to have granted refunds (as well as providing forgiveness) to all those involved in all Barrett Law projects (there were more than 40 projects) or in all open projects (there were more than 20) would have involved even greater administrative burden. The City could not just "cut . . . checks," *post*, at 691 (ROBERTS, C. J., dissenting), without taking funding from other programs or finding additional revenue. If, instead, the City had tried to keep the amount of revenue it lost constant (a rational goal) but spread it evenly among the apparently thousands of homeowners involved in any of the Barrett Law projects, the result would have been yet smaller individual payments, even more likely to have been too small to justify the administrative expense.

Finally, the rationality of the distinction draws support from the fact that the line that the City drew—distinguish-

ing past payments from future obligations—is a line well known to the law. Sometimes such a line takes the form of an amnesty program, involving, say, mortgage payments, taxes, or parking tickets. *E. g.*, 26 U. S. C. § 108(a)(1)(E) (2006 ed., Supp. IV) (federal income tax provision allowing homeowners to omit from gross income newly forgiven home mortgage debt); *United States* v. *Martin*, 523 F. 3d 281, 284 (CA4 2008) (tax amnesty program whereby State newly forgave penalties and liabilities if taxpayer satisfied debt); *Horn* v. *Chicago*, 860 F. 2d 700, 704, n. 9 (CA7 1988) (city parking ticket amnesty program whereby outstanding tickets could be newly settled for a fraction of amount specified). This kind of line is consistent with the distinction that the law often makes between actions previously taken and those yet to come.

C

Petitioners' contrary arguments are not sufficient to change our conclusion. Petitioners point out that the Indiana Supreme Court also listed a different consideration, namely, "financial hardship," as one of the factors supporting rationality. App. to Pet. for Cert. 19a. They refer to the City's resolution that said that the Barrett Law "may present financial hardships on many middle to lower income participants who most need sanitary sewer service in lieu of failing septic systems." App. 71. And they argue that the tax distinction before us would not necessarily favor low-income homeowners.

We need not consider this argument, however, for the administrative considerations we have mentioned are sufficient to show a rational basis for the City's distinction. The Indiana Supreme Court wrote that the City's classification was "rationally related" in part "to its legitimate interests *in reducing its administrative costs.*" App. to Pet. for Cert. 19a (emphasis added). The record of the City's proceedings is consistent with that determination. See App. 72 (when de-

veloping transition, the City "considered the current assessments being made by participants in active Barrett Law projects"). In any event, a legislature need not "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger*, 505 U. S., at 15; see also *Fitzgerald*, 539 U. S., at 108 (similar). Rather, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Madden*, 309 U. S., at 88; see *Heller*, 509 U. S., at 320 (same); *Lehnhausen*, 410 U. S., at 364 (same); see also *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 530 (1959) (upholding state tax classification resting "upon a state of facts that reasonably can be conceived" as creating a rational distinction). Petitioners have not "negative[d]" the Indiana Supreme Court's first listed justification, namely, the administrative concerns we have discussed.

Petitioners go on to propose various other forgiveness systems that would have included refunds for at least some of those who had already paid in full. They argue that those systems are superior to the system that the City chose. We have discussed those, and other possible, systems earlier. *Supra*, at 682–683. Each has advantages and disadvantages. But even if petitioners have found a superior system, the Constitution does not require the City to draw the perfect line nor even to draw a line superior to some other line it might have drawn. It requires only that the line actually drawn be a rational line. And for the reasons we have set forth in Part II–B, *supra*, we believe that the line the City drew here is rational.

Petitioners further argue that administrative considerations alone should not justify a tax distinction, lest a city arbitrarily allocate taxes among a few citizens while forgiving many similarly situated citizens on the ground that it is cheaper and easier to collect taxes from a few people than from many. Brief for Petitioners 45. Petitioners are right that administrative considerations could not justify such an

unfair system. But that is not because administrative considerations can *never* justify tax differences (any more than they can *always* do so). The question is whether reducing those expenses, in the particular circumstances, provides a rational basis justifying the tax difference in question.

In this case, "in the light of the facts made known or generally assumed," *Carolene Products Co.*, 304 U. S., at 152, it is reasonable to believe that to graft a refund system onto the City's forgiveness decision could have (for example) imposed an administrative burden of both collecting and paying out small sums (say, $25 per month) for years. As we have said, *supra*, at 682–684, it is rational for the City to draw a line that avoids that burden. Petitioners, who are the ones "attacking the legislative arrangement," have the burden of showing that the circumstances are otherwise, *i. e.*, that the administrative burden is too insubstantial to justify the classification. That they have not done.

Finally, petitioners point to precedent that in their view makes it more difficult than we have said for the City to show a "rational basis." With but one exception, however, the cases to which they refer involve discrimination based on residence or length of residence. *E. g.*, *Hooper* v. *Bernalillo County Assessor*, 472 U. S. 612 (state tax preference distinguishing between long-term and short-term resident veterans); *Williams* v. *Vermont*, 472 U. S. 14 (state use tax that burdened out-of-state car buyers who moved in state); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869 (state law that taxed out-of-state insurance companies at a higher rate than in-state companies); *Zobel* v. *Williams*, 457 U. S. 55 (state dividend distribution system that favored long-term residents). But those circumstances are not present here.

The exception consists of *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336 (1989). The Court there took into account a State Constitution and related laws that required equal valuation of equally valuable

property. *Id.*, at 345. It considered the constitutionality of a county tax assessor's practice (over a period of many years) of determining property values as of the time of the property's last sale; that practice meant highly unequal valuations for two identical properties that were sold years or decades apart. *Id.*, at 341. The Court first found that the assessor's practice was not rationally related to the county's avowed purpose of assessing properties equally at true current value because of the intentional systemic discrepancies the practice created. *Id.*, at 343–344. The Court then noted that, in light of the State Constitution and related laws requiring equal valuation, there could be no other rational basis for the practice. *Id.*, at 344–345. Therefore, the Court held, the assessor's discriminatory policy violated the Federal Constitution's insistence upon "equal protection of the law." *Id.*, at 346.

Petitioners argue that the City's refusal to add refunds to its forgiveness decision is similar, for it constitutes a refusal to apply "equally" an Indiana state law that says that the costs of a Barrett Law project shall be equally "apportioned." Ind. Code §36–9–39–15(b)(3). In other words, petitioners say that even if the City's decision might otherwise be related to a rational purpose, state law (as in *Allegheny*) makes this the rare case where the facts preclude any rational basis for the City's decision other than to comply with the state mandate of equality.

Allegheny, however, involved a clear state-law requirement clearly and dramatically violated. Indeed, we have described *Allegheny* as "the rare case where the facts precluded" any alternative reading of state law and thus any alternative rational basis. *Nordlinger*, *supra*, at 16. Here, the City followed state law by apportioning the cost of its Barrett Law projects equally. State law says nothing about forgiveness, how to design a forgiveness program, or whether or when rational distinctions in doing so are permitted. To adopt petitioners' view would risk transforming

ordinary violations of ordinary state tax law into violations of the Federal Constitution.

* * *

For these reasons, we conclude that the City has not violated the Federal Equal Protection Clause. And the Indiana Supreme Court's similar judgment is

Affirmed.

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

Twenty-three years ago, we released a succinct and unanimous opinion striking down a property tax scheme in West Virginia on the ground that it clearly violated the Equal Protection Clause. *Allegheny Pittsburgh Coal Co.* v. *Commission of Webster Cty.*, 488 U. S. 336 (1989). In *Allegheny Pittsburgh*, we held that a county failed to comport with equal protection requirements when it assessed property taxes primarily on the basis of purchase price, with no appropriate adjustments over time. The result was that new property owners were assessed at "roughly 8 to 35 times" the rate of those who had owned their property longer. *Id.*, at 344. We found such a "gross disparit[y]" in tax levels could not be justified in a state system that demanded that "taxation . . . be equal and uniform." *Id.*, at 338; W. Va. Const., Art. X, § 1. The case affirmed the commonsense proposition that the Equal Protection Clause is violated by state action that deprives a citizen of even "rough equality in tax treatment," when state law itself specifically provides that all the affected taxpayers are in the same category for tax purposes. 488 U. S., at 343; see *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623 (1946) ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class").

In this case, the Brisbane/Manning Sanitary Sewers Project allowed 180 property owners to have their homes hooked up to the city of Indianapolis's (City) sewer system under the State's Barrett Law. That law requires sewer costs to "be primarily apportioned equally among all abutting lands or lots." Ind. Code § 36–9–39–15(b)(3) (2011). In the case of Brisbane/Manning, the cost came to $9,278 for each property owner. Some of the property owners—petitioners here—paid the full $9,278 up front. Others elected the option of paying in installments. Shortly after hookup, the City switched to a new financing system and decided to forgive the hookup debts of those paying on an installment plan. The City refused, however, to refund any portion of the payments made by their identically situated neighbors who had already paid the full amount due. The result was that while petitioners each paid the City $9,278 for their hookups, more than half their neighbors paid less than $500 for the same improvement—some as little as $309.27. Another quarter paid less than $1,000. Petitioners thus paid between 10 and 30 times as much for their sewer hookups as their neighbors.

In seeking to justify this gross disparity, the City explained that it was presented with three choices: First, it could have continued to collect the installment plan payments of those who had not yet settled their debts under the old system. Second, it could have forgiven all those debts and given equivalent refunds to those who had made lump-sum payments up front. Or third, it could have forgiven the future payments and not refunded payments that had already been made. The first two choices had the benefit of complying with state law, treating all of Indianapolis's citizens equally, and comporting with the Constitution. The City chose the third option.

And what did the City believe was sufficient to justify a system that would effectively charge petitioners *30 times more* than their neighbors for the *same* service—when state

law promised equal treatment? Two things: the desire to avoid administrative hassle and the "fiscal[ ] challeng[e]" of giving back money it wanted to keep. Brief for Respondents 35–36. I cannot agree that those reasons pass constitutional muster, even under rational basis review.

The City argues that either of the other options for transitioning away from the Barrett Law would have been "immensely difficult from an administrative standpoint." *Id.*, at 36. The Court accepts this rationale, observing that "[o]rdinarily, administrative considerations can justify a tax-related distinction." *Ante*, at 682. The cases the Court cites, however, stand only for the proposition that a legislature crafting a tax scheme may take administrative concerns into consideration when creating classes of taxable entities that may be taxed differently. See, *e. g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973) (a State may "draw lines that treat one class of individuals or entities differently from the others"); *Madden* v. *Kentucky*, 309 U. S. 83, 87 (1940) (referring to the "broad discretion as to classification possessed by a legislature"); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 510–511 (1937) (discussing permissible considerations for the legislature in establishing a tax scheme).

Here, however, Indiana's tax scheme explicitly provides that costs will "be primarily apportioned *equally* among all abutting lands or lots." Ind. Code § 36–9–39–15(b)(3) (emphasis added). The legislature has therefore decreed that all abutting landowners are within the same class. We have never before held that administrative burdens justify grossly disparate tax treatment of those the State has provided should be treated alike. Indeed, in *Allegheny Pittsburgh* the county argued that its unequal assessments were based on "[a]dministrative cost[ ]" concerns, to no avail. Brief for Respondent, O. T. 1988, No. 87–1303, p. 22. The reason we have rejected this argument is obvious: The Equal Protection Clause does not provide that no State shall "deny

to any person within its jurisdiction the equal protection of the laws, unless it's too much of a bother."

Even if the Court were inclined to decide that administrative burdens alone may sometimes justify grossly disparate treatment of members of the same class, this would hardly be the case to do that. The City claims it cannot issue refunds because the process would be too difficult, requiring that it pore over records of old projects to determine which homeowners had overpaid and by how much. Brief for Respondents 36. But holding that the City must refund petitioners' overpayments would not mean that it has to refund overpayments in every Barrett Law project. The Equal Protection Clause is concerned with "gross" disparity in taxing. Because the Brisbane/Manning Project was initiated shortly before the Barrett Law transition, the disparity between what petitioners paid in comparison to their installment plan neighbors was dramatic. Not so with respect to, for example, a project initiated 10 years earlier, because for those projects even installment plan payers will have largely satisfied their debts, resulting in far less significant disparities.

To the extent a ruling for petitioners would require issuing refunds to others who overpaid under the Barrett Law, I think the City workers are up to the task. The City has in fact already produced records showing exactly how much each lump-sum payer overpaid in *every* active Barrett Law project—to the penny. Record in *Cox* v. *Indianapolis*, No. 1:09–cv–0435 (SD Ind.), Doc. 98–1 (Exh. A). What the City employees would need to do, therefore, is cut the checks and mail them out.

Certainly the job need not involve the complicated procedure the Court describes in an attempt to bolster its administrative convenience argument. Under the Court's view the City would apparently continue to accept monthly payments from installment plan homeowners in order to gradually repay the money it owes to those who paid in a lump sum.

Ante, at 683, 686. But this approach was never dreamt of by the City itself. See Brief for Respondents 18 (setting out City's "three basic [transition] options," none of which involved the Court's gradual refund scheme).

The Court suggests that the City's administrative convenience argument is one with which the law is comfortable. The Court compares the City's decision to forgive the installment balances to the sort of parking ticket and mortgage payment amnesty programs that currently abound. *Ante*, at 683. This analogy is misplaced: Amnesty programs are designed to entice those who are unlikely ever to pay their debts to come forward and pay at least a portion of what they owe. It is not administrative convenience alone that justifies such schemes. In a sense, these schemes help remedy payment inequities by prompting those who would pay nothing to pay at least some of their fair share. The same cannot be said of the City's system.

The Court is willing to concede that "administrative considerations could not justify . . . an unfair system" in which "a city arbitrarily allocate[s] taxes among a few citizens while forgiving many similarly situated citizens on the ground that it is cheaper and easier to collect taxes from a few people than from many." *Ante*, at 685–686. Cold comfort, that. If the quoted language does not accurately describe this case, I am not sure what it would reach.

The Court wisely does not embrace the City's alternative argument that the unequal tax burden is justified because "it would have been fiscally challenging to issue refunds." Brief for Respondents 35. "Fiscally challenging" gives euphemism a bad name. The City's claim that it has already spent petitioners' money is hardly worth a response, and the City recognizes as much when it admits it could provide refunds to petitioners by "arrang[ing] for payments from non-Barrett Law sources." *Id.*, at 36. One cannot evade returning money to its rightful owner by the simple expedient of spending it. The "fiscal challenge" justification seems particularly inappropriate in this case, as the City—with an

annual budget of approximately $900 million—admits that the cost of refunding all of petitioners' money would be approximately $300,000. Adopted 2012 Budget for the Consolidated City of Indianapolis, Marion County (Oct. 17, 2011), p. 7; Tr. of Oral Arg. 17, 58.

Equally unconvincing is the Court's attempt to distinguish *Allegheny Pittsburgh*. The Court claims that case was different because it involved "a clear state-law requirement clearly and dramatically violated." *Ante*, at 687. Nothing less is at stake here. Indiana law requires that the costs of sewer projects be "apportioned equally among all abutting lands." Ind. Code § 36–9–39–15(b)(3). The City has instead apportioned the costs of the Brisbane/Manning Project such that petitioners paid between 10 and 30 times as much as their neighbors. Worse still, it has done so in order to avoid administrative hassle and save a bit of money. To paraphrase A Man for All Seasons: "It profits a city nothing to give up treating its citizens equally for the whole world . . . but for $300,000?" See R. Bolt, A Man for All Seasons, act II, p. 158 (1st Vintage Int'l ed. 1990).

Our precedents do not ask for much from government in this area—only "rough equality in tax treatment." *Allegheny Pittsburgh*, 488 U. S., at 343. The Court reminds us that *Allegheny Pittsburgh* is a "rare case." *Ante*, at 687. It is and should be; we give great leeway to taxing authorities in this area, for good and sufficient reasons. But every generation or so a case comes along when this Court needs to say enough is enough, if the Equal Protection Clause is to retain any force in this context. *Allegheny Pittsburgh* was such a case; so is this one. Indiana law promised neighboring homeowners that they would be treated equally when it came to paying for sewer hookups. The City then ended up charging some homeowners *30 times* what it charged their neighbors for the same hookups. The equal protection violation is plain. I would accordingly reverse the decision of the Indiana Supreme Court, and respectfully dissent from the Court's decision to do otherwise.

Reporter's Note

The next page is purposely numbered 901. The numbers between 693 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 20, THROUGH
JUNE 4, 2012

MARCH 20, 2012

Certiorari Denied

No. 11–9290 (11A875). PUCKETT *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MARCH 23, 2012

Certiorari Denied

No. 11–9373 (11A882). MITCHELL *v.* MISSISSIPPI. Sup. Ct. Miss. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MARCH 26, 2012

Certiorari Granted—Vacated and Remanded

No. 10–1240. THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION *v.* ARNOLD. C. A. 5th Cir. Reported below: 630 F. 3d 367; and

No. 10–1557. THURMER, WARDEN *v.* KERR. C. A. 7th Cir. Reported below: 639 F. 3d 315. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Lafler* v. *Cooper*, *ante*, p. 156.

No. 10–8629. SMITH *v.* COLSON, WARDEN. C. A. 6th Cir. Reported below: 381 Fed. Appx. 547;

No. 10–11031. CANTU *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 632 F. 3d 157;

No. 11–5067. MIDDLEBROOKS *v.* COLSON, WARDEN. C. A. 6th Cir. Reported below: 619 F. 3d 526;

No. 11–6969. NEWBURY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 437 Fed. Appx. 290; and

No. 11–7978. WOODS *v.* HOLBROOK, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Reported below: 655 F. 3d 886. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Martinez* v. *Ryan*, *ante*, p. 1.

No. 10–10543. LOVELL *v.* DUFFEY. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Cullen* v. *Pinholster*, 563 U. S. 170 (2011). Reported below: 629 F. 3d 587.

No. 11–725. ASSOCIATION FOR MOLECULAR PATHOLOGY ET AL. *v.* MYRIAD GENETICS, INC., ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, *ante*, p. 66. Reported below: 653 F. 3d 1329.

No. 11–6589. RODRIGUEZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Missouri* v. *Frye*, *ante*, p. 134.

Certiorari Dismissed

No. 11–8362. MARTIN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–8707. TATE *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 11M87. KAETZ *v.* KAETZ; and

No. 11M88. JENNINGS *v.* UNITED STATES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11M89. KIRSCH *v.* O'NEIL ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 11M90. ARIAS *v.* UNITED STATES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 11–798. AMERICAN TRUCKING ASSNS., INC. *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 11–8363. IN RE EVANS;

No. 11–8384. PETERSON *v.* SEAMAN. C. A. 11th Cir.;

No. 11–8406. BIRDETTE *v.* GEORGIA DEPARTMENT OF TRANSPORTATION. C. A. 11th Cir.;

No. 11–8501. JUNFENG HAN ET AL. *v.* JIANONG GUO ET AL. Ct. App. Cal., 2d App. Dist.;

No. 11–8505. FISHER *v.* VIZIONCORE, INC., ET AL. C. A. 7th Cir.; and

No. 11–8521. AREF *v.* HICKMAN ET AL. C. A. 9th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 16, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9063. IN RE PATTERSON. Petition for writ of habeas corpus denied.

No. 11–884. IN RE DEL RIO;

No. 11–894. IN RE LONDON;

No. 11–920. IN RE CATHCART ET AL.;

No. 11–8379. IN RE BRADIN; and

No. 11–8394. IN RE WARD. Petitions for writs of mandamus denied.

No. 11–8478. IN RE FLYNN. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 11–8971. IN RE CRAWFORD. Petition for writ of mandamus denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Certiorari Granted

No. 11–817. FLORIDA *v.* HARRIS. Sup. Ct. Fla. Motion of National Police Canine Association et al. for leave to file a brief as *amici curiae* granted. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 71 So. 3d 756.

Certiorari Denied

No. 10–8116. FRYE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 311 S. W. 3d 350.

No. 10–9742. COOK *v.* ARIZONA. Super. Ct. Ariz., County of Mohave. Certiorari denied.

No. 10–10782. WILLIAMS *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 10–11036. BALENTINE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–457. KITSAP ALLIANCE OF PROPERTY OWNERS ET AL. *v.* CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD ET AL. Ct. App. Wash. Certiorari denied. Reported below: 160 Wash. App. 250, 255 P. 3d 696.

No. 11–561. SMITH ET AL. *v.* FIELDS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 653 F. 3d 550.

No. 11–622. HTH CORP. ET AL. *v.* FRANKL, REGIONAL DIRECTOR OF REGION 20 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 650 F. 3d 1334.

No. 11–677. MOORE *v.* GUERRERO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 57.

No. 11–741. Philip Morris USA Inc. et al. *v.* Campbell, Personal Representative of the Estate of Campbell; and No. 11–756. R. J. Reynolds Tobacco Co. *v.* Campbell, Personal Representative of the Estate of Campbell. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 60 So. 3d 1078.

No. 11–752. R. J. Reynolds Tobacco Co. *v.* Gray, Personal Representative of the Estate of Gray. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 63 So. 3d 902.

No. 11–754. R. J. Reynolds Tobacco Co. *v.* Martin, Personal Representative of the Estate of Martin. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 53 So. 3d 1060.

No. 11–755. R. J. Reynolds Tobacco Co. *v.* Hall, Personal Representative of the Estate of Hall. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 70 So. 3d 642.

No. 11–773. Guerra *v.* Shinseki, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 642 F. 3d 1046.

No. 11–780. Howard *v.* Walgreen Co., dba Walgreens Pharmacy. C. A. 11th Cir. Certiorari denied. Reported below: 605 F. 3d 1239.

No. 11–782. Marina Point Development Associates et al. *v.* Center for Biological Diversity et al. C. A. 9th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 843.

No. 11–786. Nampa Classical Academy et al. *v.* Goesling et al. C. A. 9th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 776.

No. 11–800. Apotex Inc. et al. *v.* Allergan, Inc., et al. C. A. Fed. Cir. Certiorari denied. Reported below: 643 F. 3d 1366.

No. 11–825. Frey et al. *v.* Comptroller of the Treasury of Maryland. Ct. App. Md. Certiorari denied. Reported below: 422 Md. 111, 29 A. 3d 475.

No. 11–885. Freeman *v.* MML Bay State Life Insurance Co. C. A. 3d Cir. Certiorari denied. Reported below: 445 Fed. Appx. 577.

No. 11–886. KENNEDY *v.* TIMES PUBLISHING CO. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 73 So. 3d 768.

No. 11–887. PIRILA ET AL. *v.* THOMSON TOWNSHIP, MINNESOTA, ET AL. Ct. App. Minn. Certiorari denied.

No. 11–891. COUNTY OF LOS ANGELES, CALIFORNIA *v.* ASSOCIATION FOR LOS ANGELES DEPUTY SHERIFFS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 3d 986.

No. 11–892. ASTER *v.* ASTER. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–893. LOUDERMILK ET AL. *v.* DANNER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 693.

No. 11–900. CABELL *v.* SONY PICTURES ENTERTAINMENT, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 425 Fed. Appx. 42.

No. 11–906. POWERCOMM, LLC *v.* HOLYOKE GAS & ELECTRIC DEPARTMENT ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 657 F. 3d 31.

No. 11–910. JOHNSON *v.* POWAY UNIFIED SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 3d 954 and 449 Fed. Appx. 696.

No. 11–914. HOUSTON *v.* EASTON AREA SCHOOL DISTRICT. C. A. 3d Cir. Certiorari denied. Reported below: 444 Fed. Appx. 523.

No. 11–917. NUCOR CORP. ET AL. *v.* BENNETT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 3d 802.

No. 11–918. SIWULA *v.* TOWN OF HORNELLSVILLE, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 82 App. Div. 3d 1662, 919 N. Y. S. 2d 457.

No. 11–924. RICK ET AL. *v.* WYETH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 3d 1067.

No. 11–933. SILVA *v.* CITY OF NEW BEDFORD, MASSACHUSETTS. C. A. 1st Cir. Certiorari denied. Reported below: 660 F. 3d 76.

No. 11–990. H. D. SMITH WHOLESALE DRUG CO., INC. *v.* SMITH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 659 F. 3d 503.

No. 11–1021. EDWARDS *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 11–1033. JOSEPH *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 422 Md. 670, 31 A. 3d 137.

No. 11–1043. KIVISTO *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 11–1048. RONCALLO *v.* SIKORSKY AIRCRAFT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 243.

No. 11–5941. SANDERS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 339 S. W. 3d 427.

No. 11–6427. FOSTER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–6472. MCGEHEE *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied.

No. 11–6594. TEMPLET *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 431 Fed. Appx. 270.

No. 11–6624. NEWBOLD *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Guilford County, N. C. Certiorari denied.

No. 11–6891. POLK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 407 Ill. App. 3d 80, 942 N. E. 2d 44.

No. 11–7098. WHITE *v.* LONGINO, DEPUTY WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 428 Fed. Appx. 491.

No. 11–7120. DAKER *v.* WARREN, SHERIFF, COBB COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 11–7523. DUNCAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 3d 1242.

No. 11–7669. EL-MUMIT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 1988–0017 (La. 5/11/11), 68 So. 3d 435.

No. 11–7838. GONZALES *v.* CALIFORNIA; and
No. 11–8133. SOLIZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 52 Cal. 4th 254, 256 P. 3d 543.

No. 11–8066. GIBSON *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI;
No. 11–8067. MCCORKLE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI;
No. 11–8068. WATKINS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI; and
No. 11–8481. GOLDBLATT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 11–8352. VIVAS *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Sup. Ct. Fla. Certiorari denied. Reported below: 69 So. 3d 279.

No. 11–8359. ZIBBELL ET UX. *v.* MICHIGAN DEPARTMENT OF HUMAN SERVICES ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8369. MCCALL *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 11–8374. JUDKINS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 405 Ill. App. 3d 1199, 997 N. E. 2d 1009.

No. 11–8376. BOOMER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 11–8380. MILLER *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 766.

No. 11–8387. NAVA *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 756.

No. 11–8388. MCPHERSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8390. SANCHEZ *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8393. RODRIGUEZ *v.* GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–8396. WATFORD *v.* WARREN, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8399. VANN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 11–8407. BAEZ *v.* HUNT ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–8415. DAVIS *v.* ROZUM ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8416. EMMETT *v.* MCGUIRE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 430 Fed. Appx. 269.

No. 11–8417. CRUMP *v.* CARUSO ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8418. GHOLSON *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 636.

No. 11–8423. CODY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8424. CONTRERAS *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8425. DUNN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1153, 2 N. E. 3d 663.

No. 11–8429. VELEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8436. BROCK *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 955 N. E. 2d 195.

No. 11–8445. PLAISANCE *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied.

No. 11–8447. VASQUEZ AGUIRRE *v.* CAMPBELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8448. BOTES *v.* STEEL. C. A. 11th Cir. Certiorari denied.

No. 11–8450. CRUMMIE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 76 So. 3d 301.

No. 11–8453. BROWN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8457. ZINK *v.* STEELE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 11–8460. JACOBOWITZ *v.* DARTMOUTH PUBLIC SCHOOLS ET AL. C. A. 1st Cir. Certiorari denied.

No. 11–8468. WESLEY M. *v.* SHEBOYGAN COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. Ct. App. Wis. Certiorari denied. Reported below: 2011 WI App 114, 336 Wis. 2d 477, 801 N. W. 2d 350.

No. 11–8472. CHRISTIAN *v.* WALGREEN CO. C. A. 7th Cir. Certiorari denied.

No. 11–8475. ANDERSON *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8477. BILAL *v.* WILKINS, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 843.

No. 11–8484. NICKERSON-MALPHER *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied.

No. 11–8487. BYRD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8489. BROWN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 74 So. 3d 1082.

No. 11–8492. BENSON *v.* TIBBALS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8493. GORDON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8495. GREENE *v.* NEVADA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 3d 1014.

No. 11–8497. HILLMAN *v.* EDWARDS. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 2011-Ohio-2677.

No. 11–8498. GOODS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–8504. ITURRALDE *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 11–8507. GRAY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 11–8511. COSSIO *v.* CASTRO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 83.

No. 11–8512. STOVER *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–8513. FAISON *v.* ARNONE, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION. C. A. 2d Cir. Certiorari denied.

No. 11–8514. GASTON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 1136.

No. 11–8515. GAMBLE *v.* SUBIA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8516. FEIGER *v.* HICKMAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8519. REEVES *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–8522. SORRELLS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 11–8523. BURLEW *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 663.

No. 11–8536. AMAYA *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 11–8537. BARKACS *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8538. BADUE *v.* REEVE ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8543. SWAN *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 28 A. 3d 362.

No. 11–8563. BARRINO *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 851.

No. 11–8565. ABULKHAIR *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 450 Fed. Appx. 117.

No. 11–8580. ADAMS *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8581. BARKER *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 11–8584. KEESLING *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–8585. WESTON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8586. LOGAN *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 4th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 659.

No. 11–8589. MACLIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 11–8667. SIMS *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8672. MILLS *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 506.

No. 11–8720. CASSELL *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. Sup. Ct. Ark. Certiorari denied. Reported below: 2011 Ark. 330.

No. 11–8755. DAVIS *v.* BARRETT. C. A. 2d Cir. Certiorari denied.

No. 11–8757. LOZA *v.* RYAN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8767. GETACHEW *v.* S & K FAMOUS BRANDS, INC. C. A. 6th Cir. Certiorari denied.

No. 11–8791. WARREN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 11–8793. ORTIZ *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 3d 863.

No. 11–8794. NAJERA *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 563.

No. 11–8804. ARNOLD *v.* TOOLE, WARDEN. Super. Ct. Ga., Wilcox County. Certiorari denied.

No. 11–8805. BALTAZAR *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8819. CATON, AKA GARVICK *v.* KIMBLE. C. A. 4th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 204.

No. 11–8837. SMITH *v.* SUPREME COURT OF COLORADO GRIEVANCE COMMITTEE. Sup. Ct. Colo. Certiorari denied.

No. 11–8869. MONIZ *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8876. DESMOND *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 29 A. 3d 245.

No. 11–8909. ESCAMILLA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–8925. WIGGINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 289.

No. 11–8927. WHITLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–8929. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 664 F. 3d 1047.

No. 11–8931. REDDITT *v.* SHERROD, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 432.

No. 11–8935. RICHARDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–8936. SOLER *v.* MARTINEZ, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 435 Fed. Appx. 69.

No. 11–8937. RANGEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 158.

No. 11–8939. ZAPATA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–8941. MCDANIEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 433 Fed. Appx. 701.

No. 11–8946. BRAXTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 242.

No. 11–8947. CEDENO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 455 Fed. Appx. 241.

No. 11–8949. DIMACHE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 3d 603.

No. 11–8955. RIVERA-ROSADAO, AKA RIVERA-ROSADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 715.

No. 11–8956. BASS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 661 F. 3d 1299.

No. 11–8958. BRUNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 143.

No. 11–8964. RUSSELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 662 F. 3d 831.

No. 11–8967. RETANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–8972. CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–8977. THOMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 659 F. 3d 339.

No. 11–8980. BURDETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 250.

No. 11–8982. BALOGUN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 476.

No. 11–8984. AYALA-ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 640.

No. 11–8988. LOPEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 441 Fed. Appx. 910.

No. 11–8990. LITTLES *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 457 Fed. Appx. 99.

No. 11–9001. NEWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 1235.

No. 11–9004. ROLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 314.

No. 11–9010. MCKOY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA. C. A. 8th Cir. Certiorari denied.

No. 11–9019. DE LA CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 11–9020. RUSHIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 642 F. 3d 1299.

No. 11–9022. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 261.

No. 11–9041. MIDYETT *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 457 Fed. Appx. 7.

No. 11–9043. NADIRASHVILI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 655 F. 3d 114.

No. 11–9045. MERTENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 767.

No. 11–904. SMITH ET VIR *v.* ABN AMRO MORTGAGE GROUP, INC., ET AL. C. A. 6th Cir. Motion of respondents for leave to file a brief in opposition under seal with redacted copies for the public record granted. Motion of petitioners for leave to file a reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 434 Fed. Appx. 454.

No. 11–8602. CHING *v.* WARNER BROTHERS STUDIOS FACILITIES, INC. Ct. App. Cal., 2d App. Dist. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 11–8934. SOREIDE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–8944. RADFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 11–8954. TROBEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 11–745. IGARASHI *v.* SKULL AND BONES ET AL., 565 U. S. 1200;

No. 11–5406. KAY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 565 U. S. 1115;

No. 11–7287. SHABAZZ *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 565 U. S. 1162;

No. 11–7357. KURTZEMANN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 565 U. S. 1163;

No. 11–7361. GARDNER *v.* UNITED STATES, 565 U. S. 1129;

No. 11–7404. HUDSON *v.* DEPARTMENT OF THE TREASURY FINANCIAL MANAGEMENT SERVICE, 565 U. S. 1165; and

No. 11–7406. HENDRICKS *v.* SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES, 565 U. S. 1165. Petitions for rehearing denied.

March 28, 2012

Certiorari Denied

No. 11–8735 (11A796). Hernandez *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied. Reported below: 440 Fed. Appx. 409.

No. 11–9486 (11A904). Hernandez *v.* Texas. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to Justice Scalia, and by him referred to the Court, denied. Certiorari denied.

April 2, 2012

Certiorari Dismissed

No. 10–7502. Reynolds *v.* Thomas, Warden. C. A. 9th Cir. Certiorari dismissed. Reported below: 603 F. 3d 1144.

No. 11–8556. Book *v.* Mortgage Electronic Registration Systems et al. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–8799. Woolridge *v.* Biter, Acting Warden. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 11A622. Bush *v.* Lindsey, Warden. Application for bail, addressed to Justice Ginsburg and referred to the Court, denied.

No. 11A797. Wilbon *v.* Booker. Application for certificate of appealability, addressed to The Chief Justice and referred to the Court, denied.

No. D–2625. In re Discipline of Kline. Ronald Craver Kline, of Irvine, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, re-

quiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2626. IN RE DISCIPLINE OF FULLER. David M. Fuller, of Kennesaw, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2627. IN RE DISCIPLINE OF BURKENROAD. David Burkenroad, of Los Angeles, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2628. IN RE DISCIPLINE OF WELLS. William G. Wells, of Santa Monica, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2629. IN RE DISCIPLINE OF DAY. Brian Leo Day, of Costa Mesa, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2630. IN RE DISCIPLINE OF MEADE. Mary Marstella Schmidt Meade, of Fairfax, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2631. IN RE DISCIPLINE OF MINOR. Paul Stephen Minor, of Canton, Miss., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2632. IN RE DISCIPLINE OF POOLE. Charles Ruffin Poole, of Raleigh, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2633. In re Discipline of Bagnell. Gilbert Scott Bagnell, of Catskill, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2634. In re Discipline of Klingsmith. Philip C. Klingsmith III, of Gunnison, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11M91. Shrewsbury *v.* Astrue, Commissioner of Social Security; and

No. 11M93. Haughton *v.* United States District Court for the Southern District of Florida. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11M92. John Mezzalingua Associates, Inc., dba PPC *v.* International Trade Commission. Motion for leave to file petition for writ of certiorari under seal denied without prejudice to filing a renewed motion explaining in detail the basis for sealing the petition along with a redacted version of the petition limited to information not part of the public record in the Court of Appeals within 30 days.

No. 11–166. RadLAX Gateway Hotel, LLC, et al. *v.* Amalgamated Bank. C. A. 7th Cir. [Certiorari granted, 565 U. S. 1092.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–192. United States *v.* Bormes. C. A. Fed. Cir. [Certiorari granted, 565 U. S. 1153.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 11–204. Christopher et al. *v.* SmithKline Beecham Corp., dba GlaxoSmithKline. C. A. 9th Cir. [Certiorari granted, 565 U. S. 1057.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–246. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians *v.* Patchak et al.; and

No. 11–247. SALAZAR, SECRETARY OF THE INTERIOR, ET AL. *v.* PATCHAK ET AL. C. A. D. C. Cir. [Certiorari granted, 565 U. S. 1092.] Motion of petitioners for divided argument granted.

No. 11–262. REICHLE ET AL. *v.* HOWARDS. C. A. 10th Cir. [Certiorari granted, 565 U. S. 1078.] Motion of The Rutherford Institute for leave to file a brief as *amicus curiae* granted. JUSTICE KAGAN took no part in the consideration or decision of this motion.

No. 11–796. BOWMAN *v.* MONSANTO CO. ET AL. C. A. Fed. Cir.; and

No. 11–889. TARRANT REGIONAL WATER DISTRICT *v.* HERRMANN ET AL. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 11–8561. YUNG *v.* BANK OF AMERICA CORP. ET AL. C. A. 2d Cir.; and

No. 11–8579. DEL BOSQUE *v.* AT&T ADVERTISING, L. P., DBA AT&T ADVERTISING & PUBLISHING. C. A. 5th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 23, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9161. IN RE RICHARDS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 11–8613. IN RE SALERNO. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 11–702. MONCRIEFFE *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari granted. Reported below: 662 F. 3d 387.

No. 11–597. ARKANSAS GAME AND FISH COMMISSION *v.* UNITED STATES. C. A. Fed. Cir. Certiorari granted. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 637 F. 3d 1366.

Certiorari Denied

No. 10–6866. VARGAS-SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 358 Fed. Appx. 496.

No. 10–8583. MENDOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 397 Fed. Appx. 941.

No. 10–8659. BUSTOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 398 Fed. Appx. 954.

No. 10–10619. CATES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 745.

No. 10–10630. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 417 Fed. Appx. 402.

No. 10–10727. HARTWELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 748.

No. 11–662. FISCHER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 641 F. 3d 1006.

No. 11–721. STEPHENS ET AL. *v.* US AIRWAYS GROUP, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 644 F. 3d 437.

No. 11–821. CADLE *v.* HICKS. C. A. 10th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 874.

No. 11–823. COREN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 432 Fed. Appx. 38.

No. 11–927. GARGANO *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 460 Mass. 1022, 957 N. E. 2d 235.

No. 11–928. MOORE ET AL. *v.* PERKINS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 341.

No. 11–930. SPENCER *v.* ROCHE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 659 F. 3d 142.

No. 11–932. BURTCH, CHAPTER 7 TRUSTEE *v.* MILBERG FACTORS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 662 F. 3d 212.

No. 11–938. BENNETT ET AL. *v.* NUCOR CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 656 F. 3d 802.

No. 11–939. WANKEN *v.* WANKEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 319.

No. 11–940. TYLER *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–942. ROBERTS *v.* FLORIDA GAS TRANSMISSION CO., L. L. C. C. A. 5th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 599.

No. 11–946. ROOS *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–949. CREWS *v.* LIME ROCK ASSOCIATES, INC. App. Ct. Conn. Certiorari denied. Reported below: 129 Conn. App. 807, 21 A. 3d 568.

No. 11–951. ACEMLA DE PUERTO RICO, INC., ET AL. *v.* CURET-VELAZQUEZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 656 F. 3d 47.

No. 11–961. VINEYARD INVESTMENTS, L. L. C. *v.* CITY OF MADISON, MISSISSIPPI. C. A. 5th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 310.

No. 11–980. VARIOUS TORT CLAIMANTS *v.* FATHER M ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 3d 417.

No. 11–992. GILLESPIE *v.* MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 433 Fed. Appx. 486.

No. 11–1015. PIRES *v.* FROTA OCEANICA E AMAZONICA S. A., AS SUCCESSOR TO FROTA OCEANICA BRASILEIRA, S. A., ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 3d 912, 918 N. Y. S. 2d 498.

No. 11–1016. PIRES *v.* FROTA OCEANICA BRASILEIRA, S. A. Ct. App. N. Y. Certiorari denied. Reported below: 17 N. Y. 3d 853, 954 N. E. 2d 1173.

No. 11–1022. SUN LIFE & HEALTH INSURANCE CO., FKA GENWORTH LIFE & HEALTH INSURANCE CO., ET AL. *v.* RILEY. C. A. 8th Cir. Certiorari denied. Reported below: 657 F. 3d 739.

No. 11–1023. HELLER ET AL. *v.* FROTA OCEANICA E AMAZONICA S. A. ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 81 App. Div. 3d 894, 920 N. Y. S. 2d 86.

No. 11–1041. JANDA *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 11–1049. WOODWORTH *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. 2d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 255.

No. 11–1051. CONCOURSE REHABILITATION & NURSING CENTER, INC. *v.* NOVELLO, INDIVIDUALLY AND AS COMMISSIONER OF NEW YORK DEPARTMENT OF HEALTH, ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 80 App. Div. 3d 507, 915 N. Y. S. 2d 252.

No. 11–1073. SOUNTRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–1087. FLETCHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 547.

No. 11–1111. MURRAY ET AL. *v.* SULLIVAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 667 F. 3d 273.

No. 11–5456. TORRES-ALFARO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 423 Fed. Appx. 410.

No. 11–6168. LABUFF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 3d 873.

No. 11–6414. POTTS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 3d 233.

No. 11–6482. ARPON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 429 Fed. Appx. 426.

No. 11–6568. SARILES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 645 F. 3d 315.

No. 11–6634. DE JESUS VENTURA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 650 F. 3d 746.

No. 11–6881. BRADY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 191.

No. 11–7140. O'NEIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–7205. CORREA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 653 F. 3d 187.

No. 11–7206. CASTRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 435 Fed. Appx. 407.

No. 11–7495. VALENTINE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 309.

No. 11–7608. BEST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–7812. FENNIE *v.* BONDI, ATTORNEY GENERAL OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 11–7878. THOMAS *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 11–8042. SPALDING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 464.

No. 11–8064. WEEKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 447.

No. 11–8097. RUNNING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 431 Fed. Appx. 500.

No. 11–8540. CRAFT *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 435 Fed. Appx. 789.

No. 11–8555. SVEHLA *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8557. PORCO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 71 App. Div. 3d 791, 896 N. Y. S. 2d 161.

No. 11–8562. WEEKS *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 75 So. 3d 1248.

No. 11–8567. LINNEN *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 3d 1655, 924 N. Y. S. 2d 915.

No. 11–8568. McIntyre *v.* City of Wilmington, Delaware. C. A. 3d Cir. Certiorari denied. Reported below: 441 Fed. Appx. 957.

No. 11–8572. Morris *v.* Busek. C. A. 2d Cir. Certiorari denied.

No. 11–8575. Jones *v.* Illinois. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 405 Ill. App. 3d 1218, 997 N. E. 2d 1018.

No. 11–8582. Khan *v.* Washington. Ct. App. Wash. Certiorari denied. Reported below: 162 Wash. App. 1024.

No. 11–8587. Malone *v.* Texas. Ct. App. Tex., 6th Dist. Certiorari denied.

No. 11–8592. Abdullah *v.* Warren, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 11–8596. Ector *v.* Howerton, Warden. C. A. 11th Cir. Certiorari denied.

No. 11–8599. Weston *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2011 IL App (1st) 092432, 956 N. E. 2d 498.

No. 11–8603. D'Antuono *v.* Bradt, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 11–8605. Payne *v.* Adams, Warden. C. A. 9th Cir. Certiorari denied.

No. 11–8606. Dye *v.* DeAngelo et al. C. A. 6th Cir. Certiorari denied.

No. 11–8609. Douthitt *v.* Hobbs, Director, Arkansas Department of Correction. Sup. Ct. Ark. Certiorari denied. Reported below: 2011 Ark. 416.

No. 11–8611. Shabazz *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 11–8612. Shabazz *v.* Superior Court of California, Los Angeles County, et al. C. A. 9th Cir. Certiorari denied.

No. 11–8614. KENDRICK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 70 So. 3d 587.

No. 11–8621. PATTERSON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–8630. MIRANDA *v.* HOREL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8633. RIZZO *v.* ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–8634. RIVERA *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 67 So. 3d 200.

No. 11–8641. BATTISTE *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 632.

No. 11–8642. CHASE *v.* HEPTIG. Sup. Jud. Ct. Me. Certiorari denied.

No. 11–8644. CHUNG-JI DAI *v.* SALT LAKE CITY, UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2011 UT App 52, 249 P. 3d 602.

No. 11–8645. ESTRELLO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8646. COLEMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 869, 948 N. E. 2d 795.

No. 11–8657. HAMMONDS *v.* HARRISON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 717.

No. 11–8673. SWANN *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 45 Kan. App. 2d xlii, 249 P. 3d 27.

No. 11–8679. MANTERIS *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 669.

No. 11–8697. WALLACE *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8699. SELEMOGO *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8712. HUNG VIET VU *v.* KIRKLAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 713.

No. 11–8721. AKINE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 73 So. 3d 759.

No. 11–8723. BUDDHI *v.* BENSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 3d 740.

No. 11–8744. LESHER *v.* TRENT ET AL. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 407 Ill. App. 3d 1170, 944 N. E. 2d 479.

No. 11–8745. RAMIREZ *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 11–8773. HYBERG *v.* MILYARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 843.

No. 11–8785. HILL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 451, 949 N. E. 2d 1180.

No. 11–8797. JONES *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 446 Fed. Appx. 275.

No. 11–8846. BURGHART *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 450 Fed. Appx. 973.

No. 11–8848. BROWNLEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 Fed. Appx. 196.

No. 11–8849. STONEBARGER *v.* WILLIAMS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 627.

No. 11–8907. LAMB *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 11–8923. PEREZ *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8924. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 11–8940. PULKKINEN *v.* VERIZON NEW ENGLAND, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 11–8975. EXINIA *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 457 Fed. Appx. 80.

No. 11–8981. ANDRADE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 3d 160, 927 N. Y. S. 2d 648.

No. 11–8987. SOHA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 671 F. 3d 271.

No. 11–9024. MUNIZ-BRAVO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 654.

No. 11–9038. BARRAGAN-CAMARILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 637.

No. 11–9052. ROBERTSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 322.

No. 11–9053. FRUGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 434.

No. 11–9055. GOMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 659.

No. 11–9057. IRVING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 665 F. 3d 1184.

No. 11–9060. LEVINE *v.* HOLENCIK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9066. GARCIA-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 659 F. 3d 108.

No. 11–9068. FARIAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 948.

No. 11–9078. MEEKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 736.

No. 11–9088. ROLLINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–9090. COOK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 285.

No. 11–9092. CURRY *v.* CARLTON, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 11–9095. TYSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 363.

No. 11–9097. ZAMBRANO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 945.

No. 11–9098. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 244.

No. 11–9099. VASQUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9108. BELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 634.

No. 11–9109. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 997.

No. 11–9114. WHITE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 194.

No. 11–9115. TOMKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–734. TEXAS *v.* PHILLIPS. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 362 S. W. 3d 606.

No. 11–853. DENNEY, WARDEN *v.* GRIFFIN. Sup. Ct. Mo. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 347 S. W. 3d 73.

No. 11–948. TITAN MARITIME, LLC *v.* CAPE FLATTERY LTD. C. A. 9th Cir. Motions of Chicago International Dispute Resolution Association, Law Professors, California Bankers Association

et al., and American Salvage Association et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 647 F. 3d 914.

No. 11–8470. DORSEY *v.* LOUISIANA. Sup. Ct. La. Motion of Louisiana Association of Criminal Defense Lawyers for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 2010–0216 (La. 9/7/11), 74 So. 3d 603.

No. 11–9086. STONE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 11–768. MEHDI *v.* UNITED STATES, 565 U. S. 1200;

No. 11–7246. GUZMAN *v.* MCQUIGGIN, WARDEN, 565 U. S. 1161;

No. 11–7640. BARRIOS, AKA RINCON-HERNANDEZ *v.* UNITED STATES, 565 U. S. 1136;

No. 11–7662. BURKLEY *v.* CALIFORNIA, 565 U. S. 1207; and

No. 11–8103. IN RE BALZAROTTI, 565 U. S. 1177. Petitions for rehearing denied.

No. 11–7063. RUTH *v.* UNITED STATES, 565 U. S. 1122. Motion for leave to file petition for rehearing denied.

APRIL 12, 2012

Miscellaneous Order

No. 11–9752 (11A954). IN RE GORE. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 11–9751 (11A953). GORE *v.* FLORIDA. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied. Reported below: 91 So. 3d 769.

APRIL 13, 2012

Miscellaneous Order

No. 11A975. WORKMAN, WARDEN *v.* ALLEN. Application to vacate stay of execution entered by the United States District Court for the Western District of Oklahoma, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied.

April 16, 2012

Certiorari Granted—Vacated and Remanded

No. 11–7325. Springston *v.* United States. C. A. 8th Cir. Reported below: 650 F. 3d 1153; and

No. 11–8138. Caraway *v.* United States. C. A. 2d Cir. Reported below: 431 Fed. Appx. 49. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Reynolds* v. *United States*, 565 U. S. 432 (2012).

Certiorari Dismissed

No. 11–8788. Hale *v.* Tucker, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–8853. Abulkhair *v.* Citibank & Associates. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 434 Fed. Appx. 58.

No. 11–8960. Pitchford *v.* Turbitt et al. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–9033. Tafari *v.* Paul et al. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2635. In re Discipline of McAllister. Robert T. McAllister, of Denver, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2636. In re Discipline of Guffey. William O. Guffey, of Chula Vista, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2637. IN RE DISCIPLINE OF RASMUSSEN. Thomas V. Rasmussen, Jr., of Salt Lake City, Utah, is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2638. IN RE DISCIPLINE OF BALDWIN. James E. Baldwin, of Lebanon, Mo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2639. IN RE DISCIPLINE OF PEEL. Gary E. Peel, of Glen Carbon, Ill., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2640. IN RE DISCIPLINE OF MARDIROSIAN. Robert M. Mardirosian, of East Falmouth, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2641. IN RE DISCIPLINE OF FROHLING. John B. M. Frohling, of Newark, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2642. IN RE DISCIPLINE OF NEEDLE. Leonard Sherman Needle, of Fair Haven, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2643. IN RE DISCIPLINE OF DORNY. Brett Nathan Dorny, of Arvada, Colo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2644. IN RE DISCIPLINE OF ABRAMOWITZ. Jeffrey Abramowitz, of Mt. Laurel, N. J., is suspended from the practice

of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2645. IN RE DISCIPLINE OF KATZ. Benjamin Zev Katz, of Lynbrook, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2646. IN RE DISCIPLINE OF GOLD. Avrom J. Gold, of West Orange, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2647. IN RE DISCIPLINE OF WHITE. Lucille Saundra White, of Bowie, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2648. IN RE DISCIPLINE OF GOLDBLATT. Lewis Steven Goldblatt, of West Dover, Vt., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2649. IN RE DISCIPLINE OF NUNNERY. Willie J. Nunnery, of Madison, Wis., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2650. IN RE DISCIPLINE OF HOWELL. W. Craig Howell, of Omaha, Neb., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2651. IN RE DISCIPLINE OF CLIFFORD. Charles Michael Clifford, of Charlestown, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2652. IN RE DISCIPLINE OF HOLMES. David Farrell Holmes, of Hutchinson, Kan., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2653. IN RE DISCIPLINE OF UHL. Christopher M. Uhl, of Southborough, Mass., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2654. IN RE DISCIPLINE OF WILSON. John Charles Wilson, of Mobile, Ala., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2655. IN RE DISCIPLINE OF NWADIKE. Ozomena Maryrose Nwadike, of Silver Spring, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2656. IN RE DISCIPLINE OF NEEDLEMAN. Stanley Howard Needleman, of Baltimore, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2657. IN RE DISCIPLINE OF LIEBERMAN. Richard Donald Lieberman, of Bethesda, Md., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2658. IN RE DISCIPLINE OF JOSEPH. Joel David Joseph, of Beverly Hills, Cal., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2659. IN RE DISCIPLINE OF DOUGLAS. James B. Douglas, Jr., of Auburn, Ala., is suspended from the practice of law in

this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11M94. CUSTODIO *v.* FISHER, WARDEN;

No. 11M95. KANOFSKY *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 11M96. COOK *v.* PEPE, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT CEDAR JUNCTION;

No. 11M97. ALLISON *v.* MARTIN ET AL.;

No. 11M98. HARRIS *v.* OCHOA, WARDEN;

No. 11M99. MWABIRA-SIMERA *v.* BARAC CO.;

No. 11M100. NALLS *v.* COLEMAN LOW FEDERAL INSTITUTION ET AL.;

No. 11M101. WHITT *v.* UNITED STATES (two judgments); and

No. 11M102. BOOK *v.* CONNECTICUT RESOURCES RECOVERY AUTHORITY ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11–393. NATIONAL FEDERATION OF INDEPENDENT BUSINESS ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.;

No. 11–398. DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. *v.* FLORIDA ET AL.; and

No. 11–400. FLORIDA ET AL. *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL. C. A. 11th Cir. [Certiorari granted, 565 U. S. 1033 and 1034.] Motion of David Boyle for leave to intervene denied.

No. 11–7632. TATE *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.; and TATE *v.* DAVIS ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1189] denied.

No. 11–8237. BLACKMER *v.* DEPARTMENT OF JUSTICE. C. A. 1st Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1191] denied.

No. 11–8669. CHARROS *v.* MASSACHUSETTS. App. Ct. Mass.;

No. 11–8695. HAYWOOD *v.* NORTHROP GRUMMAN SHIPBUILDING, INC., ET AL. C. A. 4th Cir.;

No. 11–8802. AKAOMA *v.* SUPERSHUTTLE INTERNATIONAL CORP. ET AL. C. A. 4th Cir.;

No. 11–8896. LEAVITT *v.* SAN JACINTO UNIFIED SCHOOL DISTRICT. Ct. App. Cal., 4th App. Dist., Div. 2;

No. 11–9080. ZACK *v.* UNITED STATES. C. A. 6th Cir.;

No. 11–9228. HARRIS *v.* UNITED STATES. C. A. 6th Cir.;

No. 11–9289. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir.; and

No. 11–9325. CHAFFO *v.* UNITED STATES. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 7, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9299. IN RE RUSSO;

No. 11–9300. IN RE RADCLIFF;

No. 11–9326. IN RE DAKER;

No. 11–9342. IN RE BEAMAN;

No. 11–9392. IN RE TUCKER;

No. 11–9429. IN RE SAPP;

No. 11–9475. IN RE GARDNER; and

No. 11–9514. IN RE LOPEZ. Petitions for writs of habeas corpus denied.

No. 11–8731. IN RE LLOVERA LINARES. Petition for writ of mandamus denied.

No. 11–8823. IN RE FOURNERAT. Petition for writ of prohibition denied.

Certiorari Granted

No. 11–697. KIRTSAENG, DBA BLUECHRISTINE99 *v.* JOHN WILEY & SONS, INC. C. A. 2d Cir. Certiorari granted. Reported below: 654 F. 3d 210.

Certiorari Denied

No. 11–711. NATIONAL MARITIME SAFETY ASSN. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 649 F. 3d 743.

No. 11–718. CONWAY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 647 F. 3d 228.

No. 11–750. HELD ET AL. *v.* STATE OF NEW YORK WORKERS' COMPENSATION BOARD ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 17 N. Y. 3d 837, 954 N. E. 2d 1157.

No. 11–753. Beaulieu *v.* Minnesota. Ct. App. Minn. Certiorari denied.

No. 11–775. Mann *v.* California. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–793. Linklater *v.* Prince of Peace Lutheran Church et al.; and

No. 11–923. Prince of Peace Lutheran Church et al. *v.* Linklater et al. Ct. App. Md. Certiorari denied. Reported below: 421 Md. 664, 28 A. 3d 1171.

No. 11–833. Johnson *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 85.

No. 11–843. Barberis et al., on Behalf of Themselves and All Others Similarly Situated *v.* Retirement Plan for Employees of S. C. Johnson & Son, Inc., et al.; and

No. 11–970. Retirement Plan for Employees of S. C. Johnson & Son, Inc., et al. *v.* Barberis et al. C. A. 7th Cir. Certiorari denied. Reported below: 651 F. 3d 600.

No. 11–855. America *v.* Mills, Administrator, Small Business Administration. C. A. D. C. Cir. Certiorari denied. Reported below: 643 F. 3d 330.

No. 11–880. Ralphs Grocery Co. et al. *v.* Brown. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 197 Cal. App. 4th 489, 128 Cal. Rptr. 3d 854.

No. 11–956. Shore *v.* Superior Court of California, San Bernardino County, et al. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 11–960. A Society Without A Name, For People Without A Home Millennium Future-Present *v.* Virginia, t/a Virginia Commonwealth University, et al. C. A. 4th Cir. Certiorari denied. Reported below: 655 F. 3d 342.

No. 11–964. Grant et al., Individually and on Behalf of All Others Similarly Situated *v.* Metropolitan Government of Nashville and Davidson County, Tennessee. C. A. 6th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 737.

No. 11–971. ROUNDS ET VIR *v.* GENZYME CORP. C. A. 11th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 753.

No. 11–977. MARSHALL *v.* WASHINGTON STATE BAR ASSN. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 661.

No. 11–981. SUTTON *v.* COLSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 645 F. 3d 752.

No. 11–987. GARDNER ET AL. *v.* CHISM ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 3d 380.

No. 11–988. FLINT *v.* HEYBURN, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 11–989. FALDAS *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 75 So. 3d 736.

No. 11–993. LEISER, LEISER & HENNESSY, PLLC *v.* MCCARTHY ET AL. Sup. Ct. Va. Certiorari denied.

No. 11–995. MCKENNA ET AL. *v.* CITY OF PHILADELPHIA, PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 649 F. 3d 171.

No. 11–996. TODD *v.* COPELAND. Sup. Ct. Va. Certiorari denied. Reported below: 282 Va. 183, 715 S. E. 2d 11.

No. 11–997. ZHONG HUA YAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 436 Fed. Appx. 38.

No. 11–1000. POLIN *v.* VIRGINIA ET AL. Sup. Ct. Va. Certiorari denied.

No. 11–1002. WEBER, FKA SALL *v.* SALL. Sup. Ct. N. D. Certiorari denied. Reported below: 2011 ND 202, 804 N. W. 2d 378.

No. 11–1010. PIERCE ET AL. *v.* ALLEGHENY COUNTY, PENNSYLVANIA, ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 23 A. 3d 607.

No. 11–1017. QI YANG CHEN *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 342.

No. 11–1018. BERISHA ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 430 Fed. Appx. 52.

No. 11–1020. DAVIS *v.* BLACKSTOCK ET AL. Sup. Ct. Ala. Certiorari denied.

No. 11–1037. MOODY *v.* SUPERIOR COURT OF CALIFORNIA, MARIN COUNTY, ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–1038. CORELOGIC, INC., ET AL. *v.* SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 18 N. Y. 3d 173, 960 N. E. 2d 927.

No. 11–1050. LIBERTARIAN PARTY OF NORTH DAKOTA ET AL. *v.* JAEGER. C. A. 8th Cir. Certiorari denied. Reported below: 659 F. 3d 687.

No. 11–1058. SEVAYEGA *v.* WILKERSON. C. A. 6th Cir. Certiorari denied.

No. 11–1061. NGUYEN *v.* VAN BOENING, SUPERINTENDENT, MCNEIL ISLAND CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 11–1065. SIBLEY *v.* SIBLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF SIBLEY. C. A. D. C. Cir. Certiorari denied.

No. 11–1079. GENETICS INSTITUTE, LLC *v.* NOVARTIS VACCINES & DIAGNOSTICS, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 655 F. 3d 1291.

No. 11–1082. TRINEN *v.* CITY OF AURORA, COLORADO. C. A. 10th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 914.

No. 11–1083. MILLER *v.* NATIONWIDE LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 423.

No. 11–1088. SMITH *v.* SUPREME COURT OF MISSOURI. Sup. Ct. Mo. Certiorari denied.

No. 11–1099. CABRERA-BELTRAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 660 F. 3d 742.

No. 11–1134. HYNES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–1141. CHUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 815.

No. 11–6022. SHELBY *v.* ENLERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 429 Fed. Appx. 392.

No. 11–6741. YBARRA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 47, 247 P. 3d 269.

No. 11–7469. COWLING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 648 F. 3d 690.

No. 11–7682. EVANS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 29.

No. 11–7784. BLACKSHEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 241.

No. 11–7827. GUL ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 652 F. 3d 12.

No. 11–7834. VILLACANA-OCHOA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 737.

No. 11–7849. POWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 444 Fed. Appx. 517.

No. 11–7857. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 413 Fed. Appx. 151.

No. 11–7900. GUNNINGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 432 Fed. Appx. 265.

No. 11–7921. PAUL *v.* SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL.; and PAUL *v.* BUCKLES ET AL. Ct. App. S. C. Certiorari denied.

No. 11–8065. TRAVAGLIA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 611 Pa. 481, 28 A. 3d 868.

No. 11–8112. BARANI *v.* HAVANA INC. ET AL. Sup. Ct. Pa. Certiorari denied.

No. 11–8149. SNYDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 3d 694.

No. 11–8151. GIBBS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 655 F. 3d 473.

No. 11–8161. RAY *v.* NASH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 332.

No. 11–8255. HERNANDEZ-NAVARRETE *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 433 Fed. Appx. 251.

No. 11–8256. SNOW *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 3d 498.

No. 11–8279. BECKER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–8288. HAGANS *v.* GEORGIA. Ct. App. Ga. Certiorari denied.

No. 11–8303. BORDEN *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 646 F. 3d 785.

No. 11–8383. PAREDES-BURBANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–8443. NEWLAND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 934.

No. 11–8459. JACKSON *v.* ROHM & HAAS PENSION PLAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 3d 629.

No. 11–8486. ADLER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 443 Fed. Appx. 736.

No. 11–8650. GRAFFIA *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8662. BACCHUS *v.* SOUTHEASTERN MECHANICAL SERVICES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 384.

No. 11–8663. ANDERSON *v.* VIRGINIA DEPARTMENT OF PUBLIC WORKS ET AL. Sup. Ct. Va. Certiorari denied.

No. 11–8664. ANDERSON *v.* PARKER. Sup. Ct. Va. Certiorari denied.

No. 11–8668. SUAREZ *v.* ORTIZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8674. STOECKER *v.* GALLEY, JUDGE, CIRCUIT COURT OF ILLINOIS, TENTH JUDICIAL CIRCUIT. Sup. Ct. Ill. Certiorari denied.

No. 11–8678. KELLY *v.* FAYRAM, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 11–8681. TAYLOR *v.* MIAMI-DADE COUNTY DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–8683. MIZE *v.* WOOSLEY ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8686. YON *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 11–8689. WALKER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–8693. ALEXANDER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8694. AUSTIN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 3d 880.

No. 11–8703. SOARES *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–8708. SOLIS *v.* HARRISON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8710. LOPEZ *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8713. VAN HOOK *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 661 F. 3d 264.

No. 11–8716. SEEBOTH *v.* MAYBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 945.

No. 11–8718. OAKLEY *v.* SHEARIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 318.

No. 11–8722. BOYKIN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8725. BELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 2011 Ark. 379.

No. 11–8729. HARRINGTON *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 805 N. W. 2d 391.

No. 11–8736. VOISIN *v.* RADER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8739. BLAKE-BEY ET AL. *v.* COOK COUNTY, ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 522.

No. 11–8751. DELAO *v.* LONG, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8752. COVARRUBIAS *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 11–8753. COCHRAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 11–8754. EWING *v.* SMELOSKY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8758. KYLES *v.* GARRETT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 814.

No. 11–8760. WEBSTER *v.* GROUNDS, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8761. WINCHESTER *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 811.

No. 11–8762. BOTA *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied.

No. 11–8763. PADILLA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–8766. ARELLANO *v.* CURRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 622.

No. 11–8769. GEBERETENSIA *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 308.

No. 11–8772. GREENE *v.* DEPARTMENT OF LABOR. C. A. 4th Cir. Certiorari denied.

No. 11–8774. FLOWERS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–8775. GUERRIER *v.* LEGRAND, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8776. HARVEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 11–8780. FRANCIS *v.* STANDIFIRD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 422 Fed. Appx. 729.

No. 11–8781. GZIKOWSKI *v.* BUSBY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8783. FRAME *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 15 A. 3d 563.

No. 11–8787. CLYDE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 18 N. Y. 3d 145, 961 N. E. 2d 634.

No. 11–8789. HOWARD *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8790. HEARNE *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–8792. WOODALL *v.* BEAUCHAMP, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 655.

No. 11–8798. LEPRE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 11–8800. THOMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 408 Ill. App. 3d 1126, 1 N. E. 3d 665.

No. 11–8801. AMALEMBA *v.* HOLDER, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 94.

No. 11–8803. BYRD *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–8809. NELSON *v.* SAM'S CLUB. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 383.

No. 11–8813. WILSON *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8817. GEORGE *v.* GANSHEIMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8820. HUTCHINSON *v.* MILYARD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 423 Fed. Appx. 806.

No. 11–8821. GASS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 11–8824. HULSEY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 421 Fed. Appx. 386.

No. 11–8825. GARY *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 421 Fed. Appx. 286.

No. 11–8826. EVANS *v.* GONZALEZ, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8827. DAY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8829. COWSER *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8831. GASTON *v.* TERRONEZ. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 11–8832. HAYES *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 407 Ill. App. 3d 1193, 998 N. E. 2d 985.

No. 11–8834. HUBBARD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 408 Ill. App. 3d 1125, 1 N. E. 3d 664.

No. 11–8835. HALLFORD *v.* CLINTON, SECRETARY OF STATE. C. A. 9th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 159.

No. 11–8836. SLAY *v.* BANK OF AMERICA CORP. C. A. 1st Cir. Certiorari denied.

No. 11–8841. WORTHINGTON *v.* ADVOCATE HEALTH CARE, DBA BETHANY HOSPITAL. C. A. 7th Cir. Certiorari denied.

No. 11–8850. ROBINSON *v.* BAYER HEALTHCARE, LLC. C. A. 7th Cir. Certiorari denied. Reported below: 434 Fed. Appx. 556.

No. 11–8854. AJAJ *v.* COMMUNICATIONS DATA SERVICES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 423 Fed. Appx. 659.

No. 11–8857. PYATT *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 11–8859. CARICO *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 11–8861. SUBLET *v.* MILLION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 458.

No. 11–8866. CAMPBELL *v.* GOLDBERG. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–8867. CROMER *v.* BRAMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8868. DAVIS *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 658 F. 3d 525.

No. 11–8871. PAGTAKHAN *v.* FOULK. C. A. 9th Cir. Certiorari denied.

No. 11–8872. JONES *v.* BOWERSOX, SUPERINTENDENT, SOUTH CENTRAL CORRECTIONAL FACILITY. C. A. 8th Cir. Certiorari denied.

No. 11–8873. DOMINGO FELISCIAN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 11–8874. GIBBS *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 744.

No. 11–8875. KELLY *v.* UNIVERSITY HEALTH SYSTEMS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 297.

No. 11–8877. SANTOS MENDOZA *v.* MCDONALD, CHIEF DEPUTY WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 686.

No. 11–8878. CARTER *v.* SISTO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8879. ARAFET *v.* CONNOLLY, SUPERINTENDENT, FISHKILL CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–8886. THOMAS *v.* CALIFORNIA (two judgments). Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–8897. TIBURCIO *v.* OBAMA, PRESIDENT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 437 Fed. Appx. 1.

No. 11–8899. VIRAY *v.* SMITH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8902. MATHIS *v.* SCRIBNER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8912. ABASCAL *v.* BELLAMY ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–8953. VINSON *v.* UNITED STATES MARSHALS SERVICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 221.

No. 11–8962. NORWOOD *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 457 Fed. Appx. 74.

No. 11–8969. DESAN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8970. CURRY *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8986. ROBINSON *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–8991. JOHNSON *v.* KNOWLIN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 378.

No. 11–8996. TOMLIN *v.* MARTEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9002. PONA *v.* WALL, DIRECTOR, RHODE ISLAND DEPARTMENT OF CORRECTIONS. C. A. 1st Cir. Certiorari denied.

No. 11–9006. MANUS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 75 So. 3d 1258.

No. 11–9012. AL-AMIN *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 290.

No. 11–9018. JONES-EL *v.* POLLARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 658 F. 3d 778.

No. 11–9027. BROWN *v.* HANEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9031. WOODWARD *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 196 Cal. App. 4th 1143, 127 Cal. Rptr. 3d 117.

No. 11–9034. VARNER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 29 A. 3d 848.

No. 11–9048. MILLER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 2011 IL App (5th) 090156–U.

No. 11–9049. OTERO *v.* RHODE ISLAND. C. A. 1st Cir. Certiorari denied.

No. 11–9069. FORD *v.* TRANI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 811.

No. 11–9071. HENDERSON *v.* PFISTER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 11–9073. ROEBUCK *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 668.

No. 11–9076. OLIVER *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 30 A. 3d 535.

No. 11–9079. BROWN *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 3d 619.

No. 11–9082. CURRY *v.* BLUE CROSS BLUE SHIELD OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 181.

No. 11–9084. MARQUARDT *v.* VAN RYBROEK. Sup. Ct. Wis. Certiorari denied.

No. 11–9093. WRIGHT *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9110. ASBERRY *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 674.

No. 11–9117. JORDAN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–9118. JONES *v.* CONLEY. C. A. 8th Cir. Certiorari denied.

No. 11–9122. HACKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 3d 671.

No. 11–9127. DUGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 3d 84 and 450 Fed. Appx. 20.

No. 11–9130. DRAGANOV *v.* WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 11–9131. OFFILL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 3d 168.

No. 11–9132. OZUNA-CABRERA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 663 F. 3d 496.

No. 11–9134. PARHAM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 279.

No. 11–9143. BARBOZA-MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 525.

No. 11–9145. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 576.

No. 11–9147. STATEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 3d 154.

No. 11–9148. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 616.

No. 11–9149. STURGIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 652 F. 3d 842.

No. 11–9151. MONTOYA *v.* WONG, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9154. SANTIAGO-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 3d 57.

No. 11–9158. ROBLES-GARCIA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 356.

No. 11–9159. STARNES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9160. REILLY, AKA RILEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 3d 754.

No. 11–9164. MOORE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 243.

No. 11–9167. DEESE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 298.

No. 11–9168. DINGLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 321.

No. 11–9169. GRAHAM *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 429 Fed. Appx. 783.

No. 11–9171. GRINDLING *v.* THOMAS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 907.

No. 11–9173. HALL *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 11–9175. IRBY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 282.

No. 11–9178. GREEN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 17 A. 3d 1196.

No. 11–9179. GORDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 430 Fed. Appx. 213.

No. 11–9186. RODRIGUEZ-FRANCO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–9188. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 421 Fed. Appx. 23.

No. 11–9192. FIDALGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9194. AYALA-NICANOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 744.

No. 11–9195. ALEXCE *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 447 Fed. Appx. 175.

No. 11–9196. AUSLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9203. FREEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 501.

No. 11–9207. FRANCIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9210. LEE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–9211. MASSEY *v.* JOHNSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9212. IBARRA-PINO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 657 F. 3d 1000.

No. 11–9215. ESSARY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9218. RICHART *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 3d 1037.

No. 11–9219. NEWMAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–9224. FOSS *v.* NINTH JUDICIAL CIRCUIT COURT OF FLORIDA ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9225. FREEMAN *v.* CHANDLER, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 645 F. 3d 863.

No. 11–9227. GARNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9233. BEASLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9238. GONZALEZ PEREZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 3d 568.

No. 11–9239. TRINDADE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 21 A. 3d 1008.

No. 11–9242. LANDON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 500.

No. 11–9244. LITTLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 219.

No. 11–9246. FATUMABAHIRTU *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 26 A. 3d 322.

No. 11–9247. SAFEEULLAH, AKA STRICKLAND, AKA OGELSBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 944.

No. 11–9248. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 319.

No. 11–9250. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 702.

No. 11–9251. ORTIZ-VALDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 620.

No. 11–9252. NANCE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9253. WELLMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 663 F. 3d 224.

No. 11–9254. BRODEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 450 Fed. Appx. 84.

No. 11–9258. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–9262. SANTOS-ZARATE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 517.

No. 11–9265. FLORES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 37 A. 3d 866.

No. 11–9266. HERNANDEZ-RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 557.

No. 11–9267. GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 658.

No. 11–9270. GRAPES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 408 Fed. Appx. 766.

No. 11–9275. BEST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–9276. BEST *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–9277. BASTIEN *v.* HOLT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 455 Fed. Appx. 144.

No. 11–9282. ESCUE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 295.

No. 11–9285. LAJQI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 246.

No. 11–9286. KODSY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 57 So. 3d 237.

No. 11–9293. BERGIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 908.

No. 11–9296. HOLLY *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 11–9303. RASHID *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 451 Fed. Appx. 156.

No. 11–9305. BULLARD *v.* SCISM, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 449 Fed. Appx. 232.

No. 11–9312. NEAL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 246.

No. 11–9313. DAME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 541.

No. 11–9314. LEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 498.

No. 11–9320. AGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 606.

No. 11–9322. WYNN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 3d 847.

No. 11–9323. WILBORN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 310.

No. 11–9331. PEAY *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9332. QUALLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 11–9333. SANDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 584.

No. 11–9334. OCTAVIO ARBELAEZ *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 72 So. 3d 745.

No. 11–9336. BRADEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 751.

No. 11–9339. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 1223.

No. 11–9340. CURRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–9345. WOODSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–9348. THANH VAN TRAN *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9351. MUELLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 3d 338.

No. 11–9352. NAVAJAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 544.

No. 11–9358. SAUCILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 319.

No. 11–9360. BURNETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 81.

No. 11–9361. BUDDHI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–9363. OK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 615.

No. 11–9364. PAULINO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 421.

No. 11–9366. SHIGEMURA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 664 F. 3d 310.

No. 11–9369. WOODERTS *v.* TAMEZ, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 384.

No. 11–9374. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 3d 301.

No. 11–9381. OKUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 364.

No. 11–9385. SWANSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 580.

No. 11–9387. FOWLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 298.

No. 11–9393. ALCALA-VALADEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 729.

No. 11–9398. ANDRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9407. CHAVEZ-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 666.

No. 11–9411. KNIGHT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 659 F. 3d 1285.

No. 11–9414. TAYLOR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 215.

No. 11–9415. VANCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–9416. VAUGHN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 875.

No. 11–9417. RODRIGUEZ-BERMUDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 339.

No. 11–9419. YOUNG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–9439. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 118.

No. 11–421. ABDAH ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–674. SKILLING *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 638 F. 3d 480.

No. 11–832. CLOER *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Motion of National Vaccine Information Center et al. for leave to file a brief as *amici curiae*

out of time granted. Certiorari denied. Reported below: 654 F. 3d 1322.

No. 11–984. GEO FOUNDATION, LTD. *v.* COSTCO WHOLESALE CORP. ET AL. C. A. Fed. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 438 Fed. Appx. 898.

No. 11–1008. CLEVELAND BROWNS FOOTBALL CO. LLC ET AL. *v.* BENTLEY. Ct. App. Ohio, Cuyahoga County. Motion of Ohio Chamber of Commerce for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 194 Ohio App. 3d 826, 2011-Ohio-3390, 958 N. E. 2d 585.

No. 11–7366. MCNEALY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9126. BONILLA *v.* WAINWRIGHT, WARDEN. C. A. D. C. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9155. MURPHY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 11–9157. ROSS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9264. PIGNARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR and JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9383. PHILLIPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 459 Fed. Appx. 216.

No. 11–9400. EZELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9428. SPAULDING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9435. LOPEZ-PENA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 10–577. KAWASHIMA ET UX. *v.* HOLDER, ATTORNEY GENERAL, 565 U. S. 478;

No. 10–999. ALLEN *v.* UNITED STATES, 565 U. S. 1234;

No. 11–687. CALLAHAN *v.* 515 DC, LLC, ET AL., 565 U. S. 1198;

No. 11–743. FISCHER *v.* GLOBAL CONNECTOR RESEARCH, INC., 565 U. S. 1200;

No. 11–810. BURKE *v.* KLEVAN, 565 U. S. 1235;

No. 11–6460. WASHINGTON ET VIR *v.* LOUISIANA ET AL., 565 U. S. 1236;

No. 11–6863. REID *v.* WYATT ET AL., 565 U. S. 1204;

No. 11–7579. DEBOSE *v.* WILLIAMS ET AL., 565 U. S. 1205;

No. 11–7641. RIVERS *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL., 565 U. S. 1168;

No. 11–7717. JONES *v.* MAZDA NORTH AMERICAN OPERATIONS, 565 U. S. 1208;

No. 11–7777. RIDDICK *v.* MILIOTIS ET AL., 565 U. S. 1210;

No. 11–7876. GLASER *v.* COLORADO, 565 U. S. 1212;

No. 11–7936. MUNIZ *v.* MCKEE, WARDEN, 565 U. S. 1214;

No. 11–8015. BROWN *v.* VIRGINIA, 565 U. S. 1217;

No. 11–8054. BLYDEN *v.* UNITED STATES, 565 U. S. 1218;

No. 11–8107. SHAYKIN *v.* MICHIGAN, 565 U. S. 1220;

No. 11–8156. GEER *v.* UNITED STATES, 565 U. S. 1221;

No. 11–8211. JEEP *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL., 565 U. S. 1222; and

No. 11–8395. TURNER *v.* UNITED STATES, 565 U. S. 1226. Petitions for rehearing denied.

APRIL 20, 2012

Miscellaneous Order

No. 11A998. FORD, AS NEXT FRIEND OF JOHNSON *v.* BIDEN, ATTORNEY GENERAL OF DELAWARE. Application for stay of execution of sentence of death, presented to JUSTICE ALITO, and by him referred to the Court, denied.

April 23, 2012

Certiorari Dismissed

No. 11–9505. Alexander *v.* United States. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Justice Kagan took no part in the consideration or decision of this motion and this petition. Reported below: 451 Fed. Appx. 466.

*Miscellaneous Orders**

No. D–2620. In re Disbarment of Elliott. Disbarment entered. [For earlier order herein, see 565 U. S. 1107.]

No. D–2660. In re Discipline of Burke. Thomas Patrick Burke, of Fishers, Ind., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2661. In re Discipline of Newman. Lawrence T. Newman, of Bradenton, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2662. In re Discipline of Barley. Tracy Hicks Barley, of Durham, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–2663. In re Discipline of Viloski. Benjamin J. Viloski, of Oak Island, N. C., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2664. In re Discipline of Richardson. Donald L. Richardson, of Crescent Springs, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within

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*For the Court's orders prescribing amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1047; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1055.

40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2665. IN RE DISCIPLINE OF FITZGERALD. William P. Fitzgerald, of Sayville, N. Y., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2666. IN RE DISCIPLINE OF SNYDER. Ronald Russ Snyder, of Jefferson, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2667. IN RE DISCIPLINE OF SHIMER. Robert W. Shimer, of Camp Hill, Pa., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2668. IN RE DISCIPLINE OF SINDACO. Joseph P. Sindaco, of Fort Lauderdale, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2669. IN RE DISCIPLINE OF SINKO. Michael David Sinko, of Cherry Hill, N. J., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2670. IN RE DISCIPLINE OF WEXLER. Norman Paul Wexler, of Weston, Fla., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2671. IN RE DISCIPLINE OF LEONARD. Vann F. Leonard, of Jackson, Miss., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2672. In re Discipline of Hackett. Robert L. Hackett, of Atlanta, Ga., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11M65. Lahrichi *v.* Lumera Corp. et al. Renewed motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 11M103. Walker *v.* United States. Motion for leave to file petition for writ of certiorari under seal denied.

No. 11–1185. Sibley *v.* United States District Court for the District of Columbia. C. A. D. C. Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 11–8957. Babey *v.* Minnesota et al. C. A. 8th Cir.; and
No. 11–9513. Lezdey et ux. *v.* United States. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 14, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9562. In re Harp;
No. 11–9593. In re Jackson;
No. 11–9596. In re O'Bryant;
No. 11–9599. In re Baca;
No. 11–9606. In re DeCarlo; and
No. 11–9618. In re Wheeler. Petitions for writs of habeas corpus denied.

No. 11–8932. In re Richards. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

No. 11–9230. In re Garcia. Petition for writ of mandamus and/or prohibition denied.

Certiorari Denied

No. 10–1536. Bowoto et al. *v.* Chevron Corp. et al. C. A. 9th Cir. Certiorari denied. Reported below: 621 F. 3d 1116.

No. 11–496. HARMON ET UX. *v.* KIMMEL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 412 Fed. Appx. 420.

No. 11–652. SID-MAR'S RESTAURANT & LOUNGE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 644 F. 3d 270.

No. 11–690. CHRISTI ET AL. *v.* PRUELL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 645 F. 3d 81.

No. 11–881. MERRIFIELD *v.* BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANTA FE, NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 654 F. 3d 1073.

No. 11–905. WB, THE BUILDING CO., LLC *v.* EL DESTINO, LP, ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 227 Ariz. 302, 257 P. 3d 1182.

No. 11–909. SANCHEZ *v.* DALLAS/FORT WORTH INTERNATIONAL AIRPORT BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 343.

No. 11–983. TICKETMASTER ET AL. *v.* STEARNS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 3d 1013.

No. 11–1013. SALESSI *v.* WACHOVIA MORTGAGE, FSB, ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–1014. HARMAN ET VIR *v.* DATTE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 427 Fed. Appx. 240.

No. 11–1028. PREY *v.* KRUSE ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–1030. CASPER, BY HER NEXT FRIEND CHURCH *v.* SANDERS, EXECUTOR OF THE ESTATE OF SANDERS-HOWERTON, DECEASED, ET AL. Sup. Ct. Va. Certiorari denied. Reported below: 282 Va. 203, 717 S. E. 2d 783.

No. 11–1031. SCHULZ PARTNERS, LLC *v.* ZEPHYR COVE PROPERTY OWNERS ASSN., INC. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 1174, 373 P. 3d 959.

No. 11–1035. SHIPP ET UX. *v.* DONAHER ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–1040. FRIENDS OF THE NORBECK ET AL. *v.* UNITED STATES FOREST SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 3d 969.

No. 11–1055. ATTARD *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 451 Fed. Appx. 21.

No. 11–1075. AHMAD *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 438.

No. 11–1076. CLENDENIN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1168, 2 N. E. 3d 670.

No. 11–1092. MCCRARY *v.* IVANOF BAY VILLAGE ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 265 P. 3d 337.

No. 11–1098. LOMAX *v.* UNITED STATES SENATE ARMED SERVICES COMMITTEE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 454 Fed. Appx. 93.

No. 11–1100. MEEKS *v.* DONAHOE, POSTMASTER GENERAL. C. A. 6th Cir. Certiorari denied.

No. 11–1114. ESCANDON *v.* LOS ANGELES COUNTY, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–1123. KIBURZ *v.* MABUS, SECRETARY OF THE NAVY. C. A. 3d Cir. Certiorari denied. Reported below: 446 Fed. Appx. 434.

No. 11–1129. ZAHN *v.* MCHUGH, SECRETARY OF THE ARMY. C. A. 9th Cir. Certiorari denied.

No. 11–1144. ERNST, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ERNST, DECEASED *v.* MERCK & CO., INC. Ct. App. Tex., 14th Dist. Certiorari denied. Reported below: 296 S. W. 3d 81.

No. 11–6527. CLAYTON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 610 Pa. 457, 21 A. 3d 1187.

No. 11–7200. PORTILLO-MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 643 F. 3d 437.

No. 11–7553. YELLOWEAGLE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 643 F. 3d 1275.

No. 11–7988. HAYNES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 324.

No. 11–8372. HATCH *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 11–8377. BECOATS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 17 N. Y. 3d 643, 958 N. E. 2d 865.

No. 11–8410. DIBS *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8618. HENNESS *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 644 F. 3d 308.

No. 11–8888. DARRIAN *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 11–8889. CLARK *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8891. EL-BEY ET VIR *v.* CITY OF RALEIGH POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 384.

No. 11–8892. MORROW *v.* HUMPHREY, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 289 Ga. 864, 717 S. E. 2d 168.

No. 11–8900. WILKINSON *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–8903. DICKERSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 395 S. C. 101, 716 S. E. 2d 895.

No. 11–8908. CAMPBELL *v.* SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 218.

No. 11–8914. PEROTTI *v.* MEDLIN, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–8916. WINGO *v.* CITY OF SOUTH BEND, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 90.

No. 11–8920. VALENZUELA *v.* ARIZONA DEPARTMENT OF CORRECTIONS HEALTH SERVICES ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8921. VALENZUELA *v.* KENDALL ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–8928. DAVIS *v.* HOLMES, ADMINISTRATOR, SOUTH WOODS STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 11–8930. SEGOVIA CRUZ *v.* SALAZAR, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8933. SMITH *v.* LAFRINERE ET AL. C. A. 10th Cir. Certiorari denied.

No. 11–8938. REYES *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8943. KEMPPAINEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–8945. VASQUEZ-BONILLA *v.* UNITED UNION OF ROOFERS LOCAL 8 ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 432 Fed. Appx. 28.

No. 11–8950. MICHUDA *v.* MINNESOTA BOARD OF PUBLIC DEFENSE ET AL. C. A. 8th Cir. Certiorari denied.

No. 11–8951. MICHUDA *v.* MINNESOTA ET AL. C. A. 8th Cir. Certiorari denied.

No. 11–8961. JORDAN *v.* GWINNETT COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 761.

No. 11–9032. WILLIAMS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 405 Ill. App. 3d 1204, 997 N. E. 2d 1011.

No. 11–9035. NIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–9042. OWENS *v.* BUSH ET AL. C. A. 7th Cir. Certiorari denied.

No. 11–9044. AUSBECK *v.* SALT LAKE CITY, UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2011 UT App 269, 274 P. 3d 991.

No. 11–9047. MAGWOOD *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 75 So. 3d 1245.

No. 11–9065. SONES *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9067. HARRIS *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 438 Fed. Appx. 11.

No. 11–9133. OGUNDIPE *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 424 Md. 58, 33 A. 3d 984.

No. 11–9172. HERMANSEN *v.* PARKER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9182. GOMEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 11–9202. FLOOD *v.* PENNSYLVANIA. Commw. Ct. Pa. Certiorari denied. Reported below: 23 A. 3d 648.

No. 11–9214. MCCARTHY *v.* SOSNICK ET AL. Sup. Ct. Mich. Certiorari denied.

No. 11–9245. LIKE *v.* PALMER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 558.

No. 11–9271. HAWK *v.* WHITE, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. Fed. Cir. Certiorari denied. Reported below: 425 Fed. Appx. 905.

No. 11–9315. JACKSON *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 620.

No. 11–9349. GOODLOE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 980.

No. 11–9350. MILTON *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied. Reported below: 2011-Ohio-4773.

No. 11–9378. DUMA *v.* FANNIE MAE ET AL. C. A. D. C. Cir. Certiorari denied.

No. 11–9413. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9424. COLEMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 640.

No. 11–9427. SCHOLZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 680.

No. 11–9434. LEOPARD *v.* OHIO. Ct. App. Ohio, Clark County. Certiorari denied. Reported below: 194 Ohio App. 3d 500, 2011-Ohio-3864, 957 N. E. 2d 55.

No. 11–9436. HOLT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 3d 1147.

No. 11–9440. IBANEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 328.

No. 11–9441. SLAUGHTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9444. GOOCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 665 F. 3d 1318.

No. 11–9445. FENDERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9450. HERNANDEZ-LUNA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 335.

No. 11–9454. HARTSFIELD *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9455. LOPEZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 587.

No. 11–9457. DALZELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 306.

No. 11–9460. PICHARDO-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 454 F. 3d 337.

No. 11–9462. ALVARADO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 835.

No. 11–9463. BARAJAS-ALVARADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 3d 1077.

No. 11–9464. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–9468. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 504.

No. 11–9476. GWEH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9487. ELIGWE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 196.

No. 11–9488. WASHINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 346.

No. 11–9490. VARGAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9496. GARDNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 1002.

No. 11–9499. HARRISON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 30 A. 3d 810.

No. 11–9501. RODRIGUEZ-ROSALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 506.

No. 11–9502. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 382.

No. 11–9503. ISSA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9504. GROSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9511. LOREN-MALTESE *v.* PHILLIPS. C. A. 7th Cir. Certiorari denied.

No. 11–9518. TESSMER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 659 F. 3d 716.

No. 11–9519. VANDERWERFF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 254.

No. 11–9523. PORTILLO-ESCALANTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 664.

No. 11–9524. PROWLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 696.

No. 11–9525. PATTEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 3d 247.

No. 11–9527. GRAVES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 657.

No. 11–9528. GUZMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 654 F. 3d 753.

No. 11–9529. THUONG DUY HOANG *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 11–9530. SANTOS-SANTOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 728.

No. 11–9532. MCCOY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9535. HADAWAY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 466 Fed. Appx. 154.

No. 11–9536. HICKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 3d 865.

No. 11–9538. CASTELLAR, AKA RAMOS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 455 Fed. Appx. 191.

No. 11–9539. CARDENAS-MIRELES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 991.

No. 11–9543. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 199.

No. 11–9547. ALDEA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 450 Fed. Appx. 151.

No. 11–9553. HILL ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 643 F. 3d 807.

No. 11–9555. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 454 Fed. Appx. 44.

No. 11–9557. FEARCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 528.

No. 11–9565. FINCH *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 428 Fed. Appx. 547.

No. 11–9566. HAMMONDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–9578. RIVERA *v.* KING, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 11–9601. SAINZ-PRECIADO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–783. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 650 F. 3d 581.

No. 11–1063. BLYE ET AL. *v.* KOZINSKI, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 466 Fed. Appx. 650.

No. 11–9554. SALAZAR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 446 Fed. Appx. 110.

Rehearing Denied

No. 11–7562. SMITH *v.* BYARS, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 565 U. S. 1205;

No. 11–7724. SKINNER *v.* OKLAHOMA ET AL., 565 U. S. 1209;

No. 11–7750. GENA *v.* UNITED STATES, 565 U. S. 1247;

No. 11–7910. BERRETTINI *v.* UNITED STATES, 565 U. S. 1247;

No. 11–8060. BROWNING *v.* UNITED STATES, 565 U. S. 1218;

No. 11–8115. MCNAUGHTON *v.* AUBURN CORRECTIONAL FACILITY, 565 U. S. 1248; and

No. 11–8458. LOTTER *v.* HOUSTON, WARDEN, 565 U. S. 1268. Petitions for rehearing denied.

No. 11–6205. ORTIZ-ALVEAR *v.* WELLS, WARDEN, 565 U. S. 1229; and

No. 11–8740. IN RE CRAWFORD, 565 U. S. 1259. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

APRIL 26, 2012

Miscellaneous Order

No. 11A1024. ADAMS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

Certiorari Denied

No. 11–9359 (11A884). ADAMS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

APRIL 27, 2012

Miscellaneous Order

No. 11–9886 (11A997). IN RE SELSOR. Application for stay of execution of sentence of death, presented to JUSTICE SOTOMAYOR, and by her referred to the Court, denied. Petition for writ of habeas corpus denied.

APRIL 30, 2012

Certiorari Granted—Vacated and Remanded

No. 10–1553. BEARD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Reported below: 633 F. 3d 616;

No. 11–163. GRAPEVINE IMPORTS, LTD., ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Reported below: 636 F. 3d 1368; and

No. 11–582. SALMAN RANCH, LTD., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Reported below: 647 F. 3d 929. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v.

Home Concrete & Supply, LLC, *ante*, p. 478. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

No. 11–499. RYAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wood* v. *Milyard*, *ante*, p. 463. Reported below: 645 F. 3d 913.

No. 11–663. INTERMOUNTAIN INSURANCE SERVICE OF VAIL, LLC, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Reported below: 650 F. 3d 691; and

No. 11–747. UTAM, LTD., ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Reported below: 645 F. 3d 415. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Home Concrete & Supply, LLC*, *ante*, p. 478.

Certiorari Dismissed

No. 11–8998. WATTS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 11–9011. JOHNSON *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2657. IN RE DISBARMENT OF LIEBERMAN. Richard Donald Lieberman, of Bethesda, Md., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys permitted to the practice of law before this Court. The rule to show cause, issued on April 16, 2012 [*ante*, p. 934], is discharged.

No. D–2673. IN RE DISCIPLINE OF REED. Michael John Reed, of Poway, Cal., is suspended from the practice of law in this

Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2674. IN RE DISCIPLINE OF SETO. Robert M. M. Seto, of Virginia Beach, Va., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2675. IN RE DISCIPLINE OF MATTHEWS. Gary Robert Matthews, of Lexington, Ky., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11–8648. FERGUSON *v.* AVELO MORTGAGE, LLC. App. Div., Super. Ct. Cal., County of Los Angeles;

No. 11–9003. SCHULMAN *v.* ATTORNEY'S TITLE INSURANCE FUND, INC. Dist. Ct. App. Fla., 5th Dist.;

No. 11–9023. SAGHIR *v.* GRIEVANCE COMMITTEE FOR THE 2d, 11th, AND 13th JUDICIAL DISTRICTS. App. Div., Sup. Ct. N. Y., 2d Jud. Dept.; and

No. 11–9056. FERGUSON *v.* AVELO MORTGAGE, LLC. Ct. App. Cal., 2d App. Dist. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 21, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–8863. GRAHAM *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1258] denied.

No. 11–9477. SATTERFIELD *v.* JOHNSON ET AL. C. A. 3d Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 11–9676. IN RE JONES. Petition for writ of habeas corpus denied.

No. 11–9040. IN RE BALZAROTTI. Petition for writ of mandamus denied.

Certiorari Granted

No. 11–820. CHAIDEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted. Reported below: 655 F. 3d 684.

Certiorari Denied

No. 11–763. COMMISSIONER OF INTERNAL REVENUE *v.* R AND J PARTNERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 271.

No. 11–915. LARA ET AL. *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 421 Fed. Appx. 978.

No. 11–925. HATT 65, L. L. C., ET AL. *v.* KREITZBERG ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 3d 1243.

No. 11–934. CARONA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 660 F. 3d 360.

No. 11–1044. BUNCH, INDIVIDUALLY AND AS GUARDIAN OF THE PERSON AND ESTATE OF BUNCH, AN INCAPACITATED ADULT *v.* TOMICIC ET AL. Ct. App. Okla. Certiorari denied.

No. 11–1046. SMITH ET AL. *v.* WYETH, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 657 F. 3d 420.

No. 11–1052. CUNNINGHAM ET AL. *v.* OFFSHORE SPECIALTY FABRICATORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 663 F. 3d 759.

No. 11–1057. WEAVER *v.* TEXAS CAPITAL BANK N. A. C. A. 5th Cir. Certiorari denied. Reported below: 660 F. 3d 900.

No. 11–1064. JACKSON *v.* FUJI PHOTO FILM, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 515.

No. 11–1072. COHEN *v.* ALFRED & ADELE DAVIS ACADEMY, INC. Ct. App. Ga. Certiorari denied. Reported below: 310 Ga. App. 761, 714 S. E. 2d 350.

No. 11–1081. BARNARD ET AL. *v.* VERIZON COMMUNICATIONS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 451 Fed. Appx. 80.

No. 11–1106. Yoon Ja Kim *v.* Earthgrains Co., nka Earthgrains Bakery Group, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 451 Fed. Appx. 922.

No. 11–1108. Byrd *v.* Tennessee Board of Chiropractic Examiners. Ct. App. Tenn. Certiorari denied.

No. 11–1116. Salard, as Tutor, on Behalf of L. A. S. et al. *v.* Salard. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 588.

No. 11–1132. Millman et al. *v.* Inglish et al. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 627.

No. 11–1162. MacPherson *v.* JPMorgan Chase Bank, N. A. C. A. 2d Cir. Certiorari denied. Reported below: 665 F. 3d 45.

No. 11–1163. Mayfield *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 11–1167. City of Syracuse, New York *v.* Lee. C. A. 2d Cir. Certiorari denied. Reported below: 446 Fed. Appx. 319.

No. 11–1186. Peninger *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 214.

No. 11–1190. Lopez *v.* Terrell, Warden, et al. C. A. 2d Cir. Certiorari denied. Reported below: 654 F. 3d 176.

No. 11–1199. Mitrano *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 658 F. 3d 117.

No. 11–1202. Jaensch *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 665 F. 3d 83.

No. 11–7668. Livingston *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 445 Fed. Appx. 550.

No. 11–7794. Taylor *v.* Delaware. Sup. Ct. Del. Certiorari denied. Reported below: 28 A. 3d 399.

No. 11–7975. Savarirayan *v.* White County Community Hospital et al. C. A. 6th Cir. Certiorari denied.

No. 11–8055. Berry *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 165.

No. 11–8257. WINSTON *v.* TEGELS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 649 F. 3d 618.

No. 11–8347. BAKARR *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 866.

No. 11–8952. STONE *v.* MISSOURI DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 11–8959. BOBO *v.* FRESNO COUNTY DEPENDENCY COURT. C. A. 9th Cir. Certiorari denied.

No. 11–8963. PROPES *v.* DISTRICT ATTORNEY OFFICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 766.

No. 11–8965. WALLS *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 658 F. 3d 1274.

No. 11–8968. KIRSCH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–8973. CHAGOLLA *v.* RYAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8974. CASTILLO *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–8983. ARAFAT *v.* IBRAHIM. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 82 So. 3d 1020.

No. 11–8989. JAIN *v.* NORTHWESTERN MEMORIAL HOSPITAL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1149, 2 N. E. 3d 661.

No. 11–8992. JULIAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied. Reported below: 198 Cal. App. 4th 1524, 131 Cal. Rptr. 3d 561.

No. 11–8993. KINARD *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–8994. LOPEZ *v.* TRANI, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 434 Fed. Appx. 758.

No. 11–8995. WALKER *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 276.

No. 11–8997. WINTERS *v.* KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 611.

No. 11–9000. PEGUES *v.* PGW AUTO GLASS LLC ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 417.

No. 11–9005. REYES *v.* COURSEY, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 11–9007. JONES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 406 Ill. App. 3d 1208, 998 N. E. 2d 715.

No. 11–9008. BOBO *v.* COUNTRYWIDE HOME LOANS, INC. C. A. 9th Cir. Certiorari denied.

No. 11–9014. BOLGAR *v.* GLEN DONALD APARTMENTS, INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9015. KORNEGAY *v.* NEW YORK STATE OFFICE OF MENTAL HEALTH ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9017. MASSEY *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9021. JONES *v.* LAPINA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 450 Fed. Appx. 105.

No. 11–9026. BRANSON *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9030. VICKERS *v.* LOPEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9039. BRISCOE *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9046. PENDLETON *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9050. MOFFAT *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9051. PEARSON *v.* LOUISIANA. C. A. 5th Cir. Certiorari denied.

No. 11–9058. GILKESON *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9059. HORTON *v.* DICKINSON, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 660.

No. 11–9061. CATHELL *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9062. CHAN *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–9070. HANNAH *v.* NEW JERSEY STATE POLICE ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9123. GUPTA *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9162. SARTORI *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Haywood County, N. C. Certiorari denied.

No. 11–9170. GRESHAM *v.* MARTEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9209. FRANQUI *v.* FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 638 F. 3d 1368.

No. 11–9223. HOFFMAN *v.* TANNER, SHERIFF, BEAUFORT COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied.

No. 11–9226. VAN GOFFNEY *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 11–9255. ARMSTEAD *v.* NEVEN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 728.

No. 11–9287. KARAGIANES *v.* THOMAS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9298. LUCAS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 107 So. 3d 237.

No. 11–9346. TUCKER *v.* MURPHY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 756.

No. 11–9371. CHRISTENSEN *v.* COURT OF APPEALS OF UTAH. Sup. Ct. Utah. Certiorari denied.

No. 11–9376. MORENO *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9377. ANH VU NGUYEN *v.* WINGLER. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 662.

No. 11–9382. MUCHNICK *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 31 A. 3d 743.

No. 11–9386. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 75 So. 3d 1257.

No. 11–9388. BRYANT *v.* GROUNDS, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 726.

No. 11–9403. WRIGHT *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9469. RAI *v.* BARCLAYS CAPITAL, INC. C. A. 2d Cir. Certiorari denied. Reported below: 456 Fed. Appx. 8.

No. 11–9489. WADE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 31 A. 3d 749.

No. 11–9550. YOUNG *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 11–9558. FARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 327.

No. 11–9567. REYNOLDS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 298.

No. 11–9571. RUHBAYAN, AKA WOOD, AKA JOHNSON, AKA RUH'ALAMIN, AKA RUHALAMIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 209.

No. 11–9585. HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 686.

No. 11–9587. DOLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 805.

No. 11–9590. KELLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 511.

No. 11–9592. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 297.

No. 11–9598. RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 666 F. 3d 944.

No. 11–9608. VAZQUEZ-FIGUEROA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 11–9609. TRACY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 267.

No. 11–9610. APONTE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 828.

No. 11–9612. BELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 130.

No. 11–9613. MARQUEZ-MURILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 406.

No. 11–9616. MURPH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 31.

No. 11–9617. CAMPOS-MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 530.

No. 11–9620. KELLY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 661 F. 3d 682.

No. 11–9625. TORRES-CESPEDES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 459 Fed. Appx. 62.

No. 11–9626. VALENZUELA-QUINTERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 596.

No. 11–9627. STONER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 720.

No. 11–9628. DELGADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 642.

No. 11–9633. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 179.

No. 11–9634. STEFANIK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 674 F. 3d 71.

No. 11–9635. BIDWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 853.

No. 11–9636. ABRAHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 3d 1105.

No. 11–9638. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 Fed. Appx. 142.

No. 11–9639. MELANCON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 662 F. 3d 708.

No. 11–9643. RAMIREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 618.

No. 11–9646. CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 654.

No. 11–9647. CAREL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 3d 1211.

No. 11–9652. WILKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 662 F. 3d 524.

No. 11–9654. PELLING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 599.

No. 11–178. UNITED STATES ET AL. *v.* BURKS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 633 F. 3d 347.

No. 11–581. COMMISSIONER OF INTERNAL REVENUE *v.* DSDBL, LTD., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 436 Fed. Appx. 384.

No. 11–657. COMMISSIONER OF INTERNAL REVENUE *v.* EQUIPMENT HOLDING CO., LLC, ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 439 Fed. Appx. 368.

No. 11–834. BACA, LOS ANGELES COUNTY SHERIFF *v.* STARR. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 652 F. 3d 1202.

No. 11–912. FIRST ANNAPOLIS BANCORP, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 644 F. 3d 1367.

No. 11–922. RIVER CENTER LLC *v.* DORMITORY AUTHORITY OF THE STATE OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Motions of Center for Constitutional Jurisprudence, Real Estate Board of New York, Inc., et al., and Owners' Counsel of America for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 74 App. Div. 3d 460, 905 N. Y. S. 2d 18.

No. 11–1071. VIRGINIA *v.* BANKS. Sup. Ct. Va. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 11–9190. GARCIA *v.* BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 11–9621. QUIROZ-MENDEZ, AKA GARCIA-MORENO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 11–991. HILL *v.* LAWSON REALTY CO., DBA PORTSMOUTH ESTATES ASSOCIATES, 565 U. S. 1262;

No. 11–7214. ENRIQUEZ *v.* LIVINGSTON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL., 565 U. S. 1204;

No. 11–7583. BELL *v.* DAVIS, WARDEN, 565 U. S. 1205;

No. 11–7637. BRYSON *v.* OCWEN FEDERAL BANK, FSB, 565 U. S. 1206;

No. 11–7881. VIG *v.* SEELIGER, JUDGE, SUPERIOR COURT OF GEORGIA, STONE MOUNTAIN JUDICIAL CIRCUIT, 565 U. S. 1212;

No. 11–7914. TURNER *v.* NIXON ET AL., 565 U. S. 1213;

No. 11–8007. SHREVE *v.* FETTER ET AL., 565 U. S. 1217;

No. 11–8274. EL BEY, AKA SAVALL, AKA SAKIM *v.* DAVIS ET AL., 565 U. S. 1266;

No. 11–8287. SWISHER *v.* INDIANA, 565 U. S. 1266;

No. 11–8414. QUEEN *v.* CALIFORNIA, 565 U. S. 1239;

No. 11–8637. JONES *v.* UNITED STATES, 565 U. S. 1252; and

No. 11–8839. IN RE WALKER, 565 U. S. 1245. Petitions for rehearing denied.

No. 11–8150. WHIGUM, AKA BECK, AKA DAVIS, AKA HAMILTON *v.* FLORIDA ET AL., 565 U. S. 1253. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

MAY 2, 2012

Miscellaneous Order

No. 11–10098 (11A1038). IN RE BARTEE. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 14, 2012

Certiorari Granted—Vacated and Remanded

No. 11–8728. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief for the United States filed on April 11, 2012. Reported below: 448 Fed. Appx. 500.

Certiorari Dismissed

No. 11–9316. FLORES *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further

petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 11–9317. FLORES *v.* HOLDER, ATTORNEY GENERAL, ET AL. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

Miscellaneous Orders

No. 11A807. ROWELL *v.* PALMER, WARDEN, ET AL. Application for certificate of appealability, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 11A961. ABDURAKHMANOV *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. D–2638. IN RE BALDWIN. James E. Baldwin, of Lebanon, Mo., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys permitted to the practice of law before this Court. The rule to show cause, issued on April 16, 2012 [*ante*, p. 932], is discharged.

No. D–2676. IN RE DISCIPLINE OF SIMON. Bruce W. Simon, of Saint Joseph, Mo., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2677. IN RE DISCIPLINE OF SCHOENECKER. James Michael Schoenecker, of Milwaukee, Wis., is suspended from the practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–2678. IN RE DISCIPLINE OF AGILIGA. Alexander Nnanna Agiliga, of Largo, Md., is suspended from the practice of

law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 11M104. GASKINS *v.* ELI LILLY & CO.; and

No. 11M108. VLASTELICA, INDIVIDUALLY AND AS NEXT FRIEND OF CHEHAIBER *v.* BREND ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11M105. CONYERS *v.* PISTOLE, ADMINISTRATOR, TRANSPORTATION SECURITY AUTHORITY. Motion for leave to proceed as a veteran denied.

No. 11M106. AVIDAIR HELICOPTER SUPPLY, INC. *v.* ROLLS-ROYCE CORP. Motion for leave to file petition for writ of certiorari with the supplemental appendix under seal granted.

No. 11M107. DUNSON *v.* MCKINNEY ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 11–8535. IN RE DELESTON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1234] denied.

No. 11–9081. BIRDETTE *v.* WELLSTAR HEALTH SYSTEMS COBB HOSPITAL. C. A. 11th Cir.;

No. 11–9198. HARRINGTON *v.* HARRINGTON. App. Ct. Mass.;

No. 11–9406. IN RE WRIGHT; and

No. 11–9432. CHONG HAO SU *v.* CITY OF CINCINNATI, OHIO. Ct. App. Ohio, Hamilton County. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 4, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–1223. IN RE SHANG. Petition for writ of habeas corpus denied.

No. 11–9091. IN RE HIEN ANH DAO;

No. 11–9165. IN RE DUNLAP;

No. 11–9327. IN RE DURSCHMIDT; and

No. 11–9666. IN RE CARTER. Petitions for writs of mandamus denied.

No. 11–9281. In re Doyle. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Denied

No. 11–719. Doyle *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 11–757. Kohlberg Kravis Roberts & Co., L. P., et al. *v.* 27001 Partnership et al. Sup. Ct. Ala. Certiorari denied. Reported below: 78 So. 3d 959.

No. 11–777. Robbins *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 360 S. W. 3d 446.

No. 11–784. Al Kassar et al. *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 660 F. 3d 108.

No. 11–788. Hijazi *v.* United States. C. A. 7th Cir. Certiorari denied.

No. 11–812. Psystar Corp. *v.* Apple Inc. C. A. 9th Cir. Certiorari denied. Reported below: 658 F. 3d 1150.

No. 11–837. Commonwealth of Puerto Rico *v.* United States et al.; and

No. 11–876. Igartua et al. *v.* United States et al. C. A. 1st Cir. Certiorari denied. Reported below: 626 F. 3d 592.

No. 11–844. Tellechea *v.* United States; and

No. 11–862. Bradley et al. *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 644 F. 3d 1213.

No. 11–860. Xianli Zhang et al. *v.* United States. C. A. Fed. Cir. Certiorari denied. Reported below: 640 F. 3d 1358.

No. 11–935. Chamberlain *v.* Pennsylvania. Sup. Ct. Pa. Certiorari denied. Reported below: 612 Pa. 107, 30 A. 3d 381.

No. 11–945. Empresa Cubana Exportadora de Alimentos y Productos Varios, dba CUBAEXPORT *v.* Department of the Treasury et al. C. A. D. C. Cir. Certiorari denied. Reported below: 638 F. 3d 794.

No. 11–953. HASSEBROCK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 3d 906.

No. 11–954. BULLDOG INVESTORS GENERAL PARTNERSHIP ET AL. *v.* GALVIN, SECRETARY OF THE COMMONWEALTH OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 460 Mass. 647, 953 N. E. 2d 691.

No. 11–967. NAJBAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 649 F. 3d 868.

No. 11–978. SULLIVAN ET AL. *v.* CUNA MUTUAL INSURANCE SOCIETY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 649 F. 3d 553.

No. 11–979. COOPER ET AL. *v.* BOYCE & ISLEY, PLLC, ET AL. Ct. App. N. C. Certiorari denied. Reported below: 211 N. C. App. 469, 710 S. E. 2d 309.

No. 11–1004. LAFOND *v.* AMMONS. C. A. 9th Cir. Certiorari denied. Reported below: 648 F. 3d 1020.

No. 11–1084. RODRIGUEZ *v.* CITY OF CLEVELAND, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 433.

No. 11–1086. JORDAN *v.* UNEMPLOYMENT APPEALS COMMISSION ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 65 So. 3d 1058.

No. 11–1090. LOMAKO *v.* NEW YORK INSTITUTE OF TECHNOLOGY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 440 Fed. Appx. 1.

No. 11–1091. MACKINNON *v.* CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION. C. A. 2d Cir. Certiorari denied. Reported below: 441 Fed. Appx. 16.

No. 11–1093. BRENEISEN ET AL. *v.* MOTOROLA, INC. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 3d 701.

No. 11–1095. GRAVES *v.* INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 572 ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–1096. HEBREW *v.* HOUSTON MEDIA SOURCE. C. A. 5th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 479.

No. 11–1102. MERLAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 3d 538.

No. 11–1103. BARRERA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–1104. DOAL *v.* DEPARTMENT OF DEFENSE ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–1105. CILMAN *v.* REEVES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 263.

No. 11–1107. POKU *v.* HIMELMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 448 Fed. Appx. 217.

No. 11–1109. GRACZYK ET AL. *v.* WEST PUBLISHING CORP. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 3d 275.

No. 11–1112. ZIMMERMAN *v.* FLAGSTAR BANCORP. C. A. Fed. Cir. Certiorari denied. Reported below: 653 F. 3d 1314.

No. 11–1113. JUN DU *v.* TD BANK ET AL. C. A. 1st Cir. Certiorari denied.

No. 11–1117. SCHNELLER, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF SCHNELLER *v.* MERCK & CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 500.

No. 11–1120. MEDEVAC MEDICAL RESPONSE, INC., ET AL. *v.* KIPPER ET AL. Sup. Ct. Mo. Certiorari denied.

No. 11–1121. SUTTON *v.* OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 853.

No. 11–1122. FERNANDO *v.* SAPUKOTANA, SURVIVING SPOUSE OF SAPUKOTANA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 682.

No. 11–1124. D'ANDREA *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 749.

No. 11–1126. FLINT *v.* RUSSELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 11–1128. Reilly et al. *v.* Ceridian Corp. C. A. 3d Cir. Certiorari denied. Reported below: 664 F. 3d 38.

No. 11–1136. Alger *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 29 A. 3d 847.

No. 11–1137. Aly *v.* City of Lake Jackson, Texas. C. A. 5th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 538.

No. 11–1140. Macias *v.* Good Times Stores, Inc. Ct. App. Tex., 8th Dist. Certiorari denied. Reported below: 355 S. W. 3d 240.

No. 11–1142. O'nan *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 280.

No. 11–1149. Kasonso *v.* Holder, Attorney General. C. A. 10th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 76.

No. 11–1152. Starkey *v.* Minor Miracle Productions, LLC, et al. Sup. Ct. Idaho. Certiorari denied. Reported below: 152 Idaho 333, 271 P. 3d 1189.

No. 11–1156. Bernal *v.* Cherry et al. C. A. 9th Cir. Certiorari denied.

No. 11–1164. Pleasant *v.* Neesmith Timber Co., Inc. C. A. 11th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 864.

No. 11–1169. Bhama *v.* Michigan State Employees' Retirement System. Ct. App. Mich. Certiorari denied.

No. 11–1171. Comenout et al. *v.* Washington. Sup. Ct. Wash. Certiorari denied. Reported below: 173 Wash. 2d 235, 267 P. 3d 355.

No. 11–1174. Birch *v.* North Carolina. Sup. Ct. N. C. Certiorari denied. Reported below: 365 N. C. 342, 718 S. E. 2d 370.

No. 11–1176. Noreen *v.* Shinseki, Secretary of Veterans Affairs. C. A. Fed. Cir. Certiorari denied. Reported below: 429 Fed. Appx. 1000.

No. 11–1195. GARDNER *v.* KAPPOS, DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 449 Fed. Appx. 914.

No. 11–1208. SILLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 662 F. 3d 415.

No. 11–1209. GUTIERREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 705.

No. 11–1210. DONOVAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 661 F. 3d 174.

No. 11–1224. DOLEHIDE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 343.

No. 11–1235. PHELAN *v.* NORVILLE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 376.

No. 11–1237. MIRANDA *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 71 M. J. 102.

No. 11–1238. PETTERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 375.

No. 11–7625. O'CONNOR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 656 F. 3d 630.

No. 11–7714. MILLAN *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 11–7799. COMBS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 657 F. 3d 565.

No. 11–7804. OAKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 989.

No. 11–7811. GARTHUS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 652 F. 3d 715.

No. 11–8085. SIMMONS *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 654 F. 3d 526.

No. 11–8184. BRAWNER *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 396.

No. 11–8209. JUDGE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 447 Fed. Appx. 409.

No. 11–8253. FURDA *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 421 Md. 332, 26 A. 3d 918.

No. 11–8254. GLASER *v.* ENZO BIOCHEM, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 324.

No. 11–8360. MONTGOMERY *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 654 F. 3d 668.

No. 11–8449. WEBB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 316.

No. 11–8501. JUNFENG HAN ET AL. *v.* JIANONG GUO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–8505. FISHER *v.* VIZIONCORE, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 429 Fed. Appx. 613.

No. 11–8631. PEREZ-AMAYA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 302.

No. 11–8749. CRAYTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 688.

No. 11–8844. LEAVITT *v.* ARAVE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 646 F. 3d 605.

No. 11–8884. JACKSON *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 535.

No. 11–9054. ADAMS *v.* TYSON FOODS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 433 Fed. Appx. 487.

No. 11–9064. RIZZO *v.* CITY OF WHEATON, ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 609.

No. 11–9074. ROBERSON *v.* RUDEK, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 107.

No. 11–9077. PONCE *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 11–9085. QAZZA *v.* CITY OF ORANGE, CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9087. SALCEDO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2011 IL App (1st) 083148, 954 N. E. 2d 679.

No. 11–9094. VIGIL *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 649.

No. 11–9096. WEST *v.* MYLES, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 630.

No. 11–9100. LOWE *v.* SWANSON, SHERIFF, STARK COUNTY, OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 663 F. 3d 258.

No. 11–9102. MACON *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 491.

No. 11–9103. LYON *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI. C. A. 5th Cir. Certiorari denied.

No. 11–9105. MAYBERRY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9107. MCDONALD *v.* LIPOV ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 408 Ill. App. 3d 1128, 1 N. E. 3d 666.

No. 11–9111. AMAKER *v.* APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT. C. A. 2d Cir. Certiorari denied.

No. 11–9112. BARNHILL *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 11–9113. ALEXANDER *v.* ARIZONA. Super. Ct. Ariz., County of Maricopa. Certiorari denied.

No. 11–9116. VINES *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 277.

No. 11–9119. DAWARA *v.* WARREN, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9121. HUNTER *v.* BOWDEN ET AL. Ct. App. N. C. Certiorari denied. Reported below: 211 N. C. App. 645, 712 S. E. 2d 746.

No. 11–9128. CUMMINGS *v.* ORTEGA ET AL. Sup. Ct. N. C. Certiorari denied. Reported below: 365 N. C. 262, 716 S. E. 2d 235.

No. 11–9129. CREWS *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 277.

No. 11–9135. KINCAID *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 649.

No. 11–9136. LOHNER *v.* PROSPER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9138. LIGHTFOOT *v.* MICHIGAN DEPARTMENT OF CORRECTIONS PAROLE BOARD ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9139. EVERETT *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9140. THOMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1159, 2 N. E. 3d 666.

No. 11–9141. THOMAS *v.* NISH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT WAYMART, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9144. BELCHER *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 273.

No. 11–9146. HARDIN *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 11–9150. POINTER *v.* DORMIRE, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 11–9156. WALTERS *v.* KIDS ARE US LEARNING CENTERS, INC. Ct. App. D. C. Certiorari denied.

No. 11–9163. NHIEU HUYNH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 11–9166. DAHLSTROM *v.* TROMBLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9174. GRAY *v.* WALKER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 659 F. 3d 578.

No. 11–9176. GARRETT *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9177. GERMAN *v.* BROWARD COUNTY SHERIFF'S OFFICE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 867.

No. 11–9180. HENDRIX *v.* THOMPSON, SHERIFF, HARRIS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 436 Fed. Appx. 359.

No. 11–9181. FRIEDMAN *v.* GALLEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 427 Fed. Appx. 261.

No. 11–9183. GARCIA *v.* RODEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK. C. A. 1st Cir. Certiorari denied.

No. 11–9184. FACEN *v.* JAMES, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9185. HOFFNER *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9187. HILTON *v.* FLORIDA PAROLE COMMISSION ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 75 So. 3d 289.

No. 11–9189. GAMAGE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 11–9191. GIVENS *v.* MAIN STREET FINANCIAL SERVICES CORP. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 411 Fed. Appx. 586.

No. 11–9193. FLEMMING *v.* VELARDI ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9197. FREEMAN *v.* BYRNE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 818.

No. 11–9199. FORTSON *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 11–9200. GUERRA *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 67 So. 3d 217.

No. 11–9201. HARDRICK *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9204. HERNANDEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1155, 2 N. E. 3d 664.

No. 11–9205. HALL, AKA REDDITT *v.* BALLARD, DISTRICT ATTORNEY, FAYETTE COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied.

No. 11–9206. HOYT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–9208. GARCIA *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9213. MAMISSA E. *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 282 Neb. xix.

No. 11–9216. CARICO *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9217. SMITH *v.* LASSITER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 336.

No. 11–9220. ELLISON *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 11–9221. ROBERTSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 11–9222. GARCIA *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9229. FRATUS *v.* LOPEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9231. RATHBUN *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–9232. RIGGS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1158, 2 N. E. 3d 665.

No. 11–9234. AMERSON *v.* CITY OF DES MOINES, IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 398.

No. 11–9235. BARR *v.* GEE, SHERIFF, HILLSBOROUGH COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 437 Fed. Appx. 865.

No. 11–9236. CRESWELL *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–9237. HANEGAN *v.* MILLER, ATTORNEY GENERAL OF IOWA. C. A. 8th Cir. Certiorari denied. Reported below: 663 F. 3d 349.

No. 11–9240. CAGE *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9241. DISE *v.* EXPRESS MARINE, INC. C. A. 4th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 514.

No. 11–9243. LYONS *v.* WISCONSIN. Ct. App. Wis. Certiorari denied.

No. 11–9256. BLAKELY *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 616.

No. 11–9257. KEMPPAINEN *v.* ARANSAS COUNTY DETENTION CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 411.

No. 11–9260. SCHUETZ *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 11–9268. GRIFFIN *v.* RAMSEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 438 Fed. Appx. 222.

No. 11–9269. HONESTO *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9272. BROWN *v.* ANGLIN, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 11–9273. BRUCE *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 812.

No. 11–9274. BYRD *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9278. BREWSTER *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 11–9279. BUMPUS *v.* WATTS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 3.

No. 11–9280. DEANDA *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–9283. GORDON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–9288. JACKSON *v.* BROWN, WARDEN. Super. Ct. Montgomery County, Ga. Certiorari denied.

No. 11–9291. HINES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 357.

No. 11–9295. BARTHOLOMEW *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 729.

No. 11–9297. KNAPP *v.* KNAPP. Super. Ct. Gwinnett County, Ga. Certiorari denied.

No. 11–9304. BRINKER *v.* MICHIGAN DEPARTMENT OF HUMAN SERVICES. Ct. App. Mich. Certiorari denied.

No. 11–9306. BRUMMETT *v.* CLARK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9309. WATSON *v.* SPARKMAN, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 11–9319. BROOKS *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 409.

No. 11–9329. KNIGHT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 76 So. 3d 879.

No. 11–9362. PULLIAM *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 625.

No. 11–9380. POLLARD *v.* DOE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 38.

No. 11–9396. BRADLEY *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9401. JORDAN *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 668 F. 3d 1188.

No. 11–9402. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 957 So. 3d 683.

No. 11–9405. TAYLOR *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9408. PHERNETTON *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied.

No. 11–9418. WILSON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 79 So. 3d 746.

No. 11–9421. DORCANT *v.* HOLDER, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 164.

No. 11–9438. BROWN *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9442. GORBATOVA *v.* SOCIAL SECURITY ADMINISTRATION; and

No. 11–9443. GORBATOVA *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 1st Cir. Certiorari denied.

No. 11–9446. HOLLAND *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–9447. FULCHER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 3d 1201, 925 N. Y. S. 2d 889.

No. 11–9456. ALBERTS *v.* WHEELING JESUIT UNIVERSITY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 239.

No. 11–9465. VALENZUELA *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 702.

No. 11–9467. PAMPLIN *v.* BENEDETTI, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9474. FULLER *v.* BROWN, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9494. LACOUR *v.* CAIN, WARDEN. Sup. Ct. La. Certiorari denied. Reported below: 2011–0105 (La. 11/18/11), 75 So. 3d 451.

No. 11–9500. PFENDER *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 443 Fed. Appx. 749.

No. 11–9509. MOON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9537. YOUNG *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 291.

No. 11–9542. VALENZUELA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 199 Cal. App. 4th 1214, 133 Cal. Rptr. 3d 196.

No. 11–9552. BALDON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 393.

No. 11–9559. FAVORS *v.* HARRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 11–9589. GOMEZ *v.* SANDOR, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 656.

No. 11–9605. Cox *v.* Madigan, Attorney General of Illinois, et al. C. A. 7th Cir. Certiorari denied.

No. 11–9640. Kartiganer *v.* Newman, Sheriff, Huerfano County, Colorado, et al. C. A. 10th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 713.

No. 11–9645. Doyle *v.* Law, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 601.

No. 11–9648. Caylor *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 78 So. 3d 482.

No. 11–9649. Wilson *v.* Rednour, Warden. C. A. 7th Cir. Certiorari denied.

No. 11–9656. Grigsby *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 469 Fed. Appx. 589.

No. 11–9657. Finklea *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 860.

No. 11–9658. Haynes *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 11–9660. Gray *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 515.

No. 11–9667. Washington *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 215.

No. 11–9668. Devine *v.* United States. C. A. 4th Cir. Certiorari denied.

No. 11–9669. Perkins *v.* Cooper, Attorney General of Tennessee. C. A. 6th Cir. Certiorari denied.

No. 11–9670. Morales-Pena *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 11–9677. Jennings *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 3d 988.

No. 11–9678. Flores *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 471 Fed. Appx. 654.

No. 11–9682. Ramsey *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 356.

No. 11–9685. WELCH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9688. CRANE-HORTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 449 Fed. Appx. 557.

No. 11–9689. DAVILA-NIEVES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 670 F. 3d 1.

No. 11–9695. DAVIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9699. NEDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 842.

No. 11–9701. OTISO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 270.

No. 11–9702. MIKELL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 11–9706. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 3d 427.

No. 11–9709. BLACKWELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–9713. MORGAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 412 Fed. Appx. 357.

No. 11–9714. CERVANTES-MALAGON, AKA PATINO-VEGA, AKA DOMINGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 364.

No. 11–9715. KOPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 662.

No. 11–9718. BALLEW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9719. YBARRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 716.

No. 11–9722. BODY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 855.

No. 11–9726. SANTOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 694.

No. 11–9730. Moore *v.* Galaza, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 767.

No. 11–9731. Puglisi *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 458 Fed. Appx. 31.

No. 11–9732. Paneto *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 661 F. 3d 709.

No. 11–9733. Negrette-Medina *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 505.

No. 11–9739. Cano-Medina *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 739.

No. 11–9743. Milan *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 595.

No. 11–9744. Mora *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 736.

No. 11–9745. Palma-Salome *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 430.

No. 11–9747. Jones *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 476 Fed. Appx. 484.

No. 11–9749. Jolliffe *v.* Uttecht, Superintendent, Coyote Correctional Center. C. A. 9th Cir. Certiorari denied.

No. 11–9754. Sarraj *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 3d 916.

No. 11–9755. Osuna-Armenta *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 702.

No. 11–9756. Miranda *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 666 F. 3d 1280.

No. 11–9758. Butterworth *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 11–9764. Espinoza-Castillo *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 341.

No. 11–9765. De La Cruz-Ulin *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 714.

No. 11–9767. BOLZE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 889.

No. 11–9772. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 255.

No. 11–9774. WESTON *v.* MCCALL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 264.

No. 11–9775. MOON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9777. BOYD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 447 Fed. Appx. 684.

No. 11–9779. PEREZ-GONZALEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 257.

No. 11–9782. ROGERS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 581.

No. 11–9786. BELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9788. BANKS *v.* KASTNER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 777.

No. 11–9789. BLAKE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–9790. COMRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 637.

No. 11–9792. KAIALAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–9793. SCHLEINING *v.* THOMAS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 642 F. 3d 1242.

No. 11–9794. SCOTT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 463 Fed. Appx. 85.

No. 11–9795. MEJIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–9808. LYTTLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 455 Fed. Appx. 61.

No. 11–9809. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9811. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 383.

No. 11–9812. MORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 252.

No. 11–9817. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 259.

No. 11–9818. ODOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 355.

No. 11–9819. MCCAMMON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–9822. KHOURY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 258.

No. 11–9826. HEIZELMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 584.

No. 11–9835. HOUSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 665 F. 3d 991.

No. 11–9839. BUSH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 226.

No. 11–9848. ORUCHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 375 Fed. Appx. 61.

No. 11–9850. MEADOWEAL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 471.

No. 11–9857. RODRIGUEZ GONZALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 381.

No. 11–9859. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 504.

No. 11–9860. HENNIS *v.* HEMLICK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 666 F. 3d 270.

No. 11–838. MACARELLI, ADMINISTRATRIX OF THE ESTATE OF HALLORAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 634 F. 3d 615.

No. 11–1067. ODYSSEY MARINE EXPLORATION, INC. *v.* UNIDENTIFIED SHIPWRECKED VESSEL ET AL.;

No. 11–1068. REPUBLIC OF PERU *v.* UNIDENTIFIED SHIPWRECKED VESSEL ET AL.; and

No. 11–1070. DE ALIAGA ET AL. *v.* KINGDOM OF SPAIN. C. A. 11th Cir. Motion of Professional Marine Explorers Society, Inc., et al. for leave to file a brief as *amici curiae* out of time denied. Certiorari denied. Reported below: 657 F. 3d 1159.

No. 11–1077. NICHOLAS & ASSOCIATES, INC., ET AL. *v.* CENTRAL LABORERS' PENSION FUND ET AL. App. Ct. Ill., 2d Dist. Motion of Builders Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 2011 IL App (2d) 100125, 956 N. E. 2d 609.

No. 11–1125. FLINT *v.* WHALIN, MAGISTRATE JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 11–8619. AL-MONLA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 658 F. 3d 35.

No. 11–9804. VINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 463 Fed. Appx. 225.

Rehearing Denied

No. 10–8629. SMITH *v.* COLSON, WARDEN, *ante*, p. 901;

No. 10–9742. COOK *v.* ARIZONA, *ante*, p. 904;

No. 11–863. SMITH *v.* FRIEDMAN ET AL., 565 U. S. 1260;

No. 11–867. HOLKESVIG *v.* MOORE, 565 U. S. 1260;

No. 11–918. SIWULA *v.* TOWN OF HORNELLSVILLE, NEW YORK, ET AL., *ante*, p. 906;

No. 11–927. GARGANO *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS, *ante*, p. 921;

No. 11–939. WANKEN *v.* WANKEN ET AL., *ante*, p. 922;

No. 11–5141. ROSA *v.* UNITED STATES, 565 U. S. 1236;

No. 11–7148. OTTO ET UX. *v.* HILLSBOROUGH COUNTY, FLORIDA, 565 U. S. 1236;

No. 11–7158. GRAY *v.* VALDEZ, WARDEN, ET AL., 565 U. S. 1124;
No. 11–7388. FLORES *v.* CALIFORNIA, 565 U. S. 1164;
No. 11–7392. HAYNES *v.* TEXAS, 565 U. S. 1164;
No. 11–7483. IN RE SQUARE, 565 U. S. 1109;
No. 11–7692. AKINE *v.* FLORIDA, 565 U. S. 1208;
No. 11–7754. SOUTHWARD *v.* WARREN, WARDEN, 565 U. S. 1209;
No. 11–7853. WATSON *v.* KELLEY FLEET SERVICES, LLC, 565 U. S. 1212;
No. 11–7901. GONZALEZ *v.* BERGHUIS, WARDEN, 565 U. S. 1213;
No. 11–8004. MERRITT *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 565 U. S. 1216;
No. 11–8137. DIXON *v.* MISSISSIPPI, 565 U. S. 1248;
No. 11–8139. GORDON *v.* FLORIDA ET AL., 565 U. S. 1248;
No. 11–8167. VELLEFF *v.* UNITED STATES, 565 U. S. 1221;
No. 11–8183. OFOR *v.* U. S. BANK, N. A., ET AL., 565 U. S. 1264;
No. 11–8196. RUTLEDGE *v.* LASSEN COUNTY, CALIFORNIA, ET AL., 565 U. S. 1264;
No. 11–8205. WILLIAMS *v.* GEORGIA ET AL., 565 U. S. 1264;
No. 11–8214. BLANKENSHIP *v.* ALLEN, JUDGE, COUNTY COURT OF FLORIDA, ESCAMBIA COUNTY, 565 U. S. 1265;
No. 11–8246. JOHNSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, 565 U. S. 1265;
No. 11–8280. BENNETT *v.* UNITED STATES, 565 U. S. 1223;
No. 11–8307. OBI *v.* VIRGINIA, 565 U. S. 1266;
No. 11–8351. CASTLEBERRY *v.* ACE AMERICAN INSURANCE/ESIS, 565 U. S. 1268;
No. 11–8405. BIRDETTE *v.* DAL GLOBAL SERVICES, LLC, 565 U. S. 1250;
No. 11–8407. BAEZ *v.* HUNT ET AL., *ante*, p. 909;
No. 11–8434. MCGUIRE *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, 565 U. S. 1268;
No. 11–8573. MOORE *v.* UNITED STATES, 565 U. S. 1241;
No. 11–8591. MCPHERSON *v.* TEXAS, 565 U. S. 1270;
No. 11–8721. AKINE *v.* FLORIDA, *ante*, p. 927;
No. 11–8797. JONES *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS, *ante*, p. 927; and
No. 11–8811. GRIFFIN *v.* UNITED STATES, 565 U. S. 1272. Petitions for rehearing denied.

No. 11–676. SITANGGANG *v.* COUNTRYWIDE HOME LOANS, INC., ET AL., 565 U. S. 1179. Motion for leave to file petition for rehearing denied.

No. 11–8602. CHING *v.* WARNER BROTHERS STUDIOS FACILITIES, INC., *ante*, p. 916. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 11–8784. HOLLIS *v.* UNITED STATES, 565 U. S. 1276. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

MAY 21, 2012

Dismissal Under Rule 46

No. 11–1166. RECTOR, WARDENS AND VESTRYMEN OF CHRIST CHURCH IN SAVANNAH, ET AL. *v.* BISHOP OF THE EPISCOPAL DIOCESE OF GEORGIA, INC., ET AL. Sup. Ct. Ga. Certiorari dismissed under this Court's Rule 46. Reported below: 290 Ga. 95, 718 S. E. 2d 237.

Affirmed on Appeal

No. 11–943. LEAGUE OF WOMEN VOTERS OF ILLINOIS *v.* QUINN, GOVERNOR OF ILLINOIS, ET AL. Affirmed on appeal from D. C. N. D. Ill.

Certiorari Granted—Vacated and Remanded

No. 11–926. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR *v.* BOROSKI; and

No. 11–936. DYNCORP INTERNATIONAL ET AL. *v.* BOROSKI. C. A. 11th Cir. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Roberts* v. *Sea-Land Services, Inc.*, *ante*, p. 93. Reported below: 662 F. 3d 1197.

No. 11–962. WILDTANGENT, INC. *v.* ULTRAMERCIAL, LLC, ET AL. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, *ante*, p. 66. Reported below: 657 F. 3d 1323.

Miscellaneous Orders

No. 11A939. GIANNONE *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE GINSBURG and referred to the Court, denied. JUSTICE KAGAN took no part in the consideration or decision of this application.

No. 11M109. MR. S. *v.* UNITED STATES; and
No. 11M111. UNDER SEAL *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari under seal with redacted copies for the public record granted.

No. 11M110. OATES *v.* HEDGPETH, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 11–7159. GRAVES *v.* INDUSTRIAL POWER GENERATING CORP., DBA INGENCO. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1109] denied.

No. 11–8707. TATE *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 902] denied.

No. 11–8799. WOOLRIDGE *v.* BITER, ACTING WARDEN. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 917] denied.

No. 11–8802. AKAOMA *v.* SUPERSHUTTLE INTERNATIONAL CORP. ET AL. C. A. 4th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 935] denied.

No. 11–9161. IN RE RICHARDS. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 920] denied.

No. 11–9394. SCARBOROUGH *v.* CHASE HOME FINANCE, LLC. Super. Ct. Pa.; and
No. 11–9395. CLEAVER-BASCOMBE *v.* KARTANO. Ct. App. D. C. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 11, 2012, within which to pay the docketing fees required by Rule 38(a) and to

submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9510. IN RE REED. Petition for writ of mandamus denied.

No. 11–9301. IN RE RICHARDS. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus and/or prohibition dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 11–1025. CLAPPER, DIRECTOR OF NATIONAL INTELLIGENCE, ET AL. *v.* AMNESTY INTERNATIONAL USA ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 638 F. 3d 118.

Certiorari Denied

No. 11–680. NIELSON *v.* KETCHUM ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 640 F. 3d 1117.

No. 11–870. PICKERING *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 276 P. 3d 553.

No. 11–1036. MITCHELL-WHITE *v.* NORTHWEST AIRLINES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 446 Fed. Appx. 316.

No. 11–1130. CYPHERS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–1131. EVANS ET AL. *v.* KENTUCKY HIGH SCHOOL ATHLETIC ASSN. C. A. 6th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 630.

No. 11–1133. PROVITOLA ET AL. *v.* EQUITY RESIDENTIAL, FKA EQUITY RESIDENTIAL PROPERTY TRUST. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 71 So. 3d 130.

No. 11–1138. ROCKWELL ET UX., INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF ROCKWELL, DECEASED *v.* BROWN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 985.

No. 11–1143. JAS Partners, Ltd. *v.* Boyer et al. C. A. 7th Cir. Certiorari denied. Reported below: 665 F. 3d 816.

No. 11–1145. Whispering Oaks Residential Care Facility, LLC *v.* Heritage Operating LP, dba Heritage Propane. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 353 S. W. 3d 110.

No. 11–1146. Snelling *v.* Michelin North American, Inc., et al. C. A. 8th Cir. Certiorari denied.

No. 11–1147. Snelling *v.* Evans et al. C. A. 8th Cir. Certiorari denied.

No. 11–1148. Schultz *v.* Cate, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 941.

No. 11–1150. Simon et al. *v.* Continental Airlines, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 439 Fed. Appx. 542.

No. 11–1151. Sonic Automotive, Inc., dba Century BMW *v.* Watts et al. Sup. Ct. S. C. Certiorari denied. Reported below: 395 S. C. 461, 719 S. E. 2d 640.

No. 11–1157. VCG Special Opportunities Master Fund, Ltd., fka CDO Plus Master Fund Ltd. *v.* Wachovia Bank, N. A., et al. C. A. 2d Cir. Certiorari denied. Reported below: 661 F. 3d 164.

No. 11–1168. Russell Country Sportsmen et al. *v.* United States Forest Service et al. C. A. 9th Cir. Certiorari denied. Reported below: 668 F. 3d 1037.

No. 11–1180. McGarry *v.* Geriatric Facilities of Cape Cod, Inc., et al. C. A. 1st Cir. Certiorari denied.

No. 11–1189. Roberts *v.* Albertson's LLC et al. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 605.

No. 11–1191. Zakzuk-Deulofeut *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 31 A. 3d 732.

No. 11–1212. Research & Diagnostic Systems, Inc., et al. *v.* Streck, Inc. (two judgments). C. A. Fed. Cir. Certiorari

denied. Reported below: 665 F. 3d 1269 (first judgment); 659 F. 3d 1186 (second judgment).

No. 11–1213. RESHARD *v.* LAHOOD, SECRETARY OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied. Reported below: 443 Fed. Appx. 568.

No. 11–1216. TESSLER *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 451 Fed. Appx. 30.

No. 11–1217. DUNN *v.* ALBANY MEDICAL COLLEGE. C. A. 2d Cir. Certiorari denied. Reported below: 445 Fed. Appx. 431.

No. 11–1245. MICHAEL C. HOLLEN, D. D. S., P. C. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 437 Fed. Appx. 525.

No. 11–1253. YUFA *v.* KAPPOS, DIRECTOR, PATENT AND TRADEMARK OFFICE. C. A. Fed. Cir. Certiorari denied. Reported below: 452 Fed. Appx. 998.

No. 11–1268. SCANLON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 666 F. 3d 796.

No. 11–7928. BRIDGES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 347 Fed. Appx. 459.

No. 11–8292. MCGEE *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 432 Fed. Appx. 976.

No. 11–8446. OUTRAM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 445 Fed. Appx. 509.

No. 11–8579. DEL BOSQUE *v.* AT&T ADVERTISING, L. P., DBA AT&T ADVERTISING & PUBLISHING. C. A. 5th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 258.

No. 11–8838. NELSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 574.

No. 11–8851. STAUNTON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 11–9284. HARRIS *v.* PBC NBADL, LLC. C. A. 10th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 300.

No. 11–9308. KIDD *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 293 Kan. 591, 265 P. 3d 1165.

No. 11–9310. THOMPSON *v.* BROWN, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9311. WOLF *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9318. ROSS *v.* CHAPMAN, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 11–9321. CHANDLER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2011 IL App (2d) 090071–U.

No. 11–9324. RICHARDSON *v.* DAYTON PUBLIC SCHOOLS ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9328. DRAKE *v.* CITY OF LOVELOCK, NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 127 Nev. 1131, 373 P. 3d 910.

No. 11–9337. SURABIAN ET AL. *v.* RESIDENTIAL FUNDING CO., LLC, FKA RESIDENTIAL FUNDING CORP. C. A. 1st Cir. Certiorari denied.

No. 11–9338. WHITMORE *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 46,120 (La. App. 2 Cir. 3/2/11), 58 So. 3d 583.

No. 11–9341. CONLEY *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 11–9343. BOWMAN *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9347. TRAYLOR *v.* BUSBY, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9354. LIGHT *v.* MARTEL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9355. KOCH *v.* GREGORY ET AL. C. A. 7th Cir. Certiorari denied.

No. 11–9356. CLARK *v.* SUBIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9365. LAROCHE *v.* MARYLAND DEPARTMENT OF LABOR, LICENSING AND REGULATION, ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 200 Md. App. 738 and 743.

No. 11–9367. VELEZ *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 11–9368. TAYLOR *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 198 Md. App. 753.

No. 11–9370. TRICOME *v.* WELCH ET AL. Super. Ct. Pa. Certiorari denied. Reported below: 32 A. 3d 258.

No. 11–9372. CHANDLER *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 11–9375. MENTOR *v.* NEW YORK STATE DIVISION OF PAROLE ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 87 App. Div. 3d 1245, 930 N. Y. S. 2d 302.

No. 11–9379. FENNELL *v.* CALIFORNIA REPUBLICAN PARTY ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 11–9390. YATES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 2011-Ohio-4962.

No. 11–9391. USHER *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9397. BETANCOURT *v.* FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 11–9399. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 11–9404. YANG *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 743.

No. 11–9409. MYRICK *v.* KEYS ET AL. C. A. 7th Cir. Certiorari denied.

No. 11–9410. McKenzie *v.* Maynard, Secretary, Maryland Department of Public Safety and Correctional Services. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 302.

No. 11–9412. Johnson *v.* Rock, Superintendent, Upstate Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 11–9420. Tilley *v.* Kiefer et al. C. A. 1st Cir. Certiorari denied.

No. 11–9423. Downs *v.* Bellnier, Superintendent, Marcy Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 657 F. 3d 97.

No. 11–9425. Cameron *v.* Wise et al. C. A. 2d Cir. Certiorari denied.

No. 11–9430. Simpson *v.* Interscope Geffen A&M Records. C. A. 9th Cir. Certiorari denied.

No. 11–9466. Griffin *v.* Tucker, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 11–9470. Harkleroad *v.* Tucker, Secretary, Florida Department of Corrections. Sup. Ct. Fla. Certiorari denied. Reported below: 75 So. 3d 1244.

No. 11–9484. Hill *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 77 So. 3d 185.

No. 11–9498. Hall *v.* Dormire, Superintendent, Jefferson City Correctional Center. C. A. 8th Cir. Certiorari denied.

No. 11–9512. Linaman *v.* Palmer, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 687.

No. 11–9516. Martel *v.* Lamarque, Warden. C. A. 9th Cir. Certiorari denied.

No. 11–9569. Quinn *v.* Bickell, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 11–9600. LANDRY *v.* CAIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 817.

No. 11–9614. LAND *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 93 So. 3d 1028.

No. 11–9624. LEWIS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 11–9781. REARDON *v.* LEASON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 465 Fed. Appx. 208.

No. 11–9791. DELESTRE *v.* RHODE ISLAND. Sup. Ct. R. I. Certiorari denied. Reported below: 35 A. 3d 886.

No. 11–9828. DESCAMPS *v.* BUSH ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9832. BELTRAN VALDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 3d 1056.

No. 11–9867. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 538.

No. 11–9871. BALLARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 715.

No. 11–9875. ALMLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9881. COLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 459.

No. 11–9883. AUGUSTINE *v.* UNITED STATES; and
No. 11–9913. BATISTE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 3d 1105.

No. 11–9884. LILES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9888. SCHAFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 880.

No. 11–9891. MCRAE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 284.

No. 11–9893. QUINTERO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9897. LANGFORDDAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 454 Fed. Appx. 34.

No. 11–9898. JIMINEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9900. WEBSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–9904. STEWART ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 349.

No. 11–9905. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9907. DAVIES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–9908. CARTER *v.* SHARTLE, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 11–9909. CARPENTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 11–9910. MILLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 595.

No. 11–9915. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 508.

No. 11–9916. EVANS ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 315.

No. 11–9917. CLAYTOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 328 Fed. Appx. 258.

No. 11–9918. SINGLETON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 914.

No. 11–9920. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 448 Fed. Appx. 596.

No. 11–9937. HUY CHI LUONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 710.

No. 11–9945. NEIGHBORS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 785.

No. 11–9946. MOSER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 762.

No. 11–9947. POULIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 272.

No. 11–9954. BUCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 661 F. 3d 364.

No. 11–217. DAWES ET UX. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 652 F. 3d 1236.

No. 11–958. KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. *v.* PABON. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 654 F. 3d 385.

No. 11–1019. TENENBAUM *v.* SONY BMG MUSIC ENTERTAINMENT ET AL. C. A. 1st Cir. Certiorari denied. THE CHIEF JUSTICE and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 660 F. 3d 487.

No. 11–9846. MARCUSSE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9878. SIMMONS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–9926. BROWN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 669 F. 3d 10.

No. 11–9962. POLK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 11–1111. MURRAY ET AL. *v.* SULLIVAN ET AL., *ante*, p. 923;
No. 11–5941. SANDERS *v.* KENTUCKY, *ante*, p. 907;
No. 11–7081. COOK *v.* HUBIN ET AL., 565 U. S. 1204;

No. 11–7098. WHITE *v.* LONGINO, DEPUTY WARDEN, ET AL., *ante*, p. 907;

No. 11–7669. EL-MUMIT *v.* LOUISIANA, *ante*, p. 908;

No. 11–7725. ROJAS *v.* CONNECTICUT, 565 U. S. 1209;

No. 11–7874. HATCHER *v.* UNITED STATES, 565 U. S. 1183;

No. 11–8162. RASCON *v.* TEXAS, 565 U. S. 1249;

No. 11–8275. CUFFY *v.* FLORIDA, 565 U. S. 1266;

No. 11–8314. MIDDLETON *v.* MOTLEY RICE LLC, 565 U. S. 1267;

No. 11–8352. VIVAS *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *ante*, p. 908;

No. 11–8429. VELEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 909;

No. 11–8453. BROWN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 910;

No. 11–8557. PORCO *v.* NEW YORK, *ante*, p. 924;

No. 11–8563. BARRINO *v.* DEPARTMENT OF THE TREASURY ET AL., *ante*, p. 912;

No. 11–8696. TIERNEY *v.* ESPINADA, WARDEN, ET AL., 565 U. S. 1270;

No. 11–8926. WHEELER *v.* UNITED STATES, 565 U. S. 1275;

No. 11–9060. LEVINE *v.* HOLENCIK, WARDEN, *ante*, p. 928; and

No. 11–9169. GRAHAM *v.* UNITED STATES, *ante*, p. 951. Petitions for rehearing denied.

MAY 23, 2012

Dismissal Under Rule 46

No. 10–1545. DEMIRAJ ET AL. *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 631 F. 3d 194.

MAY 29, 2012

Certiorari Granted—Reversed and Remanded. (See No. 11–1053, *ante*, p. 650.)

Certiorari Granted—Vacated and Remanded

No. 11–99. HOLDER, ATTORNEY GENERAL *v.* MOJICA. C. A. 9th Cir.;

No. 11–103. HOLDER, ATTORNEY GENERAL *v.* PARRA CAMACHO. C. A. 9th Cir. Reported below: 412 Fed. Appx. 32;

No. 11–104. HOLDER, ATTORNEY GENERAL *v.* BECERRA. C. A. 9th Cir. Reported below: 411 Fed. Appx. 67; and

No. 11–831. HOLDER, ATTORNEY GENERAL *v.* PIMENTEL-ORNELAS. C. A. 9th Cir. Reported below: 432 Fed. Appx. 681. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Holder* v. *Martinez Gutierrez*, *ante*, p. 583.

Certiorari Dismissed

No. 11–9459. OPONG-MENSAH *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–9515. JONES *v.* LOUISIANA STATE BAR ASSN. ET AL. C. A. D. C. Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 11–9691. SMITH *v.* DYBING ET AL. Sup. Ct. Va. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 11–9974. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition.

Miscellaneous Orders

No. D–2624. In re Disbarment of Squire. Disbarment entered. [For earlier order herein, see 565 U. S. 1257.]

No. D–2632. In re Disbarment of Poole. Disbarment entered. [For earlier order herein, see *ante*, p. 918.]

No. D–2653. In re Disbarment of Uhl. Disbarment entered. [For earlier order herein, see *ante*, p. 934.]

No. 11M92. John Mezzalingua Associates, Inc. *v.* International Trade Commission. Renewed motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 11–218. Tibbals, Warden *v.* Carter. C. A. 6th Cir. [Certiorari granted, 565 U. S. 1259.] Motion of respondent for appointment of counsel granted. Scott Michelman, Esq., of Washington, D. C., is appointed to serve as counsel for respondent in this case.

No. 11–8556. Book *v.* Mortgage Electronic Registration Systems et al. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 917] denied.

No. 11–8636. Loyola *v.* Donahoe, Postmaster General. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [565 U. S. 1258] denied.

No. 11–9692. Rana *v.* Department of the Army. C. A. Fed. Cir.; and

No. 11–9833. Thomas *v.* Ritz Condominium Assn., Inc. Super. Ct. N. J., App. Div. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 19, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–9994. In re Carrillo; and

No. 11–10052. In re Noah. Petitions for writs of habeas corpus denied.

No. 11–9507. IN RE SEKENDUR. Petition for writ of mandamus denied.

Certiorari Granted

No. 11–1175. MARX *v.* GENERAL REVENUE CORP. C. A. 10th Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 668 F. 3d 1174.

Certiorari Denied

No. 11–301. SAINT-GOBAIN CERAMICS & PLASTICS, INC. *v.* SIEMENS MEDICAL SOLUTIONS USA, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 637 F. 3d 1269.

No. 11–730. ROEDER ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 646 F. 3d 56.

No. 11–789. JENNINGS *v.* OWENS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 443 Fed. Appx. 16.

No. 11–824. SCHAFER, GUARDIAN AD LITEM FOR W. M. S., INFANT *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 4th Cir. Certiorari denied. Reported below: 641 F. 3d 49.

No. 11–890. BRIGHT *v.* HOLDER, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 649 F. 3d 397.

No. 11–895. BUSH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BUSH *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 655 F. 3d 1323.

No. 11–1032. AGARANO ET AL. *v.* MATTOS ET UX.;
No. 11–1045. BROOKS *v.* DAMAN ET AL.; and
No. 11–1165. MATTOS ET UX. *v.* AGARANO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 661 F. 3d 433.

No. 11–1074. JACOBS ENGINEERING GROUP, INC. *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 806 N. W. 2d 820.

No. 11–1159. FLINT *v.* METLIFE INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 483.

No. 11–1172. UPSHAW *v.* ANDRADE ET AL. C. A. 1st Cir. Certiorari denied.

No. 11–1181. SCOFBP, LLC, ET AL. *v.* CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 668 F. 3d 873.

No. 11–1183. SATTARI *v.* WASHINGTON MUTUAL. C. A. 9th Cir. Certiorari denied. Reported below: 475 Fed. Appx. 648.

No. 11–1196. HERSHEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 85 App. Div. 3d 1661, 925 N. Y. S. 2d 314.

No. 11–1205. BUSH ET UX. *v.* SLAGH ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–1220. FREEDMAN ET AL. *v.* STATE BAR OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 290 Ga. 303, 720 S. E. 2d 597.

No. 11–1232. COLLINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 283 Va. 263, 720 S. E. 2d 530.

No. 11–1244. GRUNDSTEIN *v.* EIGHTH DISTRICT COURT OF APPEALS OF OHIO ET AL. (two judgments). C. A. 6th Cir. Certiorari denied.

No. 11–1265. INTERNATIONAL STRATEGIC PARTNERS, LLC *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 455 Fed. Appx. 91.

No. 11–1282. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–1293. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 997.

No. 11–1300. CHOI *v.* UNITED STATES (two judgments). C. A. D. C. Cir. Certiorari denied.

No. 11–8135. RANDOLPH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 682.

No. 11–8356. TRAN *v.* SWARTHOUT, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 859.

No. 11–8432. WEARING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 641.

No. 11–8632. NICHOLS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 213.

No. 11–8635. MARTIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 442 Fed. Appx. 871.

No. 11–8915. HOLAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2011–0974 (La. 11/18/11), 125 So. 3d 416.

No. 11–9104. PELLETIER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 666 F. 3d 1.

No. 11–9228. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9325. CHAFFO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 452 Fed. Appx. 154.

No. 11–9426. SALAZAR, AKA SOLAZAR *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9431. RICHARDSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 31 A. 3d 757.

No. 11–9437. THOMPSON *v.* PREMO, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 11–9448. CORPORAL *v.* MORGAN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 461 Fed. Appx. 346.

No. 11–9449. GARRETT *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9451. HILL *v.* MUWWAKKIL. Sup. Ct. Va. Certiorari denied.

No. 11–9458. HAYNES *v.* R. W. SELBY CO. INC. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 659.

No. 11–9461. TRICOME *v.* GOOGLE, INC. Sup. Ct. Pa. Certiorari denied.

No. 11–9471. HOFELICH *v.* HAWAII ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9472. GEMAS *v.* HENEKS ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9473. FERNANDEZ *v.* HARTLEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 902.

No. 11–9477. SATTERFIELD *v.* JOHNSON ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9478. SALERNO *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 11–9479. STRICKLAND *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 444 Fed. Appx. 178.

No. 11–9480. GRIFFIN *v.* JESSON, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN SERVICES. Ct. App. Minn. Certiorari denied.

No. 11–9481. FOYE *v.* WARREN, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9482. HENRY *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 11–9483. GARCIA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 11–9485. FLOWERS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9491. DIXON *v.* LOPEZ, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9493. LOMAX *v.* CITY OF MIAMI POLICE DEPARTMENT ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9495. GOLDEN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9497. HASSAN *v.* WARREN, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9506. BUCKMAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 77 So. 3d 1257.

No. 11–9508. KENDRICK *v.* UNION BAPTIST CHURCH ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 198 Md. App. 742 and 753.

No. 11–9520. LANCASTER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 72 So. 3d 752.

No. 11–9521. KING *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 278.

No. 11–9522. PRIMAS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 673.

No. 11–9531. PEREZ *v.* STAINER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9533. MCHENRY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 11–9534. NOLL *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 32 A. 3d 283.

No. 11–9541. CRUZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 408 Ill. App. 3d 1124, 1 N. E. 3d 664.

No. 11–9544. WRIGHT *v.* BUTTS, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 11–9545. BURNS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 76 So. 3d 294.

No. 11–9546. ARNOLD *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 11–9548. BURNELL *v.* JUNIOUS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9549. TRICOME *v.* AUTOMATTIC, INC., ET AL. Super. Ct. Pa. Certiorari denied.

No. 11–9551. LEE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9568. SYKES *v.* ELLIOT ET AL. C. A. 7th Cir. Certiorari denied.

No. 11–9573. HALL *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 11–9588. DA COSTA *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9591. LISTER *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 7th Cir. Certiorari denied.

No. 11–9597. MOHSEN *v.* MORGAN STANLEY DEAN WITTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9615. MENDOZA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 52 Cal. 4th 1056, 263 P. 3d 1.

No. 11–9629. SYRUS *v.* BENNETT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 806.

No. 11–9659. HELLER *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 372.

No. 11–9679. HASAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 11–9687. WHITE *v.* KILGORE. C. A. 6th Cir. Certiorari denied.

No. 11–9690. SMARTT *v.* DEPARTMENT OF EDUCATION, DEFAULT RESOLUTION GROUP. C. A. 2d Cir. Certiorari denied.

No. 11–9694. SEPULVEDA ESQUIVEL *v.* HALL, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 11–9712. BRAVO *v.* LOPEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 682.

No. 11–9723. BROOM *v.* DENNEY, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 659 F. 3d 658.

No. 11–9727. DYER *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 460 Mass. 728, 955 N. E. 2d 271.

No. 11–9738. DAX *v.* WYOMING ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 11–9757. COLLINS *v.* LEMPKE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9762. DEERE *v.* PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9799. BURRELL *v.* TENNIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ROCKVIEW, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9813. PARVIN *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 11–9824. WADE *v.* OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 466 Fed. Appx. 886.

No. 11–9825. GREEN *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 460 Fed. Appx. 71.

No. 11–9834. GILBERT *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 88 So. 3d 172.

No. 11–9837. MATHIS *v.* OHIO REHABILITATION AND CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied.

No. 11–9854. MICOLO *v.* NEW YORK. Sup. Ct. N. Y., Suffolk County. Certiorari denied.

No. 11–9941. SHANKS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 922.

No. 11–9942. STALLWORTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 218.

No. 11–9944. STRILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 643.

No. 11–9958. BOWMAN *v.* KOVSLEK ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 268.

No. 11–9967. CERVANTES-AGUILAR, AKA AGUILAR CERVANTES, AKA CERVANTES AGUILAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 256.

No. 11–9970. LIGHTFOOT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–9972. LENNARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–9975. TUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 616.

No. 11–9983. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 369.

No. 11–9984. EWING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 632 F. 3d 412.

No. 11–9986. PINION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 339.

No. 11–9987. NDUBUISI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 436.

No. 11–9988. MUNEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 462 Fed. Appx. 172.

No. 11–9990. MCCULLERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 231.

No. 11–9992. BANSAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 663 F. 3d 634.

No. 11–9997. MOSLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 11–10000. ROBINSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 11–10004. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 469.

No. 11–10005. HUDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 462 Fed. Appx. 357.

No. 11–10007. GONZALEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 441 Fed. Appx. 404.

No. 11–10008. HERNANDEZ-BELTRAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 658.

No. 11–10010. GALLOWAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 232.

No. 11–10016. RIOJAS, AKA RIOJAS-SANDOVAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10018. ISAAC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 655 F. 3d 148.

No. 11–10019. HEWITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 434.

No. 11–10025. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 112.

No. 11–10027. FULTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 11–10028. SCANLAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 667 F. 3d 896.

No. 11–10030. GLOVER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 448 Fed. Appx. 158.

No. 11–10033. GOODWIN *v.* LOCKETT, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 645.

No. 11–10035. GORBATOVA *v.* GAETA ET AL. C. A. 1st Cir. Certiorari denied.

No. 11–10038. FOSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 652 F. 3d 776.

No. 11–10043. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–10048. GLENN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 452 Fed. Appx. 795.

No. 11–10056. MORILLO-HIDALGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 458 Fed. Appx. 40.

No. 11–10059. MARTINEZ ESCOBEDO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 656.

No. 11–10062. TADIO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 663 F. 3d 1042.

No. 11–10065. ARTEAGA-TAPIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 884.

No. 11–10067. GILYARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 362.

No. 11–10073. HACKLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 662 F. 3d 671.

No. 11–10075. THUAN HUY HA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–10076. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 407.

No. 11–10077. PICKAR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 616 F. 3d 821.

No. 11–10078. NIGG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 667 F. 3d 929.

No. 11–10080. TUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 616.

No. 11–10084. MARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 460 Fed. Appx. 103.

No. 11–10087. CEBALLOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 671 F. 3d 852.

No. 11–10090. MESA-LOPEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 301.

No. 11–10092. LOPEZ-SANCHEZ *v.* TAMEZ, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 433.

No. 11–10095. CRISP *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 216.

No. 11–10097. ASLAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 26 A. 3d 322.

No. 11–667. BEELER, AS PARENT AND NATURAL GUARDIAN OF HER MINOR CHILD *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 651 F. 3d 954.

No. 11–898. DAMAN ET AL. *v.* BROOKS. C. A. 9th Cir. Motion of Los Angeles County Police Chiefs' Association et al. for leave

to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 661 F. 3d 433.

No. 11–903. TESSERA, INC. *v.* INTERNATIONAL TRADE COMMISSION ET AL. C. A. Fed. Cir. Motion of ANP respondents for leave to file brief in opposition under seal with redacted copies for the public record granted. Motion of petitioner for leave to file reply brief under seal with redacted copies for the public record granted. Certiorari denied. Reported below: 646 F. 3d 1357.

No. 11–8948. CRIM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 451 Fed. Appx. 196.

No. 11–9982. NOWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10046. FLECK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 443 Fed. Appx. 796.

No. 11–10063. JEAN-PIERRE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 11–10081. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 438 Fed. Appx. 243.

Rehearing Denied

No. 11–7610. BROWN *v.* COLLINS ET AL., 565 U. S. 1206;

No. 11–7648. STEVENSON *v.* NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, 565 U. S. 1168;

No. 11–8207. WALTON *v.* ALSTON ET AL., 565 U. S. 1265;

No. 11–8323. CONLEY *v.* KEYS ET AL., 565 U. S. 1267;

No. 11–8492. BENSON *v.* TIBBALS, WARDEN, *ante*, p. 911;

No. 11–8599. WESTON *v.* ILLINOIS, *ante*, p. 925;

No. 11–8603. D'ANTUONO *v.* BRADT, SUPERINTENDENT, ATTICA CORRECTIONAL FACILITY, *ante*, p. 925;

No. 11–8611. SHABAZZ *v.* UNITED STATES, *ante*, p. 925;

No. 11–8897. TIBURCIO *v.* OBAMA, PRESIDENT OF THE UNITED STATES, *ante*, p. 947; and

No. 11–9099. VASQUEZ *v.* UNITED STATES, *ante*, p. 929. Petitions for rehearing denied.

No. 11–7229. IN RE BAKHOUCHE, AKA ALI, 565 U. S. 1109. Motion for leave to file petition for rehearing denied.

JUNE 4, 2012

Dismissal Under Rule 46

No. 11–968. STERLING EQUITIES ASSOCIATES ET AL. *v.* PICARD ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 654 F. 3d 229.

Certiorari Granted—Vacated and Remanded

No. 11–8806. SMITH *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reynolds* v. *United States*, 565 U. S. 432 (2012). Reported below: 655 F. 3d 839.

Certiorari Dismissed

No. 11–9632. DOWNS *v.* CALIFORNIA BOARD OF PRISON TERMS II ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*.

No. 11–9650. THREATT *v.* SECURITY CLASSIFICATION COMMITTEE. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 11–10134. SPRINGER *v.* UNITED STATES. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk

is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 427 Fed. Appx. 650.

Miscellaneous Orders

No. D–2663. IN RE DISBARMENT OF VILOSKI. Disbarment entered. [For earlier order herein, see *ante*, p. 959.]

No. 11M112. LOMAX *v.* WAL-MART STORES EAST ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 11M113. SHANKS *v.* DONAHOE, POSTMASTER GENERAL, ET AL. Motion for leave to proceed as a veteran denied.

No. 11–8478. IN RE FLYNN. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 904] denied.

No. 11–9080. ZACK *v.* UNITED STATES. C. A. 6th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 936] denied.

No. 11–9665. HOJATIZADEH *v.* BANK OF AMERICA ET AL. C. A. 8th Cir.;

No. 11–10150. IN RE PRICE; and

No. 11–10199. FARMER *v.* UNITED STATES. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 25, 2012, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 11–10152. IN RE LAWRENCE. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8.

No. 11–9644. IN RE SNYDER. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 11–770. BAILEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. Reported below: 652 F. 3d 197.

Certiorari Denied

No. 11–536. Basham *v.* Arkansas. Ct. App. Ark. Certiorari denied. Reported below: 2011 Ark. App. 384.

No. 11–813. Thomas *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 440 Fed. Appx. 148.

No. 11–814. Fiorillo et al. *v.* Incorporated Village of Ocean Beach, New York, et al. C. A. 2d Cir. Certiorari denied.

No. 11–950. Dominguez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 661 F. 3d 1051.

No. 11–1042. Kokenis *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 662 F. 3d 919.

No. 11–1060. Persfull *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 660 F. 3d 286.

No. 11–1069. Spot Runner, Inc., et al. *v.* WPP Luxembourg Gamma Three Sarl. C. A. 9th Cir. Certiorari denied. Reported below: 655 F. 3d 1039.

No. 11–1185. Sibley *v.* United States District Court for the District of Columbia. C. A. D. C. Cir. Certiorari denied.

No. 11–1192. One 1998 GMC et al. *v.* Illinois. Sup. Ct. Ill. Certiorari denied. Reported below: 2011 IL 110236, 960 N. E. 2d 1071.

No. 11–1193. Baker et ux. *v.* Hobson et al. App. Ct. Mass. Certiorari denied. Reported below: 80 Mass. App. 1107, 954 N. E. 2d 74.

No. 11–1201. Liotti *v.* United States Court of Appeals for the Fourth Circuit. C. A. 4th Cir. Certiorari denied. Reported below: 667 F. 3d 419.

No. 11–1206. Doyle *v.* Roberts, Chief Justice of the United States, et al. C. A. 2d Cir. Certiorari denied. Reported below: 463 Fed. Appx. 50.

No. 11–1222. Flint *v.* Simpson, Judge, United States District Court for the Western District of Kentucky. C. A. 6th Cir. Certiorari denied.

No. 11–1249. HIRSCHFIELD *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 11–1251. BOWERSOCK *v.* CITY OF LIMA, OHIO. Ct. App. Ohio, Allen County. Certiorari denied.

No. 11–1269. MOORE *v.* OMEGA PROTEIN, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 339.

No. 11–1291. WHITE ET AL. *v.* BLUE CROSS & BLUE SHIELD OF ALABAMA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 450 Fed. Appx. 818.

No. 11–1292. CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 460 Fed. Appx. 622.

No. 11–1317. BAMDAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 653.

No. 11–1323. ELLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 670 F. 3d 762.

No. 11–1326. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 664 F. 3d 966.

No. 11–1333. DAVENPORT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 668 F. 3d 1316.

No. 11–1356. MEMORYLINK CORP. *v.* MOTOROLA, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 468 Fed. Appx. 960.

No. 11–8040. HUTCHINSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 611 Pa. 280, 25 A. 3d 277.

No. 11–8318. CLEMENTE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 84 App. Div. 2d 829, 922 N. Y. S. 2d 193.

No. 11–8371. GARCIA *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 52 Cal. 4th 706, 258 P. 3d 751.

No. 11–8588. ROBINSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 663 F. 3d 265.

No. 11–8669. CHARROS *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied.

No. 11–8748. RADER *v.* OGDEN CITY, UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2011 UT App 247, 262 P. 3d 466.

No. 11–8858. LUCIO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 351 S. W. 3d 878.

No. 11–8896. LEAVITT *v.* SAN JACINTO UNIFIED SCHOOL DISTRICT. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 11–8985. WALKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 665 F. 3d 212.

No. 11–9036. JONES *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 351 S. W. 3d 784.

No. 11–9075. KELLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 665 F. 3d 711.

No. 11–9289. PHILLIPS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 757.

No. 11–9292. FRATTA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–9556. AGIM *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9560. HEARRON *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 68 So. 3d 699.

No. 11–9561. GUERRERO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 11–9563. HEARN *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 11–9564. HOOD *v.* KOON, WARDEN. Super. Ct. Chatham County, Ga. Certiorari denied.

No. 11–9570. RICHARD *v.* STEIB ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 451 Fed. Appx. 381.

No. 11–9572. HERNANDEZ *v.* KENNEDY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 586.

No. 11–9574. GARCIA *v.* TEXAS. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 11–9575. GREEN *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 11–9576. IVORY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 75 So. 3d 1219.

No. 11–9577. GONZALEZ *v.* DISTRICT ATTORNEY. C. A. 9th Cir. Certiorari denied.

No. 11–9579. FLEMMING *v.* CITY OF NEW YORK POLICE DEPARTMENT FOR BRONX, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9580. FOURSTAR *v.* BROWN ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9581. GONZALEZ *v.* NEW YORK CITY HOUSING AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 11–9582. HARRIS *v.* HARRIS ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 11–9583. GROVER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 11–9584. GUTIERREZ *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 11–9586. DAVIS *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 933 N. E. 2d 590.

No. 11–9594. MATTHEWS *v.* CITY OF BOISE, IDAHO, ET AL. Ct. App. Idaho. Certiorari denied.

No. 11–9595. PENG *v.* CATE, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9603. SMITH *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9607. MESSAM *v.* HASTINGS, ADMINISTRATOR, EAST JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9611. ANDERSON *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 11–9619. MORISSETTE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 409 Ill. App. 3d 1157, 2 N. E. 3d 665.

No. 11–9623. MADEIRA *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 26 A. 3d 1179.

No. 11–9630. BROWN *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2009–1602 (La. App. 1 Cir. 3/26/10), 30 So. 3d 1183.

No. 11–9631. DAIAK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 93 So. 3d 1023.

No. 11–9637. PEREZ *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 11–9641. MILLER *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9651. WIMBERLY *v.* WALDEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9653. RAGHUNATHAN ET UX. *v.* CHASE HOME FINANCE, LLC. Super. Ct. Pa. Certiorari denied. Reported below: 23 A. 3d 1094.

No. 11–9655. DENNIS *v.* ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 11–9662. HAWKS *v.* CURRY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 686.

No. 11–9663. HAGGARD *v.* CURRY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 678.

No. 11–9664. GRAVES *v.* WETZEL, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–9671. Babiker *v.* City of New Orleans, Louisiana, et al. C. A. 5th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 371.

No. 11–9673. Brandon *v.* Pennsylvania. C. A. 3d Cir. Certiorari denied.

No. 11–9674. Hooper *v.* Workman, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 446 Fed. Appx. 88.

No. 11–9675. Johnson *v.* Birkett, Warden. C. A. 6th Cir. Certiorari denied.

No. 11–9708. Chande *v.* Holder, Attorney General. C. A. 5th Cir. Certiorari denied.

No. 11–9716. Joe *v.* Florida. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 66 So. 3d 423.

No. 11–9717. Collier *v.* McVey, Chairwoman, Pennsylvania Board of Probation and Parole, et al. C. A. 3d Cir. Certiorari denied.

No. 11–9721. Trzeciak *v.* State Farm Fire & Casualty Co. C. A. 7th Cir. Certiorari denied.

No. 11–9742. Alexander *v.* Holder, Attorney General. C. A. 3d Cir. Certiorari denied. Reported below: 456 Fed. Appx. 134.

No. 11–9784. Quintero *v.* Chandler, Warden. C. A. 7th Cir. Certiorari denied.

No. 11–9805. Walker *v.* Nunn, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 456 Fed. Appx. 419.

No. 11–9842. Kilgore *v.* Walker, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 11–9869. Boyer *v.* Premo, Superintendent, Oregon State Penitentiary. C. A. 9th Cir. Certiorari denied. Reported below: 659 F. 3d 957.

No. 11–9890. Parker *v.* Virginia. Sup. Ct. Va. Certiorari denied.

No. 11–9894. BUTLER *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 11–9903. WALKER *v.* OCHOA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9912. BROWN *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 11–9919. SWAIN *v.* SEAMAN. Ct. App. N. M. Certiorari denied.

No. 11–9922. JONES *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9927. ALDRIDGE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 589.

No. 11–9929. JACKSON *v.* HARDY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 11–9950. PATINO *v.* PALMER, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 11–9977. MOELLER *v.* WEBER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 649 F. 3d 839.

No. 11–10002. RABB *v.* MCBRIDE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 455 Fed. Appx. 356.

No. 11–10088. SALIDO-ROSAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 3d 1254.

No. 11–10089. SPEIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 785.

No. 11–10093. STENSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 475 Fed. Appx. 630.

No. 11–10104. OUTLAW *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 165.

No. 11–10106. LEE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 741.

No. 11–10109. HILL *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 662 F. 3d 1335.

No. 11–10116. STRONG *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 11–10119. MUELLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–10120. PATILLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 11–10123. CURET *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 670 F. 3d 296.

No. 11–10124. FREERKSEN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 457 Fed. Appx. 765.

No. 11–10125. SHARP *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 440.

No. 11–10129. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 11–10130. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–10135. ACEVEDO SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 11–10136. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 271.

No. 11–10138. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 458 Fed. Appx. 464.

No. 11–10140. LANG *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 672 F. 3d 17.

No. 11–10144. BERNAL VALDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 440 Fed. Appx. 559.

No. 11–10146. JOHNSON *v.* SUTER, CLERK, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 442 Fed. Appx. 573.

No. 11–10147. CHRONISTER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 459 Fed. Appx. 581.

No. 11–10148. COOPER, AKA LOCKHEED *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 445 Fed. Appx. 395.

No. 11–10151. FERNANDEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 671 F. 3d 697.

No. 11–10157. CETERA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 454 Fed. Appx. 147.

No. 11–10168. COX *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 465 Fed. Appx. 267.

No. 11–10176. CASTELLANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 11–10178. SLADE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 94.

No. 11–10182. LUCAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 486.

No. 11–10184. HERNANDEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 457 Fed. Appx. 129.

No. 11–10185. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 662 F. 3d 1018.

No. 11–10191. ESCOBEDO-BALERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 326.

No. 11–10193. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 471 Fed. Appx. 118.

No. 11–10196. ESTRADA MURILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 Fed. Appx. 272.

No. 11–10211. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 649 F. 3d 1248.

No. 11–168. HARRISON *v.* GILLESPIE. C. A. 9th Cir. Motion of Constitutional Accountability Center for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 640 F. 3d 888.

No. 11–591. SLOUGH ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Motion of respondent for leave to file brief in opposition under seal with redacted copies for the public record granted. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this motion and this petition. Reported below: 641 F. 3d 544.

No. 11–955. SIEGELMAN *v.* UNITED STATES; and

No. 11–972. SCRUSHY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions. Reported below: 640 F. 3d 1159.

No. 11–1309. RICHARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 659 F. 3d 527.

No. 11–10096. SPRINGER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 444 Fed. Appx. 256.

No. 11–10117. RIOS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10121. MERCADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10149. PARKER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 463 Fed. Appx. 205.

No. 11–10181. SCHOTZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 11–10188. WYATT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 11–981. SUTTON *v.* COLSON, WARDEN, *ante*, p. 938;

No. 11–8066. GIBSON *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, *ante*, p. 908;

No. 11–8068. WATKINS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, *ante*, p. 908;

No. 11–8481. GOLDBLATT *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, *ante*, p. 908;

No. 11–8580. ADAMS *v.* MCQUIGGIN, WARDEN, *ante*, p. 912;

No. 11–8596. ECTOR *v.* HOWERTON, WARDEN, *ante*, p. 925;

No. 11–8612. SHABAZZ *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, ET AL., *ante*, p. 925;

No. 11–8662. BACCHUS *v.* SOUTHEASTERN MECHANICAL SERVICES, INC., *ante*, p. 941;

No. 11–8719. HOWARD *v.* UNC HEALTHCARE SYSTEM ET AL., 565 U. S. 1271;

No. 11–8869. MONIZ *v.* MCKEE, WARDEN, *ante*, p. 913;

No. 11–8943. KEMPPAINEN *v.* TEXAS, *ante*, p. 965; and

No. 11–9093. WRIGHT *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL., *ante*, p. 949. Petitions for rehearing denied.

No. 11–8830. DIAZ-GUTIERREZ *v.* UNITED STATES, 565 U. S. 1276; and

No. 11–9086. STONE *v.* UNITED STATES, *ante*, p. 930. Petitions for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of these petitions.

No. 09–7736. BANKES *v.* PERRY COUNTY CHILDREN AND YOUTH SERVICES, 559 U. S. 910;

No. 09–8723. DRIESSEN *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL., 559 U. S. 1039; and

No. 10–612. ANDERSON ET AL. *v.* OBAMA, PRESIDENT OF THE UNITED STATES, 562 U. S. 1139. Motions for leave to file petitions for rehearing denied.

AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 23, 2012, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1046. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, 541 U. S. 1097, 544 U. S. 1163, 547 U. S. 1227, 550 U. S. 989, 553 U. S. 1105, 556 U. S. 1307, 559 U. S. 1127, and 563 U. S. 1051.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2012

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2012

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056.

[See *infra,* pp. 1049–1051.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2012, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 1007. Lists, schedules, statements, and other documents; time limits.

. . . . .

(*c*) *Time limits.*—In a voluntary case, the schedules, statements, and other documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the petition or within 14 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the schedules, statements, and other documents required by subdivision (b)(1) shall be filed by the debtor within 14 days after the entry of the order for relief.

. . . . .

Rule 2015. Duty to keep records, make reports, and give notice of case or change of status.

(*a*) *Trustee or debtor in possession.*—A trustee or debtor in possession shall:

. . . . .

(3) file the reports and summaries required by § 704(a)(8) of the Code, which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited;

. . . . .

Rule 3001. Proof of claim.

. . . . .

(*c*) *Supporting information.*

(*1*) *Claim based on a writing.*—Except for a claim governed by paragraph (3) of this subdivision, when a claim, or an interest in property of the debtor securing the claim, is based on a writing, a copy of the writing shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

. . . . .

(*3*) *Claim based on an open-end or revolving consumer credit agreement.*

(A) When a claim is based on an open-end or revolving consumer credit agreement—except one for which a security interest is claimed in the debtor's real property—a statement shall be filed with the proof of claim, including all of the following information that applies to the account:

(i) the name of the entity from whom the creditor purchased the account;

(ii) the name of the entity to whom the debt was owed at the time of an account holder's last transaction on the account;

(iii) the date of an account holder's last transaction;

(iv) the date of the last payment on the account; and

(v) the date on which the account was charged to profit and loss.

(B) On written request by a party in interest, the holder of a claim based on an open-end or revolving consumer credit agreement shall, within 30 days after the request is sent, provide the requesting party a copy of the writing specified in paragraph (1) of this subdivision.

. . . . .

Rule 7054. Judgments; costs.

. . . . .

(*b*) *Costs.*—The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent

permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

. . . . .

Rule 7056. Summary judgment.

Rule 56 F. R. Civ. P. applies in adversary proceedings, except that any motion for summary judgment must be made at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought, unless a different time is set by local rule or the court orders otherwise.

AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 23, 2012, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1054. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, 541 U. S. 1103, 544 U. S. 1181, 547 U. S. 1269, 550 U. S. 1165, 553 U. S. 1155, 556 U. S. 1363, 559 U. S. 1151, and 563 U. S. 1063.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 23, 2012

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code. The Supreme Court recommitted proposed amendments to Rules 5(d) and 58 of the Federal Rules of Criminal Procedure to the Advisory Committee for further consideration.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 23, 2012

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5 and 15, and new Rule 37.

[See *infra*, pp. 1057–1059.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2012, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial appearance.

. . . . .

(*c*) *Place of initial appearance; transfer to another district.*

. . . . .

(*4*) *Procedure for persons extradited to the United States.*—If the defendant is surrendered to the United States in accordance with a request for the defendant's extradition, the initial appearance must be in the district (or one of the districts) where the offense is charged.

. . . . .

Rule 15. Depositions.

. . . . .

(*c*) *Defendant's presence.*

(*1*) *Defendant in custody.*—Except as authorized by Rule 15(c)(3), the officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(*2*) *Defendant not in custody.*—Except as authorized by Rule 15(c)(3), a defendant who is not in custody has the right upon request to be present at the deposition, subject to any conditions imposed by the court. If the government tenders the defendant's expenses as provided in Rule 15(d) but the defendant still fails to appear, the defendant—absent good cause—waives both the right to appear

and any objection to the taking and use of the deposition based on that right.

(*3*) *Taking depositions outside the United States without the defendant's presence.*—The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

. . . . .

(*f*) *Admissibility and use as evidence.*—An order authorizing a deposition to be taken under this rule does not determine its admissibility. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

. . . . .

Rule 37. Indicative ruling on a motion for relief that is barred by a pending appeal.

(*a*) *Relief pending appeal.*—If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(*b*) *Notice to the court of appeals.*—The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

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