UNITED STATES

REPORTS

569

OCT. TERM 2012

AMENDMENTS OF RULES

UNITED STATES REPORTS

VOLUME 569

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2012

MARCH 26 THROUGH JUNE 13, 2013

CHRISTINE LUCHOK FALLON

REPORTER OF DECISIONS

WASHINGTON : 2018

Printed on Uncoated Permanent Printing Paper

For sale by the Superintendent of Documents, U. S. Government Publishing Office

Errata

562 U. S. 1304, line 5 from bottom: Delete "No. 10–622. S&M Brands, Inc., et al. *v.* Caldwell, Attorney General of Louisiana, *ante*, p. 1270;" and replace with "No. 10–662. Asworth, LLC, fka Asworth Corp., et al. *v.* Kentucky Department of Revenue, Finance and Administration Cabinet, fka Revenue Cabinet, *ante*, p. 1200;".

565 U. S. 520, line 6: "February 24" should be "February 21".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

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

Allotment of Justices

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

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

For the First Circuit, Stephen Breyer, Associate Justice.

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

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

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

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, Elena Kagan, Associate Justice.

For the Seventh Circuit, Elena Kagan, Associate Justice.

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

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

For the Tenth Circuit, Sonia Sotomayor, Associate Justice.

For the Eleventh Circuit, Clarence Thomas, Associate Justice.

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

September 28, 2010.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2012

FLORIDA *v.* JARDINES

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 11–564. Argued October 31, 2012—Decided March 26, 2013

Police took a drug-sniffing dog to Jardines' front porch, where the dog gave a positive alert for narcotics. Based on the alert, the officers obtained a warrant for a search, which revealed marijuana plants; Jardines was charged with trafficking in cannabis. The Supreme Court of Florida approved the trial court's decision to suppress the evidence, holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause.

Held: The investigation of Jardines' home was a "search" within the meaning of the Fourth Amendment. Pp. 5–12.

(a) When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States* v. *Jones*, 565 U. S. 400, 406–407, n. 3. Pp. 5–6.

(b) At the Fourth Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511. The area "immediately surrounding and associated with the home"—the curtilage—is "part of the home itself for Fourth Amendment purposes." *Oliver* v. *United States*, 466 U. S. 170, 180. The officers entered the curtilage here: The front porch is the classic exemplar of an area "to which the activity of home life extends." *Id.*, at 182, n. 12. Pp. 6–7.

Syllabus

(c) The officers' entry was not explicitly or implicitly invited. Officers need not "shield their eyes" when passing by a home "on public thoroughfares," *California* v. *Ciraolo*, 476 U. S. 207, 213, but "no man can set his foot upon his neighbour's close without his leave," *Entick* v. *Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817. A police officer not armed with a warrant may approach a home in hopes of speaking to its occupants, because that is "no more than any private citizen might do." *Kentucky* v. *King*, 563 U. S. 452, 469. But the scope of a license is limited not only to a particular area but also to a specific purpose, and there is no customary invitation to enter the curtilage simply to conduct a search. Pp. 7–10.

(d) It is unnecessary to decide whether the officers violated Jardines' expectation of privacy under *Katz* v. *United States*, 389 U. S. 347. Pp. 10–11.

73 So. 3d 34, affirmed.

SCALIA, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG and SOTOMAYOR, JJ., joined, *post*, p. 12. ALITO, J., filed a dissenting opinion, in which ROBERTS, C. J., and KENNEDY and BREYER, JJ., joined, *post*, p. 16.

Gregory G. Garre argued the cause for petitioner. On the briefs were *Pamela Jo Bondi*, Attorney General of Florida, *Carolyn M. Snurkowski*, Associate Deputy Attorney General, *Charmaine M. Millsaps*, Assistant Attorney General, and *Timothy D. Osterhaus*, Deputy Solicitor General.

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 Breuer*, *Deputy Solicitor General Dreeben*, and *William C. Brown*.

Howard K. Blumberg argued the cause for respondent. With him on the brief were *Maria E. Lauredo* and *Robert Kalter*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *Adam W. Aston*, Assistant Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Don Clemmer*, Deputy Attorney General, and *Jonathan F. Mitchell*, Solicitor General, and by the Attorneys General for their respective States as

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment.

I

In 2006, Detective William Pedraja of the Miami-Dade Police Department received an unverified tip that marijuana was being grown in the home of respondent Joelis Jardines. One month later, the department and the Drug Enforcement Administration sent a joint surveillance team to Jardines' home. Detective Pedraja was part of that team. He watched the home for 15 minutes and saw no vehicles in the driveway or activity around the home, and could not see inside because the blinds were drawn. Detective Pedraja then approached Jardines' home accompanied by Detective Douglas Bartelt, a trained canine handler who had just ar-

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follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *William J. Schneider* of Maine, *Bill Schuette* of Michigan, *Jon Bruning* of Nebraska, *Michael A. Delaney* of New Hampshire, *Gary K. King* of New Mexico, *John R. Kroger* of Oregon, *Linda L. Kelly* of Pennsylvania, *Peter F. Kilmartin* of Rhode Island, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, and *J. B. Van Hollen* of Wisconsin; for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman*; and for the National Police Canine Association et al. by *Arthur T. Daus III*.

Briefs of *amici curiae* urging affirmance were filed for Fourth Amendment Scholars by *Leslie A. Shoebotham*; and for the National Association of Criminal Defense Lawyers et al. by *Danielle Spinelli*, *Annie L. Owens*, *Jonathan D. Hacker*, *Norman L. Reimer*, and *Mason C. Clutter*.

Briefs of *amici curiae* were filed for the Cato Institute by *James W. Harper* and *Ilya Shapiro*; and for The Rutherford Institute by *John W. Whitehead*, *Rita Dunaway*, and *Charles I. Lugosi*.

rived at the scene with his drug-sniffing dog. The dog was trained to detect the scent of marijuana, cocaine, heroin, and several other drugs, indicating the presence of any of these substances through particular behavioral changes recognizable by his handler.

Detective Bartelt had the dog on a 6-foot leash, owing in part to the dog's "wild" nature, App. to Pet. for Cert. A–35, and tendency to dart around erratically while searching. As the dog approached Jardines' front porch, he apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor. As Detective Bartelt explained, the dog "began tracking that airborne odor by . . . tracking back and forth," engaging in what is called "bracketing," "back and forth, back and forth." *Id.*, at A–33 to A–34. Detective Bartelt gave the dog "the full six feet of the leash plus whatever safe distance [he could] give him" to do this—he testified that he needed to give the dog "as much distance as I can." *Id.*, at A–35. And Detective Pedraja stood back while this was occurring, so that he would not "get knocked over" when the dog was "spinning around trying to find" the source. *Id.*, at A–38.

After sniffing the base of the front door, the dog sat, which is the trained behavior upon discovering the odor's strongest point. Detective Bartelt then pulled the dog away from the door and returned to his vehicle. He left the scene after informing Detective Pedraja that there had been a positive alert for narcotics.

On the basis of what he had learned at the home, Detective Pedraja applied for and received a warrant to search the residence. When the warrant was executed later that day, Jardines attempted to flee and was arrested; the search revealed marijuana plants, and he was charged with trafficking in cannabis.

At trial, Jardines moved to suppress the marijuana plants on the ground that the canine investigation was an unreason-

able search. The trial court granted the motion, and the Florida Third District Court of Appeal reversed. On a petition for discretionary review, the Florida Supreme Court quashed the decision of the Third District Court of Appeal and approved the trial court's decision to suppress, holding (as relevant here) that the use of the trained narcotics dog to investigate Jardines' home was a Fourth Amendment search unsupported by probable cause, rendering invalid the warrant based upon information gathered in that search. 73 So. 3d 34 (2011).

We granted certiorari, limited to the question whether the officers' behavior was a search within the meaning of the Fourth Amendment. 565 U. S. 1104 (2012).

II

The Fourth Amendment provides in relevant part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When "the Government obtains information by physically intruding" on persons, houses, papers, or effects, "a 'search' within the original meaning of the Fourth Amendment" has "undoubtedly occurred." *United States* v. *Jones*, 565 U. S. 400, 406–407, n. 3 (2012). By reason of our decision in *Katz* v. *United States*, 389 U. S. 347 (1967), property rights "are not the sole measure of Fourth Amendment violations," *Soldal* v. *Cook County*, 506 U. S. 56, 64 (1992)—but though *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections "when the Government *does* engage in [a] physical intrusion of a constitutionally protected area," *United States* v. *Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in judgment).

That principle renders this case a straightforward one. The officers were gathering information in an area belonging

to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

A

The Fourth Amendment "indicates with some precision the places and things encompassed by its protections": persons, houses, papers, and effects. *Oliver* v. *United States*, 466 U. S. 170, 176 (1984). The Fourth Amendment does not, therefore, prevent all investigations conducted on private property; for example, an officer may (subject to *Katz*) gather information in what we have called "open fields"—even if those fields are privately owned—because such fields are not enumerated in the Amendment's text. *Hester* v. *United States*, 265 U. S. 57 (1924).

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman* v. *United States*, 365 U. S. 505, 511 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "immediately surrounding and associated with the home"—what our cases call the curtilage—as "part of the home itself for Fourth Amendment purposes." *Oliver*, *supra*, at 180. That principle has ancient and durable roots. Just as the distinction between the home and the open fields is "as old as the common law," *Hester*, *supra*, at 59, so too is the identity of home and what Blackstone called the "curtilage or homestall," for the "house

protects and privileges all its branches and appurtenants," 4 W. Blackstone, Commentaries on the Laws of England 223, 225 (1769). This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986).

While the boundaries of the curtilage are generally "clearly marked," the "conception defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Oliver*, 466 U. S., at 182, n. 12. Here there is no doubt that the officers entered it: The front porch is the classic exemplar of an area adjacent to the home and "to which the activity of home life extends." *Ibid.*

B

Since the officers' investigation took place in a constitutionally protected area, we turn to the question whether it was accomplished through an unlicensed physical intrusion.[1] While law enforcement officers need not "shield their eyes" when passing by the home "on public thoroughfares," *Ciraolo*, 476 U. S., at 213, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas. In permitting, for example, visual observation of the home from "public navigable airspace," we were careful to note that it was done "in a physically nonintrusive manner." *Ibid.* *Entick* v. *Carrington*, 2 Wils. K. B. 275, 95 Eng. Rep. 807 (K. B. 1765), a case "undoubtedly familiar" to "every American statesman" at the time of the founding, *Boyd* v. *United States*, 116 U. S. 616, 626 (1886), states the general

[1] At oral argument, the State and its *amicus* the Solicitor General argued that Jardines conceded in the lower courts that the officers had a right to be where they were. This misstates the record. Jardines conceded nothing more than the unsurprising proposition that the officers could have lawfully approached his home to knock on the front door in hopes of speaking with him. Of course, that is not what they did.

rule clearly: "[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave." 2 Wils. K. B., at 291, 95 Eng. Rep., at 817. As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only question is whether he had given his leave (even implicitly) for them to do so. He had not.

"A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee* v. *Gratz*, 260 U. S. 127, 136 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard* v. *Alexandria*, 341 U. S. 622, 626 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters.[2] Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." *Kentucky* v. *King*, 563 U. S. 452, 469 (2011).

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[2] With this much, the dissent seems to agree—it would inquire into "'the appearance of things,'" *post*, at 19 (opinion of ALITO, J.), what is "typica[l]" for a visitor, what might cause "alarm" to a "resident of the premises," *post*, at 19–20, what is "expected" of "ordinary visitors," *post*, at 20 (internal quotation marks omitted), and what would be expected from a "'reasonably respectful citizen,'" *post*, at 22. These are good questions. But their answers are incompatible with the dissent's outcome, which is presumably why the dissent does not even try to argue that it would be customary, usual, reasonable, respectful, ordinary, typical, non-alarming, etc., for a stranger to explore the curtilage of the home with trained drug dogs.

But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker.[3] To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.[4]

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[3] The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. *Post*, at 23. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "'a cause for great alarm'" (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule, *post*, at 20) to find a stranger snooping about his front porch *with or without* a dog. The dissent would let the police do whatever they want by way of gathering evidence so long as they stay on the base-path, to use a baseball analogy—so long as they "stick to the path that is typically used to approach a front door, such as a paved walkway." *Post*, at 19. From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes. See Tr. of Oral Arg. 6.

[4] The dissent argues, citing *King*, that "gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach." *Post*, at 21. That is a false generalization. What *King* establishes is that it is not a Fourth Amendment search to approach the home in order to speak with the occupant, *because all are invited to do that*. The mere "purpose of discovering information," *post*, at 22, in the course of engaging in that permitted conduct does not cause it to violate the Fourth Amendment. But no one is impliedly invited to enter the protected premises of the home in order to do nothing but conduct a search.

The State points to our decisions holding that the subjective intent of the officer is irrelevant. See *Ashcroft* v. *al-Kidd*, 563 U. S. 731 (2011); *Whren* v. *United States*, 517 U. S. 806 (1996). But those cases merely hold that a stop or search *that is objectively reasonable* is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. See *id.*, at 810, 813. Here, however, the question before the Court is precisely *whether* the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

III

The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in *United States* v. *Place*, 462 U. S. 696 (1983), *United States* v. *Jacobsen*, 466 U. S. 109 (1984), and *Illinois* v. *Caballes*, 543 U. S. 405 (2005), which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in *Katz*.

Just last Term, we considered an argument much like this. *Jones* held that tracking an automobile's whereabouts using a physically mounted Global-Positioning-System (GPS) receiver is a Fourth Amendment search. The Government argued that the *Katz* standard "show[ed] that no search occurred," as the defendant had "no 'reasonable expectation of privacy'" in his whereabouts on the public roads, *Jones*, 565

U. S., at 406—a proposition with at least as much support in our case law as the one the State marshals here. See, *e. g.*, *Knotts*, 460 U. S., at 278. But because the GPS receiver had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking the vehicle's movements was a search: A person's "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones*, *supra,* at 406. The *Katz* reasonable-expectations test "has been *added to*, not *substituted for*," the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. *Jones*, *supra*, at 409.

Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.

For a related reason we find irrelevant the State's argument (echoed by the dissent) that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in *Kyllo* v. *United States*, 533 U. S. 27 (2001), that surveillance of the home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable *without physical intrusion*." *Id.*, at 40 (emphasis added). But the implication of that statement (*inclusio unius est exclusio alterius*) is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.

* * *

The government's use of trained police dogs to investigate the home and its immediate surroundings is a "search"

within the meaning of the Fourth Amendment. The judgment of the Supreme Court of Florida is therefore affirmed.

It is so ordered.

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

For me, a simple analogy clinches this case—and does so on privacy as well as property grounds. A stranger comes to the front door of your home carrying super-high-powered binoculars. See *ante*, at 9, n. 3. He doesn't knock or say hello. Instead, he stands on the porch and uses the binoculars to peer through your windows, into your home's furthest corners. It doesn't take long (the binoculars are really very fine): In just a couple of minutes, his uncommon behavior allows him to learn details of your life you disclose to no one. Has your "visitor" trespassed on your property, exceeding the license you have granted to members of the public to, say, drop off the mail or distribute campaign flyers? Yes, he has. And has he also invaded your "reasonable expectation of privacy," by nosing into intimacies you sensibly thought protected from disclosure? *Katz* v. *United States*, 389 U. S. 347, 360 (1967) (Harlan, J., concurring). Yes, of course, he has done that too.

That case is this case in every way that matters. Here, police officers came to Joelis Jardines' door with a super-sensitive instrument, which they deployed to detect things inside that they could not perceive unassisted. The equipment they used was animal, not mineral. But contra the dissent, see *post*, at 16 (opinion of ALITO, J.) (noting the ubiquity of dogs in American households), that is of no significance in determining whether a search occurred. Detective Bartelt's dog was not your neighbor's pet, come to your porch on a leisurely stroll. As this Court discussed earlier this Term, drug-detection dogs are highly trained tools of law enforcement, geared to respond in distinctive ways to specific scents so as to convey clear and reliable information

to their human partners. See *Florida* v. *Harris*, 568 U. S. 237, 241, 246–247 (2013). They are to the poodle down the street as high-powered binoculars are to a piece of plain glass. Like the binoculars, a drug-detection dog is a specialized device for discovering objects not in plain view (or plain smell). And as in the hypothetical above, that device was aimed here at a home—the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects. Was this activity a trespass? Yes, as the Court holds today. Was it also an invasion of privacy? Yes, that as well.

The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like this one. It would have talked about "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Ante*, at 6 (quoting *Silverman* v. *United States*, 365 U. S. 505, 511 (1961)). It would have insisted on maintaining the "practical value" of that right by preventing police officers from standing in an adjacent space and "trawl[ing] for evidence with impunity." *Ante*, at 6. It would have explained that "'privacy expectations are most heightened'" in the home and the surrounding area. *Ante*, at 7 (quoting *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986)). And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there. See *ante*, at 8–9, and nn. 2–3.

It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align. The law of property "naturally enough influence[s]" our "shared social expectations" of what places should be free from governmental incursions. *Georgia* v. *Randolph*, 547 U. S. 103, 111 (2006); see *Rakas* v. *Illinois*, 439 U. S. 128,

143, n. 12 (1978). And so the sentiment "my home is my own," while originating in property law, now also denotes a common understanding—extending even beyond that law's formal protections—about an especially private sphere. Jardines' home was his property; it was also his most intimate and familiar space. The analysis proceeding from each of those facts, as today's decision reveals, runs mostly along the same path.

I can think of only one divergence: If we had decided this case on privacy grounds, we would have realized that *Kyllo* v. *United States*, 533 U. S. 27 (2001), already resolved it.[1] The *Kyllo* Court held that police officers conducted a search when they used a thermal-imaging device to detect heat emanating from a private home, even though they committed no trespass. Highlighting our intention to draw both a "firm" and a "bright" line at "the entrance to the house," *id.*, at 40, we announced the following rule:

> "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Ibid.*

That "firm" and "bright" rule governs this case: The police officers here conducted a search because they used a "device . . . not in general public use" (a trained drug-detection dog) to "explore details of the home" (the presence of certain sub-

[1] The dissent claims, alternatively, that *Illinois* v. *Caballes*, 543 U. S. 405, 409–410 (2005), controls this case (or nearly does). See *post*, at 24, 25. But *Caballes* concerned a drug-detection dog's sniff of an automobile during a traffic stop. See also *Florida* v. *Harris*, 568 U. S. 237 (2013). And we have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes. See, *e. g.*, *Arizona* v. *Gant*, 556 U. S. 332, 345 (2009); *Wyoming* v. *Houghton*, 526 U. S. 295, 303 (1999); *New York* v. *Class*, 475 U. S. 106, 115 (1986); *Cardwell* v. *Lewis*, 417 U. S. 583, 590–591 (1974) (plurality opinion).

stances) that they would not otherwise have discovered without entering the premises.

And again, the dissent's argument that the device is just a dog cannot change the equation. As *Kyllo* made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new (drug-detection dogs actually go back not "12,000 years" or "centuries," *post*, at 16–17, 23, 25, but only a few decades), may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that *exists*, and that is acknowledged to be *reasonable*." 533 U. S., at 34, 36.[2] That does not mean the device is off-limits, as the dissent implies, see *post*, at 26; it just means police officers cannot use it to examine a home without a warrant or exigent circumstance. See *Brigham City* v. *Stuart*, 547 U. S. 398, 403–404 (2006) (describing exigencies allowing the warrantless search of a home).

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[2] The dissent's other principal reason for concluding that no violation of privacy occurred in this case—that police officers themselves might detect an aroma wafting from a house—works no better. If officers can smell drugs coming from a house, they can use that information; a human sniff is not a search, we can all agree. But it does not follow that a person loses his expectation of privacy in the many scents within his home that (his own nose capably tells him) are not usually detectible by humans standing outside. And indeed, *Kyllo* already decided as much. In response to an identical argument from the dissent in that case, see 533 U. S., at 43 (Stevens, J., dissenting) (noting that humans can sometimes detect "heat emanating from a building"), the *Kyllo* Court stated: "The dissent's comparison of the thermal imaging to various circumstances in which outside observers might be able to perceive, without technology, the heat of the home . . . is quite irrelevant. The fact that equivalent information could sometimes be obtained by other means does not make lawful the use of means that violate the Fourth Amendment. . . . In any event, [at the time in question,] no outside observer could have discerned the relative heat of Kyllo's home without thermal imaging." *Id.*, at 35, n. 2.

With these further thoughts, suggesting that a focus on Jardines' privacy interests would make an "easy cas[e] easy" twice over, *ante*, at 11, I join the Court's opinion in full.

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

The Court's decision in this important Fourth Amendment case is based on a putative rule of trespass law that is nowhere to be found in the annals of Anglo-American jurisprudence.

The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time. This license is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without intending to converse.) Nor is the license restricted to categories of visitors whom an occupant of the dwelling is likely to welcome; as the Court acknowledges, this license applies even to "solicitors, hawkers and peddlers of all kinds." *Ante*, at 8 (internal quotation marks omitted). And the license even extends to police officers who wish to gather evidence against an occupant (by asking potentially incriminating questions).

According to the Court, however, the police officer in this case, Detective Bartelt, committed a trespass because he was accompanied during his otherwise lawful visit to the front door of respondent's house by his dog, Franky. Where is the authority evidencing such a rule? Dogs have been domesticated for about 12,000 years;[1] they were ubiquitous in both this country and Britain at the time of the adoption of the Fourth Amendment;[2] and their acute sense of smell has

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[1] See, *e. g.*, Sloane, Dogs in War, Police Work and on Patrol, 46 J. Crim. L., C. & P. S. 385 (1955–1956) (hereinafter Sloane).

[2] M. Derr, A Dog's History of America 68–92 (2004); K. Olsen, Daily Life in 18th-Century England 32–33 (1999).

been used in law enforcement for centuries.[3] Yet the Court has been unable to find a single case—from the United States or any other common-law nation—that supports the rule on which its decision is based. Thus, trespass law provides no support for the Court's holding today.

The Court's decision is also inconsistent with the reasonable-expectations-of-privacy test that the Court adopted in *Katz* v. *United States*, 389 U. S. 347 (1967). A reasonable person understands that odors emanating from a house may be detected from locations that are open to the public, and a reasonable person will not count on the strength of those odors remaining within the range that, while detectible by a dog, cannot be smelled by a human.

For these reasons, I would hold that no search within the meaning of the Fourth Amendment took place in this case, and I would reverse the decision below.

I

The opinion of the Court may leave a reader with the mistaken impression that Detective Bartelt and Franky remained on respondent's property for a prolonged period of time and conducted a farflung exploration of the front yard. See *ante*, at 6 ("trawl for evidence with impunity"), 9 ("marching his bloodhound into the garden"). But that is not what happened.

Detective Bartelt and Franky approached the front door via the driveway and a paved path—the route that any visitor would customarily use[4]—and Franky was on the kind of leash that any dog owner might employ.[5] As Franky ap-

[3] Sloane 388–389.

[4] See App. 94; App. to Brief for Respondent 1A (depiction of respondent's home).

[5] The Court notes that Franky was on a 6-foot leash, but such a leash is standard equipment for ordinary dog owners. See, *e. g.*, J. Stregowski, Four Dog Leash Varieties, http://dogs.about.com/od/toyssupplies/tp/Dog-Leashes.htm (all Internet materials as visited Mar. 21, 2013, and available in Clerk of Court's case file).

proached the door, he started to track an airborne odor. He held his head high and began "bracketing" the area (pacing back and forth) in order to determine the strongest source of the smell. App. 95–96. Detective Bartelt knew "the minute [he] observed" this behavior that Franky had detected drugs. *Id.*, at 95. Upon locating the odor's strongest source, Franky sat at the base of the front door, and at this point, Detective Bartelt and Franky immediately returned to their patrol car. *Id.*, at 98.

A critical fact that the Court omits is that, as respondent's counsel explained at oral argument, this entire process—walking down the driveway and front path to the front door, waiting for Franky to find the strongest source of the odor, and walking back to the car—took approximately a minute or two. Tr. of Oral Arg. 57–58. Thus, the amount of time that Franky and the detective remained at the front porch was even less. The Court also fails to mention that, while Detective Bartelt apparently did not personally smell the odor of marijuana coming from the house, another officer who subsequently stood on the front porch, Detective Pedraja, did notice that smell and was able to identify it. App. 81.

II

The Court concludes that the conduct in this case was a search because Detective Bartelt exceeded the boundaries of the license to approach the house that is recognized by the law of trespass, but the Court's interpretation of the scope of that license is unfounded.

A

It is said that members of the public may lawfully proceed along a walkway leading to the front door of a house because custom grants them a license to do so. *Breard* v. *Alexandria*, 341 U. S. 622, 626 (1951); *Lakin* v. *Ames*, 64 Mass. 198, 220 (1852); J. Bishop, Commentaries on the Non-Contract Law § 823, p. 378 (1889). This rule encompasses categories

of visitors whom most homeowners almost certainly wish to allow to approach their front doors—friends, relatives, mail carriers, persons making deliveries. But it also reaches categories of visitors who are less universally welcome—"solicitors," "hawkers," "peddlers," and the like. The law might attempt to draw fine lines between categories of welcome and unwelcome visitors, distinguishing, for example, between tolerable and intolerable door-to-door peddlers (Girl Scouts selling cookies versus adults selling aluminum siding) or between police officers on agreeable and disagreeable missions (gathering information about a bothersome neighbor versus asking potentially incriminating questions). But the law of trespass has not attempted such a difficult taxonomy. See *Desnick* v. *American Broadcasting Cos.*, 44 F. 3d 1345, 1351 (CA7 1995) ("[C]onsent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent"); cf. *Skinner* v. *Ogallala Pub. School Dist.*, 262 Neb. 387, 402, 631 N. W. 2d 510, 525 (2001) ("[I]n order to determine if a business invitation is implied, the inquiry is not a subjective assessment of why the visitor chose to visit the premises in a particular instance"); *Crown Cork & Seal Co.* v. *Kane*, 213 Md. 152, 159, 131 A. 2d 470, 473–474 (1957) (noting that "there are many cases in which an invitation has been implied from circumstances, such as custom," and that this test is "objective in that it stresses custom and the appearance of things" as opposed to "the undisclosed intention of the visitor").

Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot traipse through the garden, meander into the backyard, or take other circuitous detours that veer from the pathway that a visitor would customarily use. See, *e. g.*, *Robinson* v. *Virginia*, 47 Va. App. 533, 549–550, 625 S. E. 2d

651, 659 (2006) (en banc); *United States* v. *Wells*, 648 F. 3d 671, 679–680 (CA8 2011) (police exceeded scope of their implied invitation when they bypassed the front door and proceeded directly to the backyard); *State* v. *Harris*, 919 S. W. 2d 619, 624 (Tenn. Crim. App. 1995) ("Any substantial and unreasonable departure from an area where the public is impliedly invited exceeds the scope of the implied invitation . . . " (internal quotation marks and brackets omitted)); 1 W. LaFave, Search and Seizure § 2.3(c), p. 578 (2004) (hereinafter LaFave); *id.*, § 2.3(f), at 600–603 ("[W]hen the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e. g., walkways, driveways, porches), observations made from such vantage points are not covered by the Fourth Amendment" (footnotes omitted)).

Nor, as a general matter, may a visitor come to the front door in the middle of the night without an express invitation. See *State* v. *Cada*, 129 Idaho 224, 233, 923 P. 2d 469, 478 (App. 1996) ("Furtive intrusion late at night or in the predawn hours is not conduct that is expected from ordinary visitors. Indeed, if observed by a resident of the premises, it could be a cause for great alarm").

Similarly, a visitor may not linger at the front door for an extended period. See 9 So. 3d 1, 11 (Fla. App. 2008) (case below) (Cope, J., concurring in part and dissenting in part) ("[T]here is no such thing as squatter's rights on a front porch. A stranger may not plop down uninvited to spend the afternoon in the front porch rocking chair, or throw down a sleeping bag to spend the night, or lurk on the front porch, looking in the windows"). The license is limited to the amount of time it would customarily take to approach the door, pause long enough to see if someone is home, and (if not expressly invited to stay longer) leave.

As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is

not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.

As the majority acknowledges, this implied license to approach the front door extends to the police. See *ante*, at 8. As we recognized in *Kentucky* v. *King*, 563 U. S. 452 (2011), police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," *i. e.*, knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. See *id.*, at 469 ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). See also 1 LaFave § 2.3(e), at 592 ("It is not objectionable for an officer to come upon that part of the property which has been opened to public common use" (internal quotation marks omitted)). Even when the objective of a "knock and talk" is to obtain evidence that will lead to the homeowner's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point. *California* v. *Ciraolo*, 476 U. S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"); *Cada*, *supra*, at 232, 923

P. 2d, at 477 ("[P]olice officers restricting their activity to [areas to which the public is impliedly invited] are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen" (internal quotation marks omitted)); 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577.

B

Detective Bartelt did not exceed the scope of the license to approach respondent's front door. He adhered to the customary path; he did not approach in the middle of the night; and he remained at the front door for only a very short period (less than a minute or two).

The Court concludes that Detective Bartelt went too far because he had the "*objectiv[e] . . . purpose* to conduct a search." *Ante*, at 10 (emphasis added). What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.

The Court contends that a "knock and talk" is different because it involves talking, and "all are invited" to do that. *Ante*, at 9, n. 4 (emphasis deleted). But a police officer who approaches the front door of a house in accordance with the limitations already discussed may gather evidence by means other than talking. The officer may observe items in plain view and smell odors coming from the house. *Ciraolo*, *supra*, at 213; *Cada*, *supra*, at 232, 923 P. 2d, at 477; 1 LaFave §§ 2.2(a), 2.3(c), at 450–452, 572–577. So the Court's "objective purpose" argument cannot stand.

What the Court must fall back on, then, is the particular instrument that Detective Bartelt used to detect the odor of marijuana, namely, his dog. But in the entire body of common-law decisions, the Court has not found a single case holding that a visitor to the front door of a home commits a trespass if the visitor is accompanied by a dog on a leash. On the contrary, the common law allowed even unleashed dogs to wander on private property without committing a trespass. G. Williams, Liability for Animals 136–146 (1939); J. Ingham, A Treatise on Property in Animals Wild and Domestic and the Rights and Responsibilities Arising Therefrom 277–278 (1900). Cf. B. Markesinis & S. Deakin, Tort Law 511 (4th ed. 1999).

The Court responds that "[i]t is not the dog that is the problem, but the behavior that here involved use of the dog." *Ante,* at 9, n. 3. But where is the support in the law of trespass for *this* proposition? Dogs' keen sense of smell has been used in law enforcement for centuries. The antiquity of this practice is evidenced by a Scottish law from 1318 that made it a crime to "disturb a tracking dog or the men coming with it for pursuing thieves or seizing malefactors." K. Brown et al., Records of the Parliaments of Scotland to 1707 (St Andrews, 2007–2013), online at http://www.rps.ac.uk/mss/1318/9. If bringing a tracking dog to the front door of a home constituted a trespass, one would expect at least one case to have arisen during the past 700 years. But the Court has found none.

For these reasons, the real law of trespass provides no support for the Court's holding today. While the Court claims that its reasoning has "ancient and durable roots," *ante,* at 6, its trespass rule is really a newly struck counterfeit.

III

The concurring opinion attempts to provide an alternative ground for today's decision, namely, that Detective Bartelt's conduct violated respondent's reasonable expectations of pri-

vacy. But we have already rejected a very similar, if not identical, argument, see *Illinois* v. *Caballes*, 543 U. S. 405, 409–410 (2005), and in any event I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand.

It is clear that the occupant of a house has no reasonable expectation of privacy with respect to odors that can be smelled by human beings who are standing in such places. See *United States* v. *Johns*, 469 U. S. 478, 482 (1985) ("After the officers came closer and detected the distinct odor of marihuana, they had probable cause to believe that the vehicles contained contraband"); *United States* v. *Ventresca*, 380 U. S. 102, 111 (1965) (scent of fermenting mash supported probable cause for warrant); *United States* v. *Johnston*, 497 F. 2d 397, 398 (CA9 1974) (there is no "reasonable expectation of privacy from drug agents with inquisitive nostrils"). And I would not draw a line between odors that can be smelled by humans and those that are detectible only by dogs.

Consider the situation from the point of view of the occupant of a building in which marijuana is grown or methamphetamine is manufactured. Would such an occupant reason as follows? "I know that odors may emanate from my building and that atmospheric conditions, such as the force and direction of the wind, may affect the strength of those odors when they reach a spot where members of the public may lawfully stand. I also know that some people have a much more acute sense of smell than others,[6] and I have no idea who might be standing in one of the spots in question when

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[6] Some humans naturally have a much more acute sense of smell than others, and humans can be trained to detect and distinguish odors that could not be detected without such training. See E. Hancock, A Primer on Smell, http://www.jhu.edu/jhumag/996web/smell.html. Some individuals employed in the perfume and wine industries, for example, have an amazingly acute sense of smell. *Ibid.*

the odors from my house reach that location. In addition, I know that odors coming from my building, when they reach these locations, may be strong enough to be detected by a dog. But I am confident that they will be so faint that they cannot be smelled by any human being." Such a finely tuned expectation would be entirely unrealistic, and I see no evidence that society is prepared to recognize it as reasonable.

In an attempt to show that respondent had a reasonable expectation of privacy in the odor of marijuana wafting from his house, the concurrence argues that this case is just like *Kyllo* v. *United States*, 533 U. S. 27 (2001), which held that police officers conducted a search when they used a thermal imaging device to detect heat emanating from a house. *Ante*, at 14–15 (opinion of KAGAN, J.). This Court, however, has already rejected the argument that the use of a drug-sniffing dog is the same as the use of a thermal imaging device. See *Caballes*, 543 U. S., at 409–410. The very argument now advanced by the concurrence appears in Justice Souter's *Caballes* dissent. See *id.*, at 413, and n. 3. But the Court was not persuaded.

Contrary to the interpretation propounded by the concurrence, *Kyllo* is best understood as a decision about the use of new technology. The *Kyllo* Court focused on the fact that the thermal imaging device was a form of "sense-enhancing technology" that was "not in general public use," and it expressed concern that citizens would be "at the mercy of advancing technology" if its use was not restricted. 533 U. S., at 34–35. A dog, however, is not a new form of "technology" or a "device." And, as noted, the use of dogs' acute sense of smell in law enforcement dates back many centuries.

The concurrence suggests that a *Kyllo*-based decision would be "much like" the actual decision of the Court, but that is simply not so. *Ante*, at 13. The holding of the Court is based on what the Court sees as a "'physical intrusion of a constitutionally protected area.'" *Ante*, at 5 (quoting

United States v. *Knotts*, 460 U. S. 276, 286 (1983) (Brennan, J., concurring in judgment)). As a result, it does not apply when a dog alerts while on a public sidewalk or street or in the corridor of a building to which the dog and handler have been lawfully admitted.

The concurrence's *Kyllo*-based approach would have a much wider reach. When the police used the thermal imaging device in *Kyllo*, they were on a public street, 533 U. S., at 29, and "committed no trespass," *ante*, at 14. Therefore, if a dog's nose is just like a thermal imaging device for Fourth Amendment purposes, a search would occur if a dog alerted while on a public sidewalk or in the corridor of an apartment building. And the same would be true if the dog was trained to sniff, not for marijuana, but for more dangerous quarry, such as explosives or for a violent fugitive or kidnaped child. I see no ground for hampering legitimate law enforcement in this way.

IV

The conduct of the police officer in this case did not constitute a trespass and did not violate respondent's reasonable expectations of privacy. I would hold that this conduct was not a search, and I therefore respectfully dissent.

Syllabus

COMCAST CORP. ET AL. *v.* BEHREND ET AL.

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

No. 11–864. Argued November 5, 2012—Decided March 27, 2013

Petitioners, Comcast Corporation and its subsidiaries, allegedly "cluster" their cable-television operations within a particular region by swapping their systems outside the region for competitor systems inside the region. Respondents, named plaintiffs in this class-action antitrust suit, claim that they and other Comcast subscribers in the Philadelphia "cluster" are harmed because Comcast's strategy lessens competition and leads to supracompetitive prices. They sought class certification under Federal Rule of Civil Procedure 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court required them to show (1) that the "antitrust impact" of the violation could be proved at trial through evidence common to the class and (2) that the damages were measurable on a classwide basis through a "common methodology." The court accepted only one of respondents' four proposed theories of antitrust impact: that Comcast's actions lessened competition from "overbuilders," *i. e.*, companies that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. In affirming, the Third Circuit refused to consider petitioners' argument that the model failed to attribute damages to overbuilder deterrence because doing so would require reaching the merits of respondents' claims at the class-certification stage.

Held: Respondents' class action was improperly certified under Rule 23(b)(3). Pp. 33–38.

(a) A party seeking to maintain a class action must be prepared to show that Rule 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350, and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions. The same analytical principles govern certification under both Rule 23(a) and Rule 23(b). Courts may have to "'probe behind the pleadings before coming to rest on the certification question,' and [a] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prereq-

uisites . . . have been satisfied.'" *Ibid.* The analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Ibid.* Pp. 33–34.

(b) The Third Circuit ran afoul of this Court's precedents when it refused to entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination. If they prevail, respondents would be entitled only to damages resulting from reduced overbuilder competition. A model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. The lower courts' contrary reasoning flatly contradicts this Court's cases, which require a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart*, *supra,* at 350–351, and n. 6. Pp. 34–36.

(c) Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide. The figure respondents' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by respondents. Because the model cannot bridge the differences between supracompetitive prices in general and supracompetitive prices attributable to overbuilder deterrence, Rule 23(b)(3) cannot authorize treating subscribers in the Philadelphia cluster as members of a single class. Pp. 36–38.

655 F. 3d 182, reversed.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. GINSBURG and BREYER, JJ., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined, *post*, p. 38.

Miguel A. Estrada argued the cause for petitioners. With him on the briefs were *Mark A. Perry*, *Scott P. Martin*, *Sheron Korpus*, and *Darryl J. May.*

Barry Barnett argued the cause for respondents. With him on the brief were *Daniel H. Charest* and *Joseph Goldberg.**

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*Briefs of *amici curiae* urging reversal were filed for the Cato Institute by *David B. Rivkin, Jr., Thomas D. Warren, Deborah H. Renner, John B. Lewis,* and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America et al. by *Kannon K. Shanmugam, John S. Williams,*

JUSTICE SCALIA delivered the opinion of the Court.

The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages for alleged violations of the federal antitrust laws. We consider whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).

I

Comcast Corporation and its subsidiaries, petitioners here, provide cable-television services to residential and commercial customers. From 1998 to 2007, petitioners engaged in a series of transactions that the parties have described as "clustering," a strategy of concentrating operations within a particular region. The region at issue here, which the parties have referred to as the Philadelphia "cluster" or the Philadelphia "Designated Market Area" (DMA), includes 16 counties located in Pennsylvania, Delaware, and New Jersey.[1] Petitioners pursued their clustering strategy by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region. For instance, in 2001, petitioners

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Robin S. Conrad, *Kathryn Comerford Todd*, *Sheldon Gilbert*, and *Kevin Carroll*; for DRI–The Voice of the Defense Bar by *Henry M. Sneath*, *Carter G. Phillips*, *Jonathan F. Cohn*, and *Matthew D. Krueger*; for the Equal Employment Advisory Council by *Rae T. Vann*; for Intel Corp. by *David J. Burman*, *Joel W. Nomkin*, *A. Douglas Melamed*, and *Darren B. Bernhard*; for the Retail Litigation Center, Inc., by *Mark T. Stancil* and *Deborah R. White*; and for the Washington Legal Foundation et al. by *Cory L. Andrews*.

Briefs of *amici curiae* urging affirmance were filed for the American Antitrust Institute et al. by *Albert A. Foer*; and for the American Association for Justice et al. by *John Vail*, *F. Paul Bland, Jr.*, *Arthur H. Bryant*, *Julie Nepveu*, *Michael Schuster*, and *Mary Alice McLarty*.

Patricia A. Millett, *Ruthanne M. Deutsch*, *Michael C. Small*, and *Hyland Hunt* filed a brief for Economists as *amici curiae*.

[1] A "Designated Market Area" is a term used by Nielsen Media Research to define a broadcast-television market. Strictly speaking, the Philadelphia DMA comprises 18 counties, not 16.

obtained Adelphia Communications' cable systems in the Philadelphia DMA, along with its 464,000 subscribers; in exchange, petitioners sold to Adelphia their systems in Palm Beach, Florida, and Los Angeles, California. As a result of nine clustering transactions, petitioners' share of subscribers in the region allegedly increased from 23.9 percent in 1998 to 69.5 percent in 2007. See 264 F. R. D. 150, 156, n. 8, 160 (ED Pa. 2010).

The named plaintiffs, respondents here, are subscribers to Comcast's cable-television services. They filed a class-action antitrust suit against petitioners, claiming that petitioners entered into unlawful swap agreements, in violation of § 1 of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of § 2. Ch. 647, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2. Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.

Respondents sought to certify a class under Federal Rule of Civil Procedure 23(b)(3). That provision permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court held, and it is uncontested here, that to meet the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as "antitrust impact") was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology." 264 F. R. D., at 154.[2]

[2] Respondents sought certification for the following class: "All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely

Respondents proposed four theories of antitrust impact: First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," companies that build competing cable networks in areas where an incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.

The District Court accepted the overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest. *Id.*, at 165, 174, 178, 181. Accordingly, in its certification order, the District Court limited respondents' "[p]roof of antitrust impact" to "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. to Pet. for Cert. 192a–193a.[3]

The District Court further found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis. To establish such damages, respondents had relied solely on the testimony of Dr. James Mc-

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to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 35a.

[3] The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs. The other theories of liability may well be available for the plaintiffs to pursue as individual actions. Any contention that the plaintiffs should be allowed to recover damages attributable to all four theories in this class action would erroneously suggest one of two things—either that the plaintiffs may *also* recover such damages in individual actions or that they are precluded from asserting those theories in individual actions.

Clave. Dr. McClave designed a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities. The model calculated damages of $875,576,662 for the entire class. App. 1388a (sealed). As Dr. McClave acknowledged, however, the model did not isolate damages resulting from any one theory of antitrust impact. *Id.*, at 189a–190a. The District Court nevertheless certified the class.

A divided panel of the Court of Appeals affirmed. On appeal, petitioners contended the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder deterrence, the only theory of injury remaining in the case. The court refused to consider the argument because, in its view, such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry." 655 F. 3d 182, 207 (CA3 2011). The court emphasized that, "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages." *Id.*, at 206. According to the court, it had "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Ibid.* Rather, the court said, respondents must "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.* In the court's view, that burden was met because respondents' model calculated "supra-competitive prices regardless of the type of anticompetitive conduct." *Id.*, at 205.

We granted certiorari. 567 U. S. 933 (2012).[4]

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[4] The question presented reads: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U. S., at 933. Respondents contend that petitioners forfeited their ability to answer this

II

The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701 (1979). To come within the exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U. S. 338, 350 (2011). The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a). *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b). The provision at issue here is Rule 23(b)(3), which requires a court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

Repeatedly, we have emphasized that it "'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'" *Id.*, at 350–351 (quoting *General Telephone Co. of Southwest* v. *Falcon*, 457 U. S. 147, 160–161 (1982)). Such an analysis will frequently entail "overlap with the

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question in the negative because they did not make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence. See *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993). Such a forfeit would make it impossible for petitioners to argue that Dr. McClave's testimony was not "admissible evidence" under the Rules; but it does not make it impossible for them to argue that the evidence failed "to show that the case is susceptible to awarding damages on a class-wide basis." Petitioners argued below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.

merits of the plaintiff's underlying claim." 564 U. S., at 351. That is so because the "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Ibid.* (quoting *Falcon*, *supra*, at 160).

The same analytical principles govern Rule 23(b). If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a). *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 623–624 (1997). Rule 23(b)(3), as an "'adventuresome innovation,'" is designed for situations "'in which "class-action treatment is not as clearly called for."'" *Wal-Mart*, *supra*, at 362 (quoting *Amchem*, 521 U. S., at 614–615). That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e. g.*, an opportunity to opt out), and the court's duty to take a "'close look'" at whether common questions predominate over individual ones. *Id.*, at 615.

III

Respondents' class action was improperly certified under Rule 23(b)(3). By refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion, *post*, at 43–48 (GINSBURG and BREYER, JJ., dissenting), of substantive antitrust law.

A

We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need not be exact, see *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 563 (1931), but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." ABA Section of Antitrust Law, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010); see, *e. g.*, *Image Tech. Servs.* v. *Eastman Kodak Co.*, 125 F. 3d 1195, 1224 (CA9 1997). And for purposes of Rule 23, courts must conduct a "'rigorous analysis'" to determine whether that is so. *Wal-Mart*, *supra*, at 351.

The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. 655 F. 3d, at 206. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." *Id.*, at 206–207. That reasoning flatly contradicts our cases requiring a determination that Rule 23 is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart*, 564 U. S., at 350–351, and n. 6. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a class-wide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." 655 F. 3d, at 206. Under that

logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)'s predominance requirement to a nullity.

B

There is no question that the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised.[5] The scheme devised by respondents' expert, Dr. McClave, sought to establish a "but for" baseline—a figure that would show what the competitive prices would have been if there had been no antitrust violations. Damages would then be determined by comparing to that baseline what the actual prices were during the charged period. The "but for" figure was calculated, however, by assuming a market that contained none of the four distortions that respondents attributed to petitioners' actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. At the evidentiary hearing, Dr. McClave expressly admitted that the model calculated damages resulting from "the alleged anticompetitive conduct

[5] The dissent is of the view that what an econometric model proves is a "question of fact" on which we will not "undertake to review concurrent findings . . . by two courts below in the absence of a very obvious and exceptional showing of error." *Post*, at 46–47 (quoting *United States* v. *Virginia*, 518 U. S. 515, 589, n. 5 (1996) (SCALIA, J., dissenting); internal quotation marks omitted). To begin with, neither of the courts below found that the model established damages attributable to overbuilding alone. Second, while the data contained within an econometric model may well be "questions of fact" in the relevant sense, what those data prove is no more a question of fact than what our opinions hold. And finally, even if it were a question of fact, concluding that the model here established damages attributable to overbuilding alone would be "obvious[ly] and exceptional[ly]" erroneous.

as a whole" and did not attribute damages to any one particular theory of anticompetitive impact. App. 189a–190a, 208a.

This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case. But as Judge Jordan's partial dissent pointed out:

> "[B]ecause the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify 'damages' that are not the result of reduced overbuilding, or, in other words, that are not the certain result of the wrong." 655 F. 3d, at 216 (internal quotation marks omitted).

The majority's only response to this was that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id.*, at 206. But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining power vis-à-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined ef-

fects of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless.

In light of the model's inability to bridge the differences between supracompetitive prices in general and supracompetitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.[6] Prices whose level above what an expert deems "competitive" has been caused by factors unrelated to an accepted theory of antitrust harm are not "anticompetitive" in any sense relevant here. "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added). The District Court and the Court of Appeals ignored that first step entirely.

The judgment of the Court of Appeals for the Third Circuit is reversed.

It is so ordered.

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

Today the Court reaches out to decide a case hardly fit for our consideration. On both procedural and substantive grounds, we dissent.

I

This case comes to the Court infected by our misguided reformulation of the question presented. For that reason

[6] We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant to effect upon ability to charge supracompetitive prices.

alone, we would dismiss the writ of certiorari as improvidently granted.

Comcast sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [Federal Rule of Civil Procedure] 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3)." Pet. for Cert. i. We granted review of a different question: "Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 567 U. S. 933 (2012) (emphasis added).

Our rephrasing shifted the focus of the dispute from the District Court's Rule 23(b)(3) analysis to its attention (or lack thereof) to the admissibility of expert testimony. The parties, responsively, devoted much of their briefing to the question whether the standards for admissibility of expert evidence set out in Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), apply in class certification proceedings. See Brief for Petitioners 35–49; Brief for Respondents 24–37. Indeed, respondents confirmed at oral argument that they understood our rewritten question to center on admissibility, not Rule 23(b)(3). See, *e. g.*, Tr. of Oral Arg. 25.

As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. Fed. Rule Evid. 103(a)(1). In the months preceding the District Court's class certification order, Comcast did not object to the admission of Dr. McClave's damages model under Rule 702 or *Daubert*. Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any objection to the admission of Dr. McClave's model at the certification stage. At this late date, Comcast may

no longer argue that respondents' damages evidence was inadmissible.

Comcast's forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted. See *Rogers* v. *United States*, 522 U. S. 252, 259 (1998) (O'Connor, J., concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented."); *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 183 (1959) (dismissal appropriate in light of "circumstances . . . not fully apprehended at the time certiorari was granted" (internal quotation marks omitted)). The Court, however, elects to evaluate whether respondents "failed to show that the case is susceptible to awarding damages on a class-wide basis." *Ante*, at 33, n. 4 (internal quotation marks omitted). To justify this second revision of the question presented, the Court observes that Comcast "argued below, and continue[s] to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis." *Ibid.* And so *Comcast* did, in addition to endeavoring to address the question on which we granted review. By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents.

Abandoning the question we instructed the parties to brief does "not reflect well on the processes of the Court." *Redrup* v. *New York*, 386 U. S. 767, 772 (1967) (Harlan, J., dissenting). Taking their cue from our order, respondents did not train their energies on defending the District Court's finding of predominance in their briefing or at oral argument. The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen. See *infra*, at 43–48.

II

While the Court's decision to review the merits of the District Court's certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3). In particular, the decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable "'on a class-wide basis.'" See *ante*, at 30 (acknowledging Court's dependence on the absence of contest on the matter in this case); Tr. of Oral Arg. 41.

To gain class-action certification under Rule 23(b)(3), the named plaintiff must demonstrate, and the District Court must find, "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Products, Inc.* v. *Windsor*, 521 U. S. 591, 623 (1997), but it scarcely demands commonality as to all questions. See 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 1778, p. 121 (3d ed. 2005) (hereinafter Wright, Miller, & Kane). In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. See Advisory Committee's 1966 Notes on Fed. Rule Civ. Proc. 23, 28 U. S. C. App., p. 141 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); 7AA Wright, Miller, & Kane § 1781, at 235–237.*

*A class may be divided into subclasses for adjudication of damages. Fed. Rule Civ. Proc. 23(c)(4)–(5). Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to

Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well-nigh universal. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, "individual damage[s] calculations should not scuttle class certification under Rule 23(b)(3)"). Legions of appellate decisions across a range of substantive claims are illustrative. See, *e. g.*, *Tardiff* v. *Knox County*, 365 F. 3d 1, 6 (CA1 2004) (Fourth Amendment); *Chiang* v. *Veneman*, 385 F. 3d 256, 273 (CA3 2004) (Equal Credit Opportunity Act); *Bertulli* v. *Independent Assn. of Continental Pilots*, 242 F. 3d 290, 298 (CA5 2001) (Labor-Management Reporting and Disclosure Act and Railway Labor Act); *Beattie* v. *CenturyTel, Inc.*, 511 F. 3d 554, 564–566 (CA6 2007) (Federal Communications Act); *Arreola* v. *Godinez*, 546 F. 3d 788, 801 (CA7 2008) (Eighth Amendment). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. See *In re Visa Check/ MasterMoney Antitrust Litigation*, 280 F. 3d 124, 139–140 (CA2 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶331, p. 56 (3d ed. 2007) (hereinafter Areeda & Hovenkamp); 6 A. Conte & H. Newberg, Newberg on Class Actions § 18:27, p. 91 (4th ed. 2002). As this Court has rightly observed, "[p]redominance is a test readily met" in actions alleging "violations of the antitrust laws." *Amchem*, 521 U. S., at 625.

The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology was never challenged by respondents, see Brief for Plaintiffs-Appellees in No. 10–2865 (CA3), pp. 39–40, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a

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subsequent proceedings. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, pp. 206–208 (5th ed. 2012). Further, a certification order may be altered or amended as the case unfolds. Rule 23(c)(1)(C).

class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein, *supra*, § 4:54, at 208.

III

Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.

A

To understand the antitrust problem, some (simplified) background discussion is necessary. Plaintiffs below, respondents here, alleged that Comcast violated §§ 1 and 2 of the Sherman Act. See 15 U. S. C. §§ 1, 2. For present purposes, the § 2 claim provides the better illustration. A firm is guilty of monopolization under § 2 if the plaintiff proves (1) "the possession of monopoly power in the relevant market" and (2) "the willful acquisition or maintenance of that power[,] as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966). A private plaintiff seeking damages must also show that (3) the monopolization caused "injur[y]." 15 U. S. C. § 15. We have said that antitrust injuries must be "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U. S. 328, 334 (1990) (quoting *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489 (1977)). See 2A Areeda & Hovenkamp ¶391a, at 320 (To prove antitrust injury, "[a] private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.").

As plaintiffs below, respondents attempted to meet these requirements by showing that (1) Comcast obtained a 60% or greater share of the Philadelphia market, and that its share provides it with monopoly power; (2) Comcast acquired its share through exclusionary conduct consisting of a series of mergers with competitors and "swaps" of customers and locations; and (3) Comcast consequently injured respondents by charging them supracompetitive prices.

If, as respondents contend, Philadelphia is a separate well-defined market, and the alleged exclusionary conduct permitted Comcast to obtain a market share of at least 60%, then proving the §2 violation may not be arduous. As a point of comparison, the Government considers a market shared by four firms, each of which has 25% market share, to be "highly concentrated." Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines §5.3, p. 19 (2010). A market, such as the one alleged by respondents, where *one* firm controls 60% is far worse. See *id.*, §5.3, at 18–19, and n. 9 (using a concentration index that determines a market's concentration level by summing the squares of each firm's market share, one firm with 100% yielding 10,000, five firms with 20% each yielding 2,000, while a market where one firm accounts for 60% yields an index number of *at least* 3,600). The Guidelines, and any standard antitrust treatise, explain why firms in highly concentrated markets normally have the power to raise prices significantly above competitive levels. See, *e. g.*, 2B Areeda & Hovenkamp ¶503, at 115.

B

So far there is agreement. But consider the last matter respondents must prove: Can they show that Comcast injured them by charging higher prices? After all, a firm with monopoly power will not necessarily exercise that power by charging higher prices. It could instead act less competitively in other ways, such as by leading the quiet life. See J. Hicks, Annual Survey of Economic Theory: The

Theory of Monopoly, 3 Econometrica 1, 8 (1935) ("The best of all monopoly profits is a quiet life.").

It is at this point that Dr. McClave's model enters the scene. His model first selects a group of comparable *outside*-Philadelphia "benchmark" counties, where Comcast enjoyed a lower market share (and where satellite broadcasting accounted for more of the local business). Using multiple-regression analysis, McClave's model measures the effect of the anticompetitive conduct by comparing the class counties to the benchmark counties. The model concludes that the prices Philadelphia area consumers would have paid had the Philadelphia counties shared the properties of the benchmark counties (including a diminished Comcast market share) would have been 13.1% lower than those they actually paid. Thus, the model provides evidence that Comcast's anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices.

C

1

The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries. They proffered four "non-exclusive mechanisms" that allegedly "cause[d] the high prices" in the Philadelphia area. App. 403a. Those four theories posit that (1) due to Comcast's acquisitions of competitors, customers found it more difficult to compare prices; (2) one set of potential competitors, namely, Direct Broadcast Satellite companies, found it more difficult to obtain access to local sports broadcasts and consequently decided not to enter the Philadelphia market; (3) Comcast's ability to obtain programming material at lower prices permitted it to raise prices; and (4) a number of potential competitors (called "overbuilders"), whose presence in the market would have limited Comcast's power to raise prices, were ready to enter some parts of the market but decided not to do so in light of Com-

cast's anticompetitive conduct. 264 F. R. D. 150, 161–162 (ED Pa. 2010).

For reasons not here relevant, the District Court found the first three theories inapplicable and limited the liability-phase proof to the "overbuilder" theory. See App. to Pet. for Cert. 192a–193a. It then asked the parties to brief whether doing so had any impact on the viability of McClave's model as a measure of classwide damages. See 264 F. R. D., at 190. After considering the parties' arguments, the District Court found that striking the three theories "does not impeach Dr. McClave's damages model" because "[a]ny anticompetitive conduct is reflected in the [higher Philadelphia] price [which Dr. McClave's model determines], not in the [model's] selection of the comparison counties, [*i. e.*, the lower price 'benchmark counties' with which the Philadelphia area prices were compared]." *Id.*, at 190–191. The court explained that "whether or not we accepted all [four] . . . theories . . . is inapposite to Dr. McClave's methods of choosing benchmarks." *Ibid.* On appeal, the Third Circuit held that this finding was not an abuse of discretion. 655 F. 3d 182, 207 (2011).

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The Court, however, concludes that "the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Ante,* at 36. To reach this conclusion the Court must consider fact-based matters, namely, what this econometric multiple-regression model is about, what it proves, and how it does so. And it must overturn two lower courts' related factual findings to the contrary.

We are normally "reluctant to disturb findings of fact in which two courts below have concurred." *United States* v. *Doe*, 465 U. S. 605, 614 (1984). See also *United States* v. *Virginia*, 518 U. S. 515, 589, n. 5 (1996) (SCALIA, J., dissenting) (noting "our well-settled rule that we will not 'undertake to review concurrent findings of fact by two courts below in the

absence of a very obvious and exceptional showing of error'" (quoting *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275 (1949))). Here, the District Court found McClave's econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. 264 F. R. D., at 190–191. Contrary to the Court's characterization, see *ante*, at 36, n. 5, this was not a legal conclusion about what the model proved; it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.

In any event, as far as we can tell, the lower courts were right. On the basis of the record as we understand it, the District Court did not abuse its discretion in finding that McClave's model could measure damages suffered by the class—even if the damages were limited to those caused by deterred overbuilding. That is because respondents alleged that Comcast's anticompetitive conduct increased Comcast's market share (and market power) by deterring potential entrants, in particular, overbuilders, from entering the Philadelphia area market. See App. 43a–66a. By showing that this was so, respondents' proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided in other parts via threat of the overbuilders' expansion or that of others potentially led on by their example. Indeed, in the District Court, Comcast argued that the three other theories, *i. e.*, the three rejected theories, had no impact on prices. See 264 F. R. D., at 166, 176, 180–181. If Comcast was right, then the damages McClave's model found must have stemmed exclusively from conduct that deterred new entry, say, from "overbuilders." Not surprisingly, the Court offers no support at all for its contrary conclusion, namely, that the District Court's finding was "'obvious[ly] and exceptional[ly]' erroneous." *Ante*, at 36, n. 5 (quoting *Virginia*, 518 U. S., at 589, n. 5 (SCALIA, J., dissenting)).

We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about antitrust law that it could not mean to apply in other cases. The Court begins with what it calls an "unremarkable premise" that respondents could be "entitled only to damages resulting from reduced overbuilder competition." *Ante*, at 35. In most § 2 cases, however, the Court's starting place would seem *remarkable*, not "unremarkable."

Suppose in a different case a plaintiff were to prove that Widget, Inc., has obtained, through anticompetitive means, a 90% share of the California widget market. Suppose the plaintiff also proves that the two small remaining firms—one in Ukiah, the other in San Diego—lack the capacity to expand their widget output to the point where that possibility could deter Widget, Inc., from raising its prices. Suppose further that the plaintiff introduces a model that shows California widget prices are now twice those in every other State, which, the model concludes is (after accounting for other possible reasons) the result of lack of competition in the California widget market. Why would a court hearing that case restrict damages solely to customers in the vicinity of Ukiah and San Diego?

Like the model in this example, Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm.

* * *

Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact

based. The Court departs from our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.

Syllabus

MILLBROOK *v.* UNITED STATES

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

No. 11–10362. Argued February 19, 2013—Decided March 27, 2013

The Federal Tort Claims Act (FTCA) waives the Government's sovereign immunity from tort suits, but excepts from that waiver certain intentional torts, 28 U. S. C. § 2680(h). Section 2680(h), in turn, contains a proviso that extends the waiver of immunity to claims for six intentional torts, including assault and battery, that are based on the "acts or omissions" of an "investigative or law enforcement officer," *i. e.*, a federal officer "who is empowered by law to execute searches, to seize evidence, or to make arrests." Petitioner Millbrook, a federal prisoner, sued the United States under the FTCA, alleging, *inter alia*, assault and battery by correctional officers. The District Court granted the Government summary judgment, and the Third Circuit affirmed, hewing to its precedent that the "law enforcement proviso" applies only to tortious conduct that occurs during the course of executing a search, seizing evidence, or making an arrest.

Held: The law enforcement proviso extends to law enforcement officers' acts or omissions that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest. The proviso's plain language supports this conclusion. On its face, the proviso applies where a claim arises out of one of six intentional torts and is related to the "acts or omissions" of an "investigative or law enforcement officer." § 2680(h). And by cross-referencing § 1346(b), the proviso incorporates an additional requirement that the "acts or omissions" occur while the officer is "acting within the scope of his office or employment." § 1346(b)(1). Nothing in § 2680(h)'s text supports further limiting the proviso to conduct arising out of searches, seizures of evidence, or arrests. The FTCA's only reference to those terms is in § 2680(h)'s definition of "investigative or law enforcement officer," which focuses on the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a claim. This confirms that Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority. Nor does the proviso indicate that a waiver of immunity requires the officer to be engaged in investigative or law enforcement activity. The text never uses those terms. Had Congress

intended to further narrow the waiver's scope, it could have used language to that effect. See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 227. Pp. 54–57.

477 Fed. Appx. 4, reversed and remanded.

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

Christopher J. Paolella, by appointment of the Court, 568 U. S. 939, argued the cause and filed briefs for petitioner.

Anthony A. Yang argued the cause for the United States in support of reversal. With him on the briefs were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, and *Jonathan H. Levy.*

Jeffrey S. Bucholtz, by invitation of the Court, 568 U. S. 1046, argued the cause and filed a brief as *amicus curiae* in support of the judgment below.*

JUSTICE THOMAS delivered the opinion of the Court.

Petitioner Kim Millbrook, a prisoner in the custody of the Federal Bureau of Prisons (BOP), alleges that correctional officers sexually assaulted and verbally threatened him while he was in their custody. Millbrook filed suit in Federal District Court under the Federal Tort Claims Act (FTCA or Act), 28 U. S. C. §§ 1346(b), 2671–2680, which waives the Government's sovereign immunity from tort suits, including those based on certain intentional torts committed by federal law enforcement officers, § 2680(h). The District Court dismissed Millbrook's action, and the Court of Appeals affirmed. The Court of Appeals held that, while the FTCA waives the United States' sovereign immunity for certain intentional

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*Briefs of *amici curiae* urging reversal were filed for the Lewisburg Prison Project by *Ronald C. Travis*; and for The Rutherford Institute by *John W. Whitehead*, *Rita M. Dunaway*, and *Charles I. Lugosi*. *Douglas Hallward-Driemeier* and *Susan L. Sommer* filed a brief for the Lambda Legal Defense and Education Fund, Inc., et al. as *amici curiae* urging vacatur.

torts by law enforcement officers, it only does so when the tortious conduct occurs in the course of executing a search, seizing evidence, or making an arrest. Petitioner contends that the FTCA's waiver is not so limited. We agree and reverse the judgment of the Court of Appeals.[1]

I

A

The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort." *Levin* v. *United States*, 568 U. S. 503, 506 (2013) (internal quotation marks omitted). The Act gives federal district courts exclusive jurisdiction over claims against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of a federal employee "acting within the scope of his office or employment." 28 U. S. C. § 1346(b)(1). This broad waiver of sovereign immunity is subject to a number of exceptions set forth in § 2680. One such exception, relating to intentional torts, preserves the Government's immunity from suit for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." § 2680(h). We have referred to § 2680(h) as the "intentional tort exception." *Levin*, *supra*, at 507 (internal quotation marks omitted).

In 1974, Congress carved out an exception to § 2680(h)'s preservation of the United States' sovereign immunity for intentional torts by adding a proviso covering claims that arise out of the wrongful conduct of law enforcement officers. See Act of Mar. 16, 1974, Pub. L. 93–253, § 2, 88 Stat. 50. Known as the "law enforcement proviso," this provision ex-

[1] Because no party defends the judgment, we appointed Jeffrey S. Bucholtz to brief and argue this case, as *amicus curiae*, in support of the judgment below. 568 U. S. 1046 (2012). *Amicus* Bucholtz has ably discharged his assigned responsibilities, and the Court thanks him for his well-stated arguments.

tends the waiver of sovereign immunity to claims for six intentional torts, including assault and battery, that are based on the "acts or omissions of investigative or law enforcement officers." § 2680(h). The proviso defines " 'investigative or law enforcement officer' " to mean "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Ibid.*

B

On January 18, 2011, Millbrook filed suit against the United States under the FTCA, asserting claims of negligence, assault, and battery. In his complaint, Millbrook alleged that, on March 5, 2010, he was forced to perform oral sex on a BOP correctional officer, while another officer held him in a choke hold and a third officer stood watch nearby. Millbrook claimed that the officers threatened to kill him if he did not comply with their demands. Millbrook alleged that he suffered physical injuries as a result of the incident and, accordingly, sought compensatory damages.

The Government argued that the FTCA did not waive the United States' sovereign immunity from suit on Millbrook's intentional tort claims, because they fell within the intentional tort exception in § 2680(h). The Government contended that § 2680(h)'s law enforcement proviso did not save Millbrook's claims because of the Third Circuit's binding precedent in *Pooler* v. *United States*, 787 F. 2d 868 (1986), which interpreted the proviso to apply only to tortious conduct that occurred during the course of "executing a search, seizing evidence, or making an arrest." *Id.*, at 872. The District Court agreed and granted summary judgment for the United States because the alleged conduct "did not take place during an arrest, search, or seizure of evidence." Civ. Action No. 3:11–cv–00131 (MD Pa., Feb. 16, 2012), App. 96.[2]

[2] The District Court also concluded that Millbrook failed to state an actionable negligence claim because "it is clear that the alleged assault and battery was intentional." App. 96. This issue is not before us.

The Third Circuit affirmed. 477 Fed. Appx. 4, 5–6 (2012) (*per curiam*).

We granted certiorari, 567 U. S. 968 (2012), to resolve a Circuit split concerning the circumstances under which intentionally tortious conduct by law enforcement officers can give rise to an actionable claim under the FTCA. Compare *Pooler*, *supra*; and *Orsay* v. *United States Dept. of Justice*, 289 F. 3d 1125, 1136 (CA9 2002) (law enforcement proviso "reaches only those claims asserting that the tort occurred *in the course of investigative or law enforcement activities*" (emphasis added)), with *Ignacio* v. *United States*, 674 F. 3d 252, 256 (CA4 2012) (holding that the law enforcement proviso "waives immunity whenever an investigative or law enforcement officer commits one of the specified intentional torts, *regardless of whether the officer is engaged in investigative or law enforcement activity*" (emphasis added)).

II

The FTCA waives the United States' sovereign immunity for certain intentional torts committed by law enforcement officers. The portion of the Act relevant here provides:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> . . . . .
>
> "(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U. S. C. § 2680(h).

On its face, the law enforcement proviso applies where a claim both arises out of one of the proviso's six intentional

torts, and is related to the "acts or omissions" of an "investigative or law enforcement officer." The proviso's cross-reference to § 1346(b) incorporates an additional requirement that the acts or omissions giving rise to the claim occur while the officer is "acting within the scope of his office or employment." § 1346(b)(1). The question in this case is whether the FTCA further limits the category of "acts or omissions" that trigger the United States' liability.[3]

The plain language of the law enforcement proviso answers when a law enforcement officer's "acts or omissions" may give rise to an actionable tort claim under the FTCA. The proviso specifies that the conduct must arise from one of the six enumerated intentional torts and, by expressly cross-referencing § 1346(b), indicates that the law enforcement officer's "acts or omissions" must fall "within the scope of his office or employment." §§ 2680(h), 1346(b)(1). Nothing in the text further qualifies the category of "acts or omissions" that may trigger FTCA liability.

A number of lower courts have nevertheless read into the text additional limitations designed to narrow the scope of the law enforcement proviso. The Ninth Circuit, for instance, held that the law enforcement proviso does not apply unless the tort was "committed in the course of investigative or law enforcement activities." *Orsay*, *supra*, at 1135. As noted, the Third Circuit construed the law enforcement proviso even more narrowly in holding that it applies only to tortious conduct by federal officers during the course of "executing a search, seizing evidence, or making an arrest." *Pooler*, *supra*, at 872. Court-appointed *amicus curiae* (*Amicus*) similarly asks us to construe the proviso to waive "sovereign immunity only for torts committed by federal of-

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[3] The Government conceded in the proceedings below that the correctional officer whose alleged conduct is at issue was acting within the scope of his employment and that the named correctional officers qualify as "investigative or law enforcement officers" within the meaning of the FTCA. App. 54–55, 84–85; Brief for United States 30. Accordingly, we express no opinion on either of these issues.

ficers acting in their capacity as 'investigative or law enforcement officers.'" Brief for *Amicus* 5. Under this approach, the conduct of federal officers would be actionable only when it "aris[es] out of searches, seizures of evidence, arrests, and closely related exercises of investigative or law-enforcement authority." *Ibid.*

None of these interpretations finds any support in the text of the statute. The FTCA's only reference to "searches," "seiz[ures of] evidence," and "arrests" is found in the statutory definition of "investigative or law enforcement officer." § 2680(h) (defining "'investigative or law enforcement officer'" to mean any federal officer who is "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law"). By its terms, this provision focuses on the *status* of persons whose conduct may be actionable, not the types of activities that may give rise to a tort claim against the United States. The proviso thus distinguishes between the acts for which immunity is waived (*e. g.*, assault and battery), and the class of persons whose acts may give rise to an actionable FTCA claim. The plain text confirms that Congress intended immunity determinations to depend on a federal officer's legal authority, not on a particular exercise of that authority. Consequently, there is no basis for concluding that a law enforcement officer's intentional tort must occur in the course of executing a search, seizing evidence, or making an arrest in order to subject the United States to liability.

Nor does the text of the proviso provide any indication that the officer must be engaged in "investigative or law enforcement activity." Indeed, the text never uses the term. *Amicus* contends that we should read the reference to "investigative or law enforcement officer" as implicitly limiting the proviso to claims arising from actions taken in an officer's investigative or law enforcement *capacity.* But there is no basis for so limiting the term when Congress has spoken directly to the circumstances in which a law enforcement

officer's conduct may expose the United States to tort liability. Under the proviso, an intentional tort is not actionable unless it occurs while the law enforcement officer is "acting within the scope of his office or employment." §§ 2680(h), 1346(b)(1). Had Congress intended to further narrow the scope of the proviso, Congress could have limited it to claims arising from "acts or omissions of investigative or law enforcement officers *acting in a law enforcement or investigative capacity.*" See *Ali* v. *Federal Bureau of Prisons*, 552 U. S. 214, 227 (2008). Congress adopted similar limitations in neighboring provisions, see § 2680(a) (referring to "[a]ny claim based upon an act or omission of an employee of the Government . . . *in the execution of a statute or regulation*" (emphasis added)), but did not do so here. We, therefore, decline to read such a limitation into unambiguous text. *Jimenez* v. *Quarterman*, 555 U. S. 113, 118 (2009) ("[W]hen the statutory language is plain, we must enforce it according to its terms"); *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) ("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent" (internal quotation marks omitted)).

* * *

We hold that the waiver effected by the law enforcement proviso extends to acts or omissions of law enforcement officers that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

MARSHALL, WARDEN *v.* RODGERS

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

No. 12–382. Decided April 1, 2013

Respondent Rodgers waived his right to counsel three times before ultimately proceeding to trial *pro se*. After the jury returned a guilty verdict, he asked the state trial court to reappoint counsel to help him file a motion for a new trial, but provided no support for that request even when offered the chance to do so. The court denied his request as well as his *pro se* motion for a new trial. The California Court of Appeal affirmed, concluding that, among other things, respondent's history of vacillating between self-representation and representation by court-appointed counsel, his failure to support his request for counsel, and his demonstrated competence in defending his case justified the trial court's refusal to appoint post-trial counsel. Respondent then sought federal habeas relief, arguing that the state courts had violated his Sixth Amendment right to counsel. The District Court denied his petition, but the Court of Appeals for the Ninth Circuit reversed. It concluded that this Court's cases, as interpreted by the Ninth and other Circuits, established that, absent bad faith, a defendant's waiver of his right to trial counsel does not bar a future request for counsel at a later critical stage of the prosecution and that a new-trial motion is a critical stage.

Held: The Court of Appeals erred in concluding that respondent's claim is supported by "clearly established Federal law, as determined by" this Court, 28 U. S. C. § 2254(d)(1). This Court has neither announced nor established a rule about whether and to what extent a trial judge has discretion to deny a request for counsel's reappointment after a defendant validly waived his right to counsel at an earlier stage. California affords trial judges the discretion to deny such a request based on the totality of the circumstances. The Court of Appeals was empowered by § 2254(d)(1) only to determine whether that approach is contrary to, or an unreasonable application of, the general standards established by this Court's assistance-of-counsel cases. Instead, it rested its judgment in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.

Certiorari granted; 678 F. 3d 1149, reversed and remanded.

PER CURIAM.

Respondent Otis Lee Rodgers, challenging his state conviction, sought a writ of habeas corpus from the United States District Court for the Central District of California. He claimed the state courts violated his Sixth Amendment right to effective assistance of counsel by declining to appoint an attorney to assist in filing a motion for a new trial notwithstanding his three prior waivers of the right to counseled representation. The District Court denied respondent's petition, and he appealed to the Court of Appeals for the Ninth Circuit, which granted habeas relief. 678 F. 3d 1149, 1163 (2012). Because the Court of Appeals erred in concluding that respondent's claim is supported by "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U. S. C. § 2254(d)(1), its judgment must be reversed.

I

In 2001, the State of California charged respondent with making criminal threats, assault with a firearm, and being a felon in possession of a firearm and ammunition. Before his arraignment, respondent executed a valid waiver of his Sixth Amendment right to counsel, electing to represent himself. See *Faretta* v. *California*, 422 U. S. 806, 807 (1975). By the time of his preliminary hearing, however, respondent changed his mind and retained counsel. Then, two months later, he fired his lawyer and again waived his right to counsel. Two months after that, respondent again changed his mind and asked the court to appoint an attorney. The court did so. Shortly before trial, however, respondent for the third time surrendered his right to counsel. He proceeded to trial *pro se*. On June 27, 2003, the jury returned a verdict of guilty.

After the verdict was read, respondent asked the state trial court to provide an attorney to help him file a motion for a new trial. The trial judge deferred ruling on the motion to appoint counsel, and respondent later renewed the

request in writing. Neither the oral nor the written motion included reasons in support of his request; and when offered a chance to supplement or explain his motion at a later hearing, respondent declined to do so. The trial court denied the request for counsel. Respondent's *pro se* motion for a new trial was likewise denied.

On direct review the California Court of Appeal affirmed respondent's convictions and sentence. As relevant here, it concluded that his history of vacillating between counseled and self-representation, the lack of support for his motion, his demonstrated competence in defending his case, and his insistence that he "'c[ould] do the motion [him]self'" but "'just need[ed] time to perfect it,'" App. to Pet. for Cert. 129–130, justified the trial court's denial of his post-trial request for counsel. The state appellate court also distinguished its decision from that of the Court of Appeals for the Ninth Circuit in *Menefield* v. *Borg*, 881 F. 2d 696 (1989), reasoning that the habeas petitioner in *Menefield* had stated reasons justifying his request for counsel, whereas respondent's request was unreasoned and unexplained. The state appellate court concluded that "[b]ecause the [trial] court was not given any reason to grant [respondent's] motion, we cannot find that the court abused its discretion in declining to do so." App. to Pet. for Cert. 130.

Having failed to obtain relief in state court, respondent filed a federal habeas petition, arguing that the California courts had violated his Sixth Amendment right to counsel by not providing an attorney to help with his new-trial motion. The District Court denied the petition but granted a certificate of appealability. The Court of Appeals reversed, holding that respondent's "Sixth Amendment right to counsel was violated when the trial court denied his timely request for representation for a new trial motion." 678 F. 3d, at 1163.

To reach the conclusion that respondent's right to counsel in these circumstances was clearly established by the Su-

preme Court of the United States, the Court of Appeals for the Ninth Circuit invoked certain Sixth Amendment precedents from its own earlier cases and from cases in other Circuits. From those precedents, the panel identified two relevant principles that it deemed to have been clearly established by this Court's cases: first, that a defendant's waiver of his right to trial counsel does not bar his later election to receive assistance of counsel at a later critical stage of the prosecution, absent proof by the State that the reappointment request was made in bad faith, see *id.*, at 1159–1162; and, second, that a new-trial motion is a critical stage, see *id.*, at 1156–1159. Combining these two propositions, the court held that respondent had a clearly established right to the reappointment of counsel for purposes of his new-trial motion, and that the California courts—which vest the trial judge with discretion to approve or deny such requests based on the totality of the circumstances, see *People* v. *Lawley*, 27 Cal. 4th 102, 147–151, 38 P. 3d 461, 493–495 (2002)—violated that right by refusing to order the reappointment of counsel. 678 F. 3d, at 1162–1163.

II

The starting point for cases subject to § 2254(d)(1) is to identify the "clearly established Federal law, as determined by the Supreme Court of the United States," that governs the habeas petitioner's claims. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000); *Knowles* v. *Mirzayance*, 556 U. S. 111, 122 (2009). As indicated above, the parties here dispute whether two principles of law are clearly established under this framework. One is whether, after a defendant's valid waiver of his right to trial counsel under *Faretta*, a post-trial, preappeal motion for a new trial is a critical stage of the prosecution. For purposes of analysis here, it will be assumed, without so holding, that it is.

The other disputed question is whether, after a defendant's valid waiver of counsel, a trial judge has discretion to deny the defendant's later request for reappointment of counsel.

In resolving this question in respondent's favor, the Court of Appeals first concluded (correctly) that "the Supreme Court has never explicitly addressed a criminal defendant's ability to re-assert his right to counsel" once he has validly waived it. 678 F. 3d, at 1159 (internal quotation marks omitted). It then (also correctly) recognized that the lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since "a general standard" from this Court's cases can supply such law. *Yarborough* v. *Alvarado*, 541 U. S. 652, 664 (2004). The Court of Appeals erred, however, in its application of this latter proposition to the controlling issues here.

It is beyond dispute that "[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa* v. *Tovar*, 541 U. S. 77, 80–81 (2004); see *United States* v. *Cronic*, 466 U. S. 648, 653–654 (1984); *Gideon* v. *Wainwright*, 372 U. S. 335, 344 (1963). It is just as well settled, however, that a defendant also has the right to "proceed *without* counsel when he voluntarily and intelligently elects to do so." *Faretta*, 422 U. S., at 807.

There can be some tension in these two principles. As the *Faretta* Court observed, "[t]here can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel." *Id.*, at 832. California has resolved this tension by adopting the framework under review. Under that approach, trial judges are afforded discretion when considering postwaiver requests for counsel; their decisions on such requests must be based on the totality of the circumstances, "includ[ing] 'the quality of [the defendant's] representation of [himself], the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption

or delay [that] might reasonably be expected to follow the granting of such a motion.' " *Lawley*, *supra*, at 149, 38 P. 3d, at 494 (quoting *People* v. *Windham*, 19 Cal. 3d 121, 128, 560 P. 2d 1187, 1191–1192 (1977); final alteration in original). The state appellate court applied those rules to the case at bar, concluding that the totality of the circumstances—and especially the shifting nature of respondent's preferences, the unexplained nature of his motion, and his demonstrated capacity to handle the incidents of trial—supported the trial court's decision. App. to Pet. for Cert. 128–131.

The Court of Appeals, however, has resolved that tension differently in its own direct-review cases. It has adopted a " 'strong presumption that a defendant's post-trial request for the assistance of an attorney should not be refused,' " 678 F. 3d, at 1160 (quoting *Robinson* v. *Ignacio*, 360 F. 3d 1044, 1058 (CA9 2004); emphasis deleted), as well as a default rule that, " 'in the absence of extraordinary circumstances,' a defendant's post-trial revocation of his waiver should be allowed unless the government can show that the request is made 'for a bad faith purpose,' " *id.*, at 1058 (quoting *Menefield*, 881 F. 2d, at 701; emphasis deleted).

It is unnecessary for present purposes to judge the merits of these two approaches or determine what rule the Sixth Amendment in fact establishes for postwaiver requests of appointment of counsel. All this case requires—and all the Court of Appeals was empowered to do under § 2254(d)(1)—is to observe that, in light of the tension between the Sixth Amendment's guarantee of "the right to counsel at all critical stages of the criminal process," *Tovar*, *supra*, at 80–81, and its concurrent promise of "a constitutional right to proceed *without* counsel when [a criminal defendant] voluntarily and intelligently elects to do so," *Faretta*, *supra*, at 807, it cannot be said that California's approach is contrary to or an unreasonable application of the "general standard[s]" established by the Court's assistance-of-counsel cases. *Alvarado*, *supra*, at 664.

The Court of Appeals' contrary conclusion rested in part on the mistaken belief that circuit precedent may be used to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced. *Parker* v. *Matthews*, 567 U. S. 37, 49 (2012) (*per curiam*) ("The highly generalized standard for evaluating claims of prosecutorial misconduct set forth in *Darden* [v. *Wainwright*, 477 U. S. 168 (1986),] bears scant resemblance to the elaborate, multistep test employed by the Sixth Circuit here"); see 678 F. 3d, at 1155, 1157. The error in this approach is subtle, yet substantial. Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, see, *e. g.*, *Tolliver* v. *Sheets*, 594 F. 3d 900, 916, n. 6 (CA6 2010) ("We are bound by prior Sixth Circuit determinations that a rule has been clearly established"); *Chambers* v. *McDaniel*, 549 F. 3d 1191, 1199 (CA9 2008), it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the federal circuits that it would, if presented to this Court, be accepted as correct. See *Parker*, *supra*, at 48–49; *Renico* v. *Lett*, 559 U. S. 766, 778–779 (2010). The Court of Appeals failed to abide by that limitation here. Its resulting holding was erroneous and must be reversed.

III

The Court expresses no view on the merits of the underlying Sixth Amendment principle respondent urges. And it does not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial. This opinion is instead confined to the determination that the conclusion of the California courts that there was no Sixth Amendment violation is not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1).

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

GENESIS HEALTHCARE CORP. ET AL. *v.* SYMCZYK

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

No. 11–1059. Argued December 3, 2012—Decided April 16, 2013

Respondent brought a collective action under the Fair Labor Standards Act of 1938 (FLSA) on behalf of herself and "other employees similarly situated." 29 U. S. C. §216(b). After she ignored petitioners' offer of judgment under Federal Rule of Civil Procedure 68, the District Court, finding that no other individuals had joined her suit and that the Rule 68 offer fully satisfied her claim, concluded that respondent's suit was moot and dismissed it for lack of subject-matter jurisdiction. The Third Circuit reversed. It held that respondent's individual claim was moot but that her collective action was not, explaining that allowing defendants to "pick off" named plaintiffs before certification with calculated Rule 68 offers would frustrate the goals of collective actions. The case was remanded to the District Court to allow respondent to seek "conditional certification," which, if successful, would relate back to the date of her complaint.

Held: Because respondent had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness, her suit was appropriately dismissed for lack of subject-matter jurisdiction. Pp. 71–79.

(a) While the Courts of Appeals disagree whether an unaccepted Rule 68 offer that fully satisfies a plaintiff's individual claim is sufficient to render that claim moot, respondent conceded the issue below and did not properly raise it here. Thus, this Court assumes, without deciding, that petitioners' offer mooted her individual claim. Pp. 71–73.

(b) Well-settled mootness principles control the outcome of this case. After respondent's individual claim became moot, the suit became moot because she had no personal interest in representing others in the action. To avoid that outcome, respondent relies on cases that arose in the context of Rule 23 class actions, but they are inapposite, both because Rule 23 actions are fundamentally different from FLSA collective actions and because the cases are inapplicable to the facts here. Pp. 73–78.

(1) Neither *Sosna* v. *Iowa*, 419 U. S. 393, nor *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, support respondent's position. *Geraghty* extended the principles of *Sosna*—which held that a class action is not rendered moot when the named plaintiff's individual claim

becomes moot *after* the class has been duly certified—to *denials* of class certification motions; and it provided that, where an action would have acquired independent legal status but for the district court's erroneous denial of class certification, a corrected ruling on appeal "relates back" to the time of the erroneous denial. 445 U. S., at 404, and n. 11. However, *Geraghty*'s holding was explicitly limited to cases in which the named plaintiff's claim remains live at the time the district court denies class certification. See *id.*, at 407, n. 11. Here, respondent had not yet moved for "conditional certification" when her claim became moot, nor had the District Court anticipatorily ruled on any such request. She thus has no certification decision to which her claim could have related back. More fundamentally, essential to *Sosna* and *Geraghty* was the fact that a putative class acquires an independent legal status once it is certified under Rule 23. By contrast, under the FLSA, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action. Pp. 74–75.

(2) A line of cases holding that an "inherently transitory" class-action claim is not necessarily moot upon the termination of the named plaintiff's claim, see, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 52, is similarly inapplicable. Respondent argues that a defendant's use of Rule 68 offers to "pick off" a named plaintiff before the collective-action process is complete renders the action "inherently transitory." But this rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course, and it has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy. Unlike a claim for injunctive relief, a damages claim cannot evade review, nor can an offer of full settlement insulate such a claim from review. Putative plaintiffs may be foreclosed from vindicating their rights in respondent's suit, but they remain free to do so in their own suits. Pp. 75–77.

(3) Finally, *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, does not support respondent's claim that the purposes served by the FLSA's collective-action provisions would be frustrated by defendants' use of Rule 68 to "pick off" named plaintiffs before the collective-action process has run its course. In *Roper*, where the named plaintiffs' individual claims became moot after the District Court denied their Rule 23 class certification motion and entered judgment in their favor based on defendant's offer of judgment, this Court found that the named plaintiffs could appeal the denial of certification because they possessed an ongoing, personal economic stake in the substantive controversy, namely, to shift a portion of attorney's fees and expenses to successful

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class litigants. Here, respondent conceded that petitioners' offer provided complete relief, and she asserted no continuing economic interest in shifting attorney's fees and costs. Moreover, *Roper* was tethered to the unique significance of Rule 23 class certification decisions. Pp. 77–78.

656 F. 3d 189, reversed.

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

Ronald J. Mann argued the cause for petitioners. With him on the briefs were *James N. Boudreau*, *Michele H. Malloy*, and *Stephen A. Miller*.

Neal Kumar Katyal argued the cause for respondent. With him on the brief were *Gary F. Lynch*, *Gerald D. Wells III*, *Adina H. Rosenbaum*, and *Stephen I. Vladeck*.

Anthony A. Yang argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Thomas M. Bondy*, *Michael E. Robinson*, and *M. Patricia Smith*.*

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*Briefs of *amici curiae* urging reversal were filed for ACA International by *Michael D. Slodov*, *David Israel*, and *Bryan C. Shartle*; for the Chamber of Commerce of the United States of America et al. by *Mark D. Harris*, *James F. Segroves*, *Robin S. Conrad*, *Shane B. Kawka*, *Karen R. Harned*, and *Elizabeth Milito*; for DRI–The Voice of the Defense Bar by *Henry M. Sneath*, *Jeffrey A. Lamken*, and *Martin V. Totaro*; and for the Equal Employment Advisory Council by *Rae T. Vann* and *Danny E. Petrella*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *Harold C. Becker*, *James B. Coppess*, and *Matthew J. Ginsburg*; for the Impact Fund et al. by *Jocelyn Larkin*, *Victoria W. Ni*, and *Arthur H. Bryant*; for the National Employment Lawyers Association et al. by *Rebecca M. Hamburg*, *Catherine K. Ruckelshaus*, *Daniel B. Kohrman*, *Laurie A. McCann*, *Thomas Osborne*, and *Melvin Radowitz*; for the Service Employees International Union et al. by *Judith A. Scott*, *Nicole G. Berner*, *Marcia D. Greenberger*, *Fatima Gross Graves*, *Patrick J. Szymanski*, *Judith L. Licthman*, *Sarah C. Crawford*, and *Sally J. Greenberg*; and for Stephen B. Burbank et al. by *Jonathan S. Massey*.

JUSTICE THOMAS delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. § 201 *et seq.*, provides that an employee may bring an action to recover damages for specified violations of the FLSA on behalf of himself and other "similarly situated" employees. We granted certiorari to resolve whether such a case is justiciable when the lone plaintiff's individual claim becomes moot. 567 U. S. 933 (2012). We hold that it is not justiciable.

I

The FLSA establishes federal minimum-wage, maximum-hour, and overtime guarantees that cannot be modified by contract. Section 16(b) of the FLSA, 52 Stat. 1060, as amended, 29 U. S. C. § 216(b), gives employees the right to bring a private cause of action on their own behalf and on behalf of "other employees similarly situated" for specified violations of the FLSA. A suit brought on behalf of other employees is known as a "collective action." See *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 169–170 (1989).

In 2009, respondent, who was formerly employed by petitioners as a registered nurse at Pennypack Center in Philadelphia, Pennsylvania, filed a complaint on behalf of herself and "all other persons similarly situated." App. 115–116. Respondent alleged that petitioners violated the FLSA by automatically deducting 30 minutes of time worked per shift for meal breaks for certain employees, even when the employees performed compensable work during those breaks. Respondent, who remained the sole plaintiff throughout these proceedings, sought statutory damages for the alleged violations.

When petitioners answered the complaint, they simultaneously served upon respondent an offer of judgment under Federal Rule of Civil Procedure 68. The offer included $7,500 for alleged unpaid wages, in addition to "such reasonable attorneys' fees, costs, and expenses . . . as the Court may determine." App. 77. Petitioners stipulated that if

respondent did not accept the offer within 10 days after service, the offer would be deemed withdrawn.

After respondent failed to respond in the allotted time period, petitioners filed a motion to dismiss for lack of subject-matter jurisdiction. Petitioners argued that because they offered respondent complete relief on her individual damages claim, she no longer possessed a personal stake in the outcome of the suit, rendering the action moot. Respondent objected, arguing that petitioners were inappropriately attempting to "pick off" the named plaintiff before the collective-action process could unfold. *Id.*, at 91.

The District Court found that it was undisputed that no other individuals had joined respondent's suit and that the Rule 68 offer of judgment fully satisfied her individual claim. It concluded that petitioners' Rule 68 offer of judgment mooted respondent's suit, which it dismissed for lack of subject-matter jurisdiction.

The Court of Appeals reversed. 656 F. 3d 189 (CA3 2011). The court agreed that no other potential plaintiff had opted into the suit, that petitioners' offer fully satisfied respondent's individual claim, and that, under its precedents, whether or not such an offer is accepted, it generally moots a plaintiff's claim. *Id.*, at 195. But the court nevertheless held that respondent's collective action was not moot. It explained that calculated attempts by some defendants to "pick off" named plaintiffs with strategic Rule 68 offers before certification could short circuit the process, and, thereby, frustrate the goals of collective actions. *Id.*, at 196–198. The court determined that the case must be remanded in order to allow respondent to seek "conditional certification" [1] in the

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[1] Lower courts have borrowed class-action terminology to describe the process of joining coplaintiffs under 29 U. S. C. § 216(b). While we do not express an opinion on the propriety of this use of class-action nomenclature, we do note that there are significant differences between certification under Federal Rule of Civil Procedure 23 and the joinder process under § 216(b).

District Court. If respondent were successful, the District Court was to relate the certification motion back to the date on which respondent filed her complaint.[2] *Ibid.*

II

Article III, § 2, of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies," which restricts the authority of federal courts to resolving "'the legal rights of litigants in actual controversies,'" *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 471 (1982) (quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885)). In order to invoke federal-court jurisdiction, a plaintiff must demonstrate that he possesses a legally cognizable interest, or "'personal stake,'" in the outcome of the action. See *Camreta* v. *Greene*, 563 U. S. 692, 701 (2011) (quoting *Summers* v. *Earth Island Institute*, 555 U. S. 488, 493 (2009)). This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes, the resolutions of which have direct consequences on the parties involved.

A corollary to this case-or-controversy requirement is that "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizo-*

[2] The "relation back" doctrine was developed in the context of class actions under Rule 23 to address the circumstance in which a named plaintiff's claim becomes moot prior to certification of the class. This case raises two circumstances in which the Court has applied this doctrine. First, where a named plaintiff's claim is "inherently transitory," and becomes moot prior to certification, a motion for certification may "relate back" to the filing of the complaint. See, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 51–52 (1991). Second, we have held that where a certification motion is denied and a named plaintiff's claim subsequently becomes moot, an appellate reversal of the certification decision may relate back to the time of the denial. See *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 404 (1980).

nans for Official English v. *Arizona*, 520 U. S. 43, 67 (1997) (quoting *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975)). If an intervening circumstance deprives the plaintiff of a "personal stake in the outcome of the lawsuit," at any point during litigation, the action can no longer proceed and must be dismissed as moot. *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472, 477–478 (1990) (internal quotation marks omitted).

In the proceedings below, both courts concluded that petitioners' Rule 68 offer afforded respondent complete relief on—and thus mooted—her FLSA claim. See 656 F. 3d, at 201; No. 09–5782, 2010 WL 2038676, *4 (ED Pa., May 19, 2010). Respondent now contends that these rulings were erroneous, because petitioners' Rule 68 offer lapsed without entry of judgment. Brief for Respondent 12–16. The United States, as *amicus curiae*, similarly urges the Court to hold that petitioners' unaccepted offer did not moot her FLSA claim and to affirm the Court of Appeals on this basis. Brief for United States 10–15.

While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot,[3] we do not reach this question, or resolve the split, because the issue is not properly before us. The Third Circuit clearly held in this case that respondent's individual claim was moot. 656 F. 3d, at 201. Acceptance of respondent's argument to the contrary now would alter the Court of Appeals' judgment, which is impermissible in the absence of a cross-petition from respondent. See *Northwest Airlines, Inc.* v. *County of Kent*, 510 U. S. 355, 364 (1994); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 119, n. 14 (1985). Moreover, even if the cross-petition rule did not apply, respondent's waiver of the issue would still prevent us from reaching it. In the District Court, respondent conceded that "[a]n offer of complete relief will generally moot the [plaintiff's] claim, as at that point the plaintiff re-

[3] Compare, *e. g.*, *Weiss* v. *Regal Collections*, 385 F. 3d 337, 340 (CA3 2004), with *McCauley* v. *Trans Union, LLC*, 402 F. 3d 340, 342 (CA2 2005).

tains no personal interest in the outcome of the litigation." App. 93; 2010 WL 2038676, *4. Respondent made a similar concession in her brief to the Court of Appeals, see App. 193, and failed to raise the argument in her brief in opposition to the petition for certiorari. We, therefore, assume, without deciding, that petitioners' Rule 68 offer mooted respondent's individual claim. See *Baldwin* v. *Reese*, 541 U. S. 27, 34 (2004).

III

We turn, then, to the question whether respondent's action remained justiciable based on the collective-action allegations in her complaint. A straightforward application of well-settled mootness principles compels our answer. In the absence of any claimant's opting in, respondent's suit became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action. While the FLSA authorizes an aggrieved employee to bring an action on behalf of himself and "other employees similarly situated," 29 U. S. C. § 216(b), the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.[4] In

[4] While we do not resolve the question whether a Rule 68 offer that fully satisfies the plaintiff's claims is sufficient by itself to moot the action, *supra*, at 72, we note that Courts of Appeals on both sides of that issue have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent. Some courts maintain that an unaccepted offer of complete relief alone is sufficient to moot the individual's claim. *E. g.*, *Weiss*, *supra*, at 340; *Greisz* v. *Household Bank (Ill.), N. A.*, 176 F. 3d 1012, 1015 (CA7 1999). Other courts have held that, in the face of an unaccepted offer of complete relief, district courts may "enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment." *O'Brien* v. *Ed Donnelly Enterprises, Inc.*, 575 F. 3d 567, 575 (CA6 2009); see also *McCauley* v. *Trans Union, LLC*, 402 F. 3d 340, 342 (CA2 2005). Contrary to the dissent's assertion, see *post*, at 86 (opinion of KAGAN, J.), nothing in the nature of FLSA actions precludes satisfaction—and thus the mooting—of the individual's claim before the collective-action component of the suit has run its course.

order to avoid this outcome, respondent relies almost entirely upon cases that arose in the context of Federal Rule of Civil Procedure 23 class actions, particularly *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388 (1980); *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326 (1980); and *Sosna* v. *Iowa*, 419 U. S. 393 (1975). But these cases are inapposite, both because Rule 23 actions are fundamentally different from collective actions under the FLSA, see *Hoffmann-La Roche Inc.*, 493 U. S., at 177–178 (SCALIA, J., dissenting), and because these cases are, by their own terms, inapplicable to these facts. It follows that this action was appropriately dismissed as moot.

A

Respondent contends that she has a sufficient personal stake in this case based on a statutorily created collective-action interest in representing other similarly situated employees under § 216(b). Brief for Respondent 47–48. In support of her argument, respondent cites our decision in *Geraghty*, which in turn has its roots in *Sosna*. Neither case supports her position.

In *Sosna*, the Court held that a class action is not rendered moot when the named plaintiff's individual claim becomes moot *after* the class has been duly certified. 419 U. S., at 399. The Court reasoned that when a district court certifies a class, "the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted by [the named plaintiff]," with the result that a live controversy may continue to exist, even after the claim of the named plaintiff becomes moot. *Id.*, at 399–402. *Geraghty* narrowly extended this principle to *denials* of class certification motions. The Court held that where an action would have acquired the independent legal status described in *Sosna* but for the district court's erroneous denial of class certification, a corrected ruling on appeal "relates back" to

the time of the erroneous denial of the certification motion. 445 U. S., at 404, and n. 11.

Geraghty is inapposite, because the Court explicitly limited its holding to cases in which the named plaintiff's claim remains live at the time the district court denies class certification. See *id.*, at 407, n. 11. Here, respondent had not yet moved for "conditional certification" when her claim became moot, nor had the District Court anticipatorily ruled on any such request. Her claim instead became moot prior to these events, foreclosing any recourse to *Geraghty*. There is simply no certification decision to which respondent's claim could have related back.

More fundamentally, essential to our decisions in *Sosna* and *Geraghty* was the fact that a putative class acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, "conditional certification" does not produce a class with an independent legal status, or join additional parties to the action. The sole consequence of conditional certification is the sending of court-approved written notice to employees, see *Hoffmann-La Roche Inc.*, *supra*, at 171–172, who in turn become parties to a collective action only by filing written consent with the court, § 216(b). So even if respondent were to secure a conditional certification ruling on remand, nothing in that ruling would preserve her suit from mootness.

B

Respondent also advances an argument based on a separate, but related, line of cases in which the Court held that an "inherently transitory" class-action claim is not necessarily moot upon the termination of the named plaintiff's claim. Like our decision in *Geraghty*, this line of cases began with *Sosna* and is similarly inapplicable here.

After concluding that the expiration of a named plaintiff's claim following certification does not moot the class action, *Sosna* suggested that, where a named plaintiff's individual

claim becomes moot before the district court has an opportunity to rule on the certification motion, and the issue would otherwise evade review, the certification might "relate back" to the filing of the complaint. 419 U. S., at 402, n. 11. The Court has since held that the relation-back doctrine may apply in Rule 23 cases where it is "certain that other persons similarly situated" will continue to be subject to the challenged conduct and the claims raised are "'so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 52 (1991) (quoting *Geraghty*, *supra*, at 399, in turn citing *Gerstein* v. *Pugh*, 420 U. S. 103, 110, n. 11 (1975)). Invoking this doctrine, respondent argues that defendants can strategically use Rule 68 offers to "pick off" named plaintiffs before the collective-action process is complete, rendering collective actions "inherently transitory" in effect. Brief for Respondent 37.

Our cases invoking the "inherently transitory" relation-back rationale do not apply. The "inherently transitory" rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course. A plaintiff might seek, for instance, to bring a class action challenging the constitutionality of temporary pretrial detentions. In doing so, the named plaintiff would face the considerable challenge of preserving his individual claim from mootness, since pretrial custody likely would end prior to the resolution of his claim. See *Gerstein*, *supra*. To address this problem, the Court explained that in cases where the transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review, certification could potentially "relate back" to the filing of the complaint. *Id.*, at 110, n. 11; *McLaughlin*, *supra*, at 52. But this doctrine has invariably focused on the fleeting nature of the challenged conduct giv-

ing rise to the claim, not on the defendant's litigation strategy. See, *e. g.*, *Swisher* v. *Brady*, 438 U. S. 204, 214, n. 11 (1978); *Spencer* v. *Kemna*, 523 U. S. 1, 17–18 (1998).

In this case, respondent's complaint requested statutory damages. Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations. Nor can a defendant's attempt to obtain settlement insulate such a claim from review, for a full settlement offer addresses plaintiff's alleged harm by making the plaintiff whole. While settlement may have the collateral effect of foreclosing unjoined claimants from having their rights vindicated in *respondent's* suit, such putative plaintiffs remain free to vindicate their rights in their own suits. They are no less able to have their claims settled or adjudicated following respondent's suit than if her suit had never been filed at all.

C

Finally, respondent argues that the purposes served by the FLSA's collective-action provisions—for example, efficient resolution of common claims and lower individual costs associated with litigation—would be frustrated by defendants' use of Rule 68 to "pick off" named plaintiffs before the collective-action process has run its course. Both respondent and the Court of Appeals purported to find support for this position in our decision in *Roper*, 445 U. S., at 339.

In *Roper*, the named plaintiffs' individual claims became moot after the District Court denied their motion for class certification under Rule 23 and subsequently entered judgment in their favor, based on the defendant bank's offer of judgment for the maximum recoverable amount of damages, in addition to interest and court costs. *Id.*, at 329–330. The Court held that even though the District Court had entered judgment in the named plaintiffs' favor, they could nevertheless appeal the denial of their motion to certify the class. The Court found that, under the particular cir-

cumstances of that case, the named plaintiffs possessed an ongoing, personal economic stake in the substantive controversy—namely, to shift a portion of attorney's fees and expenses to successful class litigants.[5] *Id.*, at 332–334, and n. 6. Only then, in dicta, did the Court underscore the importance of a district court's class certification decision and observe that allowing defendants to "'pic[k] off'" party plaintiffs before an affirmative ruling was achieved "would frustrate the objectives of class actions." *Id.*, at 339.

Roper's holding turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants' offer of judgment. *Id.*, at 336. As already explained, here, respondent conceded that petitioners' offer "provided complete relief on her individual claims," Brief in Opposition i, and she failed to assert any continuing economic interest in shifting attorney's fees and costs to others. Moreover, *Roper*'s dictum was tethered to the unique significance of certification decisions in class-action proceedings. 445 U. S., at 339. Whatever significance "conditional certification" may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23.

* * *

The Court of Appeals concluded that respondent's individual claim became moot following petitioners' Rule 68 offer of judgment. We have assumed, without deciding, that this is correct.

Reaching the question on which we granted certiorari, we conclude that respondent has no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness.

[5] Because *Roper* is distinguishable on the facts, we need not consider its continuing validity in light of our subsequent decision in *Lewis* v. *Continental Bank Corp.*, 494 U. S. 472 (1990). See *id.*, at 480 ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim").

Respondent's suit was, therefore, appropriately dismissed for lack of subject-matter jurisdiction.

The judgment of the Court of Appeals for the Third Circuit is reversed.

It is so ordered.

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

The Court today resolves an imaginary question, based on a mistake the courts below made about this case and others like it. The issue here, the majority tells us, is whether a "'collective action'" brought under the Fair Labor Standards Act of 1938 (FLSA), 29 U. S. C. §201 *et seq.*, "is justiciable when the lone plaintiff's individual claim becomes moot." *Ante*, at 69. Embedded within that question is a crucial premise: that the individual claim *has* become moot, as the lower courts held and the majority assumes without deciding. But what if that premise is bogus? What if the plaintiff's individual claim here never became moot? And what if, in addition, no similar claim for damages will ever become moot? In that event, the majority's decision—founded as it is on an unfounded assumption—would have no real-world meaning or application. The decision would turn out to be the most one-off of one-offs, explaining only what (the majority thinks) should happen to a proposed collective FLSA action when something that in fact never happens to an individual FLSA claim is errantly thought to have done so. That is the case here, for reasons I'll describe. Feel free to relegate the majority's decision to the furthest reaches of your mind: The situation it addresses should never again arise.

Consider the facts of this case, keeping an eye out for anything that would render any part of it moot. Respondent Laura Symczyk brought suit under a provision of the FLSA, 29 U. S. C. §216(b), "on behalf of herself and others similarly situated." App. 21. Her complaint alleged that her former

employer, petitioner Genesis HealthCare Corporation (Genesis), violated the FLSA by treating 30 minutes of every shift as an unpaid meal break, even when an employee worked during that time. Genesis answered the complaint and simultaneously made an offer of judgment under Federal Rule of Civil Procedure 68. That settlement proposal covered only Symczyk's individual claim, to the tune of $7,500 in lost wages. The offer, according to its terms, would "be deemed withdrawn" if Symczyk did not accept it within 10 days. App. 79. That deadline came and went without any reply. The case then proceeded in the normal fashion, with the District Court setting a schedule for discovery. Pause here for a moment to ask whether you've seen anything yet that would moot Symczyk's individual claim. No? Neither have I.

Nevertheless, Genesis moved to dismiss Symczyk's suit on the ground that it was moot. The supposed logic went like this: We (*i. e.*, Genesis) offered Symczyk complete relief on her individual damages claim; she "effectively reject[ed] the [o]ffer" by failing to respond; because she did so, she "no longer has a personal stake or legally cognizable interest in the outcome of this action"; accordingly, the court "should dismiss her claims." *Id.*, at 67. Relying on Circuit precedent, the District Court agreed; it dismissed the case for lack of jurisdiction—without awarding Symczyk any damages or other relief—based solely on the unaccepted offer Genesis had made. See App. to Pet. for Cert. 35 (citing *Weiss* v. *Regal Collections*, 385 F. 3d 337, 340 (CA3 2004)). And finally, the Court of Appeals for the Third Circuit concurred that Genesis's offer mooted Symczyk's individual claim (though also holding that she could still proceed with a collective action). See 656 F. 3d 189 (2011).

That thrice-asserted view is wrong, wrong, and wrong again. We made clear earlier this Term that "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin* v.

Chafin, 568 U. S. 165, 172 (2013) (internal quotation marks omitted). "[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ibid.* (internal quotation marks omitted). By those measures, an unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis R. Co.* v. *Columbus Rolling Mill*, 119 U. S. 149, 151 (1886). Nothing in Rule 68 alters that basic principle; to the contrary, that rule specifies that "[a]n unaccepted offer is considered withdrawn." Fed. Rule Civ. Proc. 68(b). So assuming the case was live before—because the plaintiff had a stake and the court could grant relief—the litigation carries on, unmooted.

For this reason, Symczyk's individual claim was alive and well when the District Court dismissed her suit. Recall: Genesis made a settlement offer under Rule 68; Symczyk decided not to accept it; after 10 days, it expired and the suit went forward. Symczyk's individual stake in the lawsuit thus remained what it had always been, and ditto the court's capacity to grant her relief. After the offer lapsed, just as before, Symczyk possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, Symczyk's claim was not moot, and the District Court could not send her away empty-handed. So a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home.

To this point, what I have said conflicts with nothing in the Court's opinion. The majority does not attempt to argue, à

la the Third Circuit, that the unaccepted settlement offer mooted Symczyk's individual damages claim. Instead, the majority hangs its hat on a finding of waiver. See *ante*, at 72, 78. The majority notes—correctly—that Symczyk accepted the Third Circuit's rule in her briefs below, and also failed to challenge it in her brief in opposition to the petition for certiorari; she contested it first in her merits brief before this Court. That enables the majority to "assume, without deciding," the mootness of Symczyk's individual claim and reach the oh-so-much-more-interesting question relating to her proposed collective action. *Ante*, at 73.[1]

But as this Court noted in a similar case, "assum[ing] what the facts will show to be ridiculous" about a predicate question—just because a party did not think to challenge settled Circuit precedent—runs "a risk that ought to be avoided." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 382 (1995). The question Symczyk now raises ("Did an unaccepted settlement offer moot my individual FLSA claim?") is logically prior to—and thus inextricably intertwined with—the question the majority

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[1] The majority also justifies this approach on the ground that Symczyk did not file a cross-petition for certiorari objecting to the Third Circuit's decision. But that is because Symczyk got the judgment she wanted in the Third Circuit. As the majority agrees, a cross-petition is necessary only when a respondent seeks to "alter" the judgment below. *Ante*, at 72; see E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 490 (9th ed. 2007) ("[A] party satisfied with the action of a lower court should not have to appeal from it in order to defend a judgment in his or her favor on any ground"). Here, the Third Circuit reversed the District Court's dismissal of Symczyk's FLSA suit, ruling that her collective action could go forward even though her individual claim was moot; accordingly, accepting Symczyk's new argument would lead not to modifying the appellate judgment, but to affirming it on a different ground. In any event, we have never held that the cross-petition requirement is jurisdictional. See *id.*, at 493–494. We can choose to excuse the absence of a cross-petition for the same reasons, discussed next, that we can consider an issue not raised below. See *Vance* v. *Terrazas*, 444 U. S. 252, 258–259, n. 5 (1980).

rushes to resolve ("If an unaccepted settlement offer mooted Symczyk's individual FLSA claim, could a court proceed to consider her proposed collective action?"). Indeed, the former is so much part and parcel of the latter that the question Genesis presented for our review—and on which we granted certiorari—actually looks more like Symczyk's than like the majority's. Genesis asked: "Whether a case becomes moot . . . when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." Pet. for Cert. i. Symczyk, of course, would respond "no," because merely receiving an offer does not moot any claim. The majority's refusal to consider that obviously correct answer impedes "intelligent resolution of the question presented." *Ohio* v. *Robinette*, 519 U. S. 33, 38 (1996) (internal quotation marks omitted). By taking a fallacy as its premise, the majority ensures it will reach the wrong decision.

Still, you might think, the majority's approach has at least this benefit: In a future FLSA case, when an individual claim for damages in fact becomes moot, a court will know what to do with the collective allegations. But no, even that much cannot be said for the majority's opinion. That is because the individual claims in such cases will *never* become moot, and a court will therefore never need to reach the issue the majority resolves. The majority's decision is fit for nothing: Aside from getting this case wrong, it serves only to address a make-believe problem.

To see why, consider how a collective FLSA action seeking damages unfolds. A plaintiff (just like Symczyk, but let us now call her Smith, to highlight her typicality) sues under § 216(b) on behalf of both herself and others. To determine whether Smith can serve as a representative party, the court considers whether the workplace policy her suit challenges has similarly affected other employees. If it has, the court supervises their discovery and notification, and then "oversee[s] the joinder" of any who want Smith to represent them. *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U. S. 165, 171

(1989). During that period, as the majority observes, the class has no "independent legal status." *Ante*, at 74. At the same time, Smith's own claim is in perfect health. Because it is a damages claim for past conduct, the employer cannot extinguish it by adopting new employment practices. Indeed, the claim would survive even Smith's own demise, belonging then to her estate. Smith's individual claim, in short, is not going away on its own; it can easily wait out the time involved in assembling a collective action. Accord, *ante*, at 77 ("[A] claim for damages cannot evade review; it remains live until it is settled [or] judicially resolved").

Now introduce a settlement offer into the picture: Assume that before the court finally decides whether to permit a collective action, the defendant proposes to pay Smith the value of her individual claim in exchange for her abandonment of the entire litigation. If Smith agrees, of course, all is over; like any plaintiff, she can assent to a settlement ending her suit. But assuming Smith does not agree, because she wishes to proceed on behalf of other employees, could the offer ever succeed in mooting her case? I have already shown that it cannot do so in the circumstances here, where the defendant makes an offer, the plaintiff declines it, and nothing else occurs: On those facts, Smith's claim is as it ever was, and the lawsuit continues onward. But suppose the defendant additionally requests that the court enter judgment in Smith's favor—though over her objection—for the amount offered to satisfy her individual claim. Could a court approve that motion and then declare the case over on the ground that Smith has no further stake in it? That course would be less preposterous than what the court did here; at least Smith, unlike Symczyk, would get some money. But it would be impermissible as well.

For starters, Rule 68 precludes a court from imposing judgment for a plaintiff like Smith based on an unaccepted settlement offer made pursuant to its terms. The text of the Rule contemplates that a court will enter judgment only

when a plaintiff accepts an offer. See Rule 68(a) ("If . . . the [plaintiff] serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment"). And the Rule prohibits a court from considering an unaccepted offer for any purpose other than allocating litigation costs—including for the purpose of entering judgment for either party. See Rule 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs"). That injunction accords with Rule 68's exclusive purpose: to promote voluntary cessation of litigation by imposing costs on plaintiffs who spurn certain settlement offers. See *Marek* v. *Chesny*, 473 U. S. 1, 5 (1985). The Rule provides no appropriate mechanism for a court to terminate a lawsuit without the plaintiff's consent.

Nor does a court have inherent authority to enter an unwanted judgment for Smith on her individual claim, in service of wiping out her proposed collective action. To be sure, a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory. But the court may not take that tack when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought. And a judgment satisfying an individual claim does not give a plaintiff like Smith, exercising her right to sue on behalf of other employees, "all that [she] has . . . requested in the complaint (*i. e.*, relief for the class)." *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U. S. 326, 341 (1980) (Rehnquist, J., concurring). No more in a collective action brought under the FLSA than in any other class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole. That course would short-circuit a collective action before it could begin, and thereby frustrate Congress's decision to give FLSA plaintiffs "the opportunity to proceed collec-

tively." *Hoffmann-La Roche*, 493 U. S., at 170; see *Roper*, 445 U. S., at 339. It is our plaintiff Smith's choice, and not the defendant's or the court's, whether satisfaction of her individual claim, without redress of her viable classwide allegations, is sufficient to bring the lawsuit to an end.

And so, the question the majority answers should never arise—which means the analysis the majority propounds should never apply.[2] The majority assumes that an individual claim has become moot, and then asks whether collective allegations can still proceed by virtue of the relation-back doctrine. But that doctrine comes into play only when a court confronts a jurisdictional gap—an individual claim becoming moot before the court can certify a representative action. And in an FLSA case for damages, that gap cannot occur (unless a court, as here, mistakenly creates it): As I have explained, the plaintiff's individual claim remains live all the way through the court's decision whether to join new plaintiffs to the litigation. Without any gap to span, the relation-back doctrine has no relevance. Neither, then, does the majority's decision.[3]

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[2] For similarly questionable deployment of this Court's adjudicatory authority, see *Comcast Corp.* v. *Behrend*, 569 U. S. 27, 42 (2013) (joint opinion of GINSBURG and BREYER, JJ.) (observing in dissent that "[t]he Court's ruling is good for this day and case only").

[3] And that is a good thing, because (just as a by-the-by) the majority's opinion also misconceives our decisions applying the relation-back doctrine. The majority painstakingly distinguishes those decisions on their individual facts, but misses their common take-away. In each, we confronted a situation where a would-be class representative's individual claim became moot before a court could make a final decision about the propriety of class litigation; and in each, we used relation-back principles to preserve the court's ability to adjudicate on the merits the classwide questions the representative raised. See, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 51–52 (1991); *Swisher* v. *Brady*, 438 U. S. 204, 213–214, n. 11 (1978); *Gerstein* v. *Pugh*, 420 U. S. 103, 110–111, n. 11 (1975); see also *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 399, 404, n. 11 (1980); *Sosna* v. *Iowa*, 419 U. S. 393, 402, n. 11 (1975). If, counterfactually, Symczyk's individual claim became moot when she failed to ac-

The Court could have resolved this case (along with a Circuit split, see *ante*, at 72, and n. 3) by correcting the Third Circuit's view that an unaccepted settlement offer mooted Symczyk's individual claim. Instead, the Court chose to address an issue predicated on that misconception, in a way that aids no one, now or ever. I respectfully dissent.

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cept Genesis's offer of judgment, her case would fit comfortably alongside those precedents. Because the District Court would not then have had "enough time to rule on a motion" for certification under §216(b), "the 'relation back' doctrine [would be] properly invoked to preserve the merits of the case for judicial resolution." *McLaughlin*, 500 U. S., at 52 (internal quotation marks omitted).

Syllabus

US AIRWAYS, INC., IN ITS CAPACITY AS FIDUCIARY AND PLAN ADMINISTRATOR OF THE US AIRWAYS, INC. EMPLOYEE BENEFITS PLAN *v.* McCUTCHEN ET AL.

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

No. 11–1285. Argued November 27, 2012—Decided April 16, 2013

The health benefits plan established by petitioner US Airways paid $66,866 in medical expenses for injuries suffered by respondent McCutchen, a US Airways employee, in a car accident caused by a third party. The plan entitled US Airways to reimbursement if McCutchen later recovered money from the third party. McCutchen's attorneys secured $110,000 in payments, and McCutchen received $66,000 after deducting the lawyers' 40% contingency fee. US Airways demanded reimbursement of the full $66,866 it had paid. When McCutchen did not comply, US Airways filed suit under § 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), which authorizes health-plan administrators to bring a civil action "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." McCutchen raised two defenses to US Airways' request for an equitable lien on the $66,866 it demanded: that, absent over-recovery on his part, US Airways' right to reimbursement did not kick in; and that US Airways had to contribute its fair share to the costs he incurred to get his recovery, so any reimbursement had to be reduced by 40%, to cover the contingency fee. Rejecting both arguments, the District Court granted summary judgment to US Airways. The Third Circuit vacated. Reasoning that traditional "equitable doctrines and defenses" applied to § 502(a)(3) suits, it held that the principle of unjust enrichment overrode US Airways' reimbursement clause because the clause would leave McCutchen with less than full payment for his medical bills and would give US Airways a windfall.

Held:

1. In a § 502(a)(3) action based on an equitable lien by agreement—like this one—the ERISA plan's terms govern. Neither general unjust enrichment principles nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules invoked by McCutchen—can override the applicable contract. Pp. 94–101.

(a) Section 502(a)(3) authorizes the kinds of relief "typically available in equity" before the merger of law and equity. *Mertens* v. *Hewitt*

Associates, 508 U. S. 248, 256. In *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U. S. 356, the Court permitted a health-plan administrator to bring a suit just like this one. The administrator's claim to enforce its reimbursement clause, the Court explained, was the modern-day equivalent of an action in equity to enforce a contract-based lien—called an "equitable lien 'by agreement.'" *Id.*, at 364–365. Accordingly, the administrator could use § 502(a)(3) to obtain funds that its beneficiaries had promised to turn over. The parties agree that US Airways can do the same here. Pp. 94–95.

(b) *Sereboff*'s logic dooms McCutchen's argument that two equitable doctrines meant to prevent unjust enrichment—the double-recovery rule and common-fund doctrine—can override the terms of an ERISA plan in such a suit. As in *Sereboff*, US Airways is seeking to enforce the modern-day equivalent of an equitable lien by agreement. Such a lien both arises from and serves to carry out a contract's provisions. See 547 U. S., at 363–364. Thus, enforcing the lien means holding the parties to their mutual promises and declining to apply rules—even if they would be "equitable" absent a contract—at odds with the parties' expressed commitments. The Court has found nothing to the contrary in the historic practice of equity courts. McCutchen identifies a slew of cases in which courts applied the equitable doctrines invoked here, but none in which they did so to override a clear contract that provided otherwise. This result comports with ERISA's focus on what a plan provides: Section 502(a)(3) does not "authorize 'appropriate equitable relief' *at large*," *Mertens*, 508 U. S., at 253, but countenances only such relief as will enforce "the terms of the plan" or the statute. Pp. 95–101.

2. While McCutchen's equitable rules cannot trump a reimbursement provision, they may aid in properly construing it. US Airways' plan is silent on the allocation of attorney's fees, and the common-fund doctrine provides the appropriate default rule to fill that gap. Pp. 101–106.

(a) Ordinary contract interpretation principles support this conclusion. Courts construe ERISA plans, as they do other contracts, by "looking to the terms of the plan" as well as to "other manifestations of the parties' intent." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 113. Where the terms of a plan leave gaps, courts must "look outside the plan's written language" to decide the agreement's meaning, *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 436, and they properly take account of the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise. P. 102.

(b) US Airways' reimbursement provision precludes looking to the double-recovery rule in this manner because it provides an allocation formula that expressly contradicts the equitable rule. By contrast, the plan says nothing specific about how to pay for the costs of recovery.

Syllabus

Given that contractual gap, the common-fund doctrine provides the best indication of the parties' intent. This Court's cases make clear that the doctrine would govern here in the absence of a contrary agreement. See, *e. g.*, *Boeing Co.* v. *Van Gemert*, 444 U. S. 472, 478. Because a party would not typically expect or intend a plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule, a court should be loath to read the plan in that way. The common-fund rule's rationale reinforces this conclusion: Without the rule, the insurer can free ride on the beneficiary's efforts, and the beneficiary, as in this case, may be made worse off for having pursued a third party. A contract should not be read to produce these strange results unless it specifically provides as much. Pp. 102–105.

663 F. 3d 671, vacated and remanded.

KAGAN, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined, *post*, p. 106.

Neal Kumar Katyal argued the cause for petitioner. With him on the briefs were *Catherine E. Stetson*, *Dominic F. Perella*, *Mary Helen Wimberly*, *Noah G. Lipschultz*, and *Susan Katz Hoffman*.

Joseph R. Palmore argued the cause for the United States as *amicus curiae*. With him on the brief were *Solicitor General Verrilli*, *Deputy Solicitor General Kneedler*, *M. Patricia Smith*, *Nathaniel I. Spiller*, and *Edward D. Sieger*.

Matthew W. H. Wessler argued the cause for respondents. With him on the brief were *Leah M. Nicholls*, *Jon R. Perry*, *Paul A. Hilko*, *Leslie A. Brueckner*, *Arthur H. Bryant*, *Peter K. Stris*, and *Brendan S. Maher*.*

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*Briefs of *amici curiae* urging reversal were filed for the Blue Cross Blue Shield Association et al. by *Lisa S. Blatt* and *Robert N. Weiner*; for the Central States, Southeast and Southwest Areas Health and Welfare Fund by *Thomas C. Nyhan*, *Robert A. Coco*, and *Francis J. Carey*; for the Chamber of Commerce of the United States of America et al. by *Jonathan D. Hacker*, *Brianne J. Gorod*, *Robin S. Conrad*, *Shane B. Kawka*, and *Kathryn M. Wilber*; for the National Association of Subrogation Professionals et al. by *Lawrence H. Mirel*, *William S. Consovoy*, *Brett A. Shumate*, *Daran P. Kiefer*, *John D. Kolb*, *Bryan B. Davenport*, and *Laura*

JUSTICE KAGAN delivered the opinion of the Court.

Respondent James McCutchen participated in a health benefits plan that his employer, petitioner US Airways, established under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001 *et seq.* That plan obliged US Airways to pay any medical expenses McCutchen incurred as a result of a third party's actions—for example, another person's negligent driving. The plan in turn entitled US Airways to reimbursement if McCutchen later recovered money from the third party.

This Court has held that a health-plan administrator like US Airways may enforce such a reimbursement provision by filing suit under § 502(a)(3) of ERISA, 88 Stat. 891, 29 U. S. C. § 1132(a)(3). See *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U. S. 356 (2006). That section authorizes a civil action "to obtain . . . appropriate equitable relief . . . to enforce . . . the terms of the plan." We here consider whether in that kind of suit, a plan participant like McCutchen may raise certain equitable defenses deriving from principles of unjust enrichment. In particular, we address one equitable doctrine limiting reimbursement to the amount of an insured's "double recovery" and another requiring the party seeking reimbursement to pay a share of the attorney's fees incurred in securing funds from the third party. We hold that neither of those equitable rules can override the clear terms of a plan. But we explain that the latter, usually called the common-fund doctrine, plays a role in interpreting

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D. Schmidt; and for the National Coordinating Committee for Multiemployer Plans by *Sally M. Tedrow* and *John M. McIntire.*

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Mary Ellen Signorille, Melvin Radowitz, Rebecca M. Hamburg Cappy,* and *Jeffrey Lewis*; for the American Association for Justice by *Jeffrey R. White* and *Mary Alice McLarty*; for Consumer Watchdog by *Brian Wolfman*; for Law Professors by *Pammela Saunders*; for the Michigan Association for Justice by *Robert B. June*; for the Pennsylvania Association for Justice by *Charles L. Becker*; and for United Policyholders et al. by *Tybe A. Brett, Mark D. DeBofsky,* and *Roger Baron.*

US Airways' plan because the plan is silent about allocating the costs of recovery.

I

In January 2007, McCutchen suffered serious injuries when another driver lost control of her car and collided with McCutchen's. At the time, McCutchen was an employee of US Airways and a participant in its self-funded health plan. The plan paid $66,866 in medical expenses arising from the accident on McCutchen's behalf.

McCutchen retained attorneys, in exchange for a 40% contingency fee, to seek recovery of all his accident-related damages, estimated to exceed $1 million. The attorneys sued the driver responsible for the crash, but settled for only $10,000 because she had limited insurance coverage and the accident had killed or seriously injured three other people. Counsel also secured a payment from McCutchen's own automobile insurer of $100,000, the maximum amount available under his policy. McCutchen thus received $110,000—and after deducting $44,000 for the lawyer's fee, $66,000.

On learning of McCutchen's recovery, US Airways demanded reimbursement of the $66,866 it had paid in medical expenses. In support of that claim, US Airways relied on the following statement in its summary plan description:

> "If [US Airways] pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, . . . [y]ou will be required to reimburse [US Airways] for amounts paid for claims out of any monies recovered from [the] third party, including, but not limited to, your own insurance company as the result of judgment, settlement, or otherwise." App. 20.[1]

[1] We have made clear that the statements in a summary plan description "communicat[e] with beneficiaries *about* the plan, but . . . do not themselves constitute the *terms* of the plan." *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 438 (2011). Nonetheless, the parties litigated this case, and both lower courts decided it, based solely on the language quoted above. See

McCutchen denied that US Airways was entitled to any reimbursement, but his attorneys placed $41,500 in an escrow account pending resolution of the dispute. That amount represented US Airways' full claim minus a proportionate share of the promised attorney's fees.

US Airways then filed this action under § 502(a)(3), seeking "appropriate equitable relief" to enforce the plan's reimbursement provision. The suit requested an equitable lien on $66,866—the $41,500 in the escrow account and $25,366 more in McCutchen's possession. McCutchen countered by raising two defenses relevant here. First, he maintained that US Airways could not receive the relief it sought because he had recovered only a small portion of his total damages; absent over-recovery on his part, US Airways' right to reimbursement did not kick in. Second, he contended that US Airways at least had to contribute its fair share to the costs he incurred to get his recovery; any reimbursement therefore had to be marked down by 40%, to cover the promised contingency fee. The District Court rejected both arguments, granting summary judgment to US Airways on the ground that the plan "clear[ly] and unambiguous[ly]" provided for full reimbursement of the medical expenses paid. App. to Pet. for Cert. 30a; see *id.*, at 32a.

The Court of Appeals for the Third Circuit vacated the District Court's order. The Third Circuit reasoned that in a suit for "appropriate equitable relief" under § 502(a)(3), a court must apply any "equitable doctrines and defenses" that traditionally limited the relief requested. 663 F. 3d 671, 676 (2011). And here, the court continued, "'the principle

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663 F. 3d 671, 673 (CA3 2011); App. to Pet. for Cert. 26a. Only in this Court, in response to a request from the Solicitor General, did the plan itself come to light. See Letter from Matthew W. H. Wessler to William K. Suter, Clerk of Court (Nov. 19, 2012) (available in Clerk of Court's case file). That is too late to affect what happens here: Because everyone in this case has treated the language from the summary description as though it came from the plan, we do so as well.

of unjust enrichment'" should "'serve to limit the effectiveness'" of the plan's reimbursement provision. See *id.*, at 677 (quoting 4 G. Palmer, Law of Restitution § 23.18, pp. 472–473 (1978)). Full reimbursement, the Third Circuit thought, would "leav[e] [McCutchen] with less than full payment" for his medical bills; at the same time, it would provide a "windfall" to US Airways given its failure to "contribute to the cost of obtaining the third-party recovery." 663 F. 3d, at 679. The Third Circuit then instructed the District Court to determine what amount, shy of the entire $66,866, would qualify as "appropriate equitable relief." *Ibid.*

We granted certiorari, 567 U. S. 933 (2012), to resolve a Circuit split on whether equitable defenses can so override an ERISA plan's reimbursement provision.[2] We now vacate the Third Circuit's decision.

II

A health-plan administrator like US Airways may bring suit under § 502(a)(3) for "appropriate equitable relief . . . to enforce . . . the terms of the plan."[3] That provision, we have held, authorizes the kinds of relief "typically available in equity" in the days of "the divided bench," before law and

[2] Compare 663 F. 3d 671, 673 (CA3 2011) (case below) (holding that equitable doctrines can trump a plan's terms); *CGI Technologies & Solutions Inc.* v. *Rose*, 683 F. 3d 1113, 1124 (CA9 2012) (same), with *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F. 3d 1232, 1237 (CA11 2010) (holding that they cannot do so); *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Shank*, 500 F. 3d 834, 838 (CA8 2007) (same); *Moore* v. *CapitalCare, Inc.*, 461 F. 3d 1, 9–10 and n. 10 (CADC 2006) (same); *Bombadier Aerospace Employee Welfare Benefits Plan* v. *Ferror, Poirot & Wansbrough*, 354 F. 3d 348, 362 (CA5 2003) (same); *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Varco*, 338 F. 3d 680, 692 (CA7 2003) (same).

[3] Sans ellipses, § 502(a)(3) provides that a plan administrator may bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U. S. C. § 1132(a)(3).

equity merged. *Mertens* v. *Hewitt Associates*, 508 U. S. 248, 256 (1993) (emphasis deleted).

In *Sereboff* v. *Mid Atlantic Medical Services*, we allowed a health-plan administrator to bring a suit just like this one under § 502(a)(3). Mid Atlantic had paid medical expenses for the Sereboffs after they were injured in a car crash. When they settled a tort suit against the other driver, Mid Atlantic claimed a share of the proceeds, invoking the plan's reimbursement clause. We held that Mid Atlantic's action sought "equitable relief," as § 502(a)(3) requires. See 547 U. S., at 369. The "nature of the recovery" requested was equitable because Mid Atlantic claimed "specifically identifiable funds" within the Sereboffs' control—that is, a portion of the settlement they had gotten. *Id.*, at 362–363 (internal quotation marks omitted). And the "basis for [the] claim" was equitable too, because Mid Atlantic relied on "'the familiar rul[e] of equity that a contract to convey a specific object'" not yet acquired "'create[s] a lien'" on that object as soon as "'the contractor . . . gets a title to the thing.'" *Id.*, at 363–364 (quoting *Barnes* v. *Alexander*, 232 U. S. 117, 121 (1914)). Mid Atlantic's claim for reimbursement, we determined, was the modern-day equivalent of an action in equity to enforce such a contract-based lien—called an "equitable lien by agreement." 547 U. S., at 364–365 (internal quotation marks omitted). Accordingly, Mid Atlantic could bring an action under § 502(a)(3) seeking the funds that its beneficiaries had promised to turn over. And here, as all parties agree, US Airways can do the same thing.

The question in this case concerns the role that equitable defenses alleging unjust enrichment can play in such a suit. As earlier noted, the Third Circuit held that "the principle of unjust enrichment" overrides US Airways' reimbursement clause if and when they come into conflict. 663 F. 3d, at 677. McCutchen offers a more refined version of that view, alleging that two specific equitable doctrines meant to "prevent unjust enrichment" defeat the reimbursement provi-

sion. Brief for Respondents i. First, he contends that in equity, an insurer in US Airways' position could recoup no more than an insured's "double recovery"—the amount the insured has received from a third party to compensate for the same loss the insurance covered. That rule would limit US Airways' reimbursement to the share of McCutchen's settlements paying for medical expenses; McCutchen would keep the rest (*e. g.*, damages for loss of future earnings or pain and suffering), even though the plan gives US Airways first claim on the whole third-party recovery. Second, McCutchen claims that in equity the common-fund doctrine would have operated to reduce any award to US Airways. Under that rule, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co.* v. *Van Gemert*, 444 U. S. 472, 478 (1980). McCutchen urges that this doctrine, which is designed to prevent freeloading, enables him to pass on a share of his lawyer's fees to US Airways, no matter what the plan provides.[4]

We rejected a similar claim in *Sereboff*, though without altogether foreclosing McCutchen's position. The Sereboffs argued, among other things, that the lower courts erred in enforcing Mid Atlantic's reimbursement clause "without im-

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[4] Both our prior cases and secondary sources confirm McCutchen's characterization of the common-fund and double-recovery rules as deriving primarily from principles of unjust enrichment. See *Boeing*, 444 U. S., at 478 ("The [common-fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched"); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 392 (1970) (similar); 1 D. Dobbs, Law of Remedies § 3.10(2), p. 395 (2d ed. 1993) (hereinafter Dobbs) (similar); 4 G. Palmer, Law of Restitution § 23.16(b), p. 444 (1978) ("[T]he injured person is unjustly enriched" only when he has received "in excess of full compensation" from two sources "for the same loss"); 16 G. Couch, Cyclopedia of Insurance Law § 61:18 (2d ed. 1983) (similar); 8B J. Appleman & J. Appleman, Insurance Law and Practice § 4941, p. 11 (Cum. Supp. 2012) (hereinafter Appleman) (similar).

posing various limitations" that would "apply to truly equitable relief grounded in principles of subrogation."[5] 547 U. S., at 368 (internal quotation marks omitted). In particular, the Sereboffs contended that a variant of the double-recovery rule, called the make-whole doctrine, trumped the plan's terms. We rebuffed that argument, explaining that the Sereboffs were improperly mixing and matching rules from different equitable boxes. The Sereboffs asserted a "parcel of equitable defenses" available when an out-of-pocket insurer brought a "freestanding action for equitable subrogation," not founded on a contract, to succeed to an insured's judgment against a third party. *Ibid.* But Mid Atlantic's reimbursement claim was "considered equitable," we replied, because it sought to enforce a "lien based on agreement"—*not* a lien imposed independent of contract by virtue of equitable subrogation.[6] *Ibid.* (internal quotation marks omitted). In light of that fact, we viewed the Sereboffs' equitable defenses—which again, closely resemble McCutchen's—as "beside the point." *Ibid.* And yet, we left a narrow opening for future litigants in the Sereboffs' position to make a like claim. In a footnote, we observed that the Sereboffs had forfeited a "distinct assertion" that the contract-based relief Mid Atlantic requested, although

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[5] "Subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against" a third party. 1 Dobbs § 4.3(4), at 604; see 8B Appleman § 4941, at 11 ("'Subrogation' involves the substitution of the insurer . . . to the rights of the insured").

[6] The *Sereboff* Court's analysis concerned only subrogation actions based on equitable principles independent of any agreement. A subrogation action may also be founded on a contract incorporating those principles. See 1 Dobbs § 4.3(4), at 604. US Airways suggested at oral argument that McCutchen's case would "ge[t] a lot stronger" if the plan here spoke only of subrogation, without separately granting a right of reimbursement. Tr. of Oral Arg. 18. We need not consider that question because US Airways seeks to enforce a reimbursement provision, of the same kind we considered in *Sereboff*.

"equitable," was not "appropriate" under § 502(a)(3) because "it contravened principles like the make-whole doctrine." *Id.*, at 368–369, n. 2. Enter McCutchen, to make that basic argument.

In the end, however, *Sereboff*'s logic dooms McCutchen's effort. US Airways, like Mid Atlantic, is seeking to enforce the modern-day equivalent of an "equitable lien by agreement." And that kind of lien—as its name announces—both arises from and serves to carry out a contract's provisions. See *id.*, at 363–364; 4 S. Symons, Pomeroy's Equity Jurisprudence § 1234, p. 695 (5th ed. 1941). So enforcing the lien means holding the parties to their mutual promises. See, *e. g.*, *Barnes*, 232 U. S., at 121; *Walker* v. *Brown*, 165 U. S. 654, 664 (1897). Conversely, it means declining to apply rules—even if they would be "equitable" in a contract's absence—at odds with the parties' expressed commitments. McCutchen therefore cannot rely on theories of unjust enrichment to defeat US Airways' appeal to the plan's clear terms. Those principles, as we said in *Sereboff*, are "beside the point" when parties demand what they bargained for in a valid agreement. See Restatement (Third) of Restitution and Unjust Enrichment § 2(2), p. 15 (2010) ("A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment"). In those circumstances, hewing to the parties' exchange yields "appropriate" as well as "equitable" relief.

We have found nothing to the contrary in the historic practice of equity courts. McCutchen offers us a slew of cases in which those courts applied the double-recovery or common-fund rule to limit insurers' efforts to recoup funds from their beneficiaries' tort judgments. See Brief for Respondents 21–25. But his citations are not on point. In some of McCutchen's cases, courts apparently applied equitable doctrines in the absence of any relevant contract provision. See, *e. g.*, *Washtenaw Mut. Fire Ins. Co.* v. *Budd*, 208 Mich.

483, 486–487, 175 N. W. 231, 232 (1919); *Fire Assn. of Philadelphia* v. *Wells*, 84 N. J. Eq. 484, 487, 94 A. 619, 621 (1915). In others, courts found those rules to comport with the applicable contract term. For example, in *Svea Assurance Co.* v. *Packham*, 92 Md. 464, 48 A. 359 (1901)—the case McCutchen calls his best, see Tr. of Oral Arg. 47–48—the court viewed the double-recovery rule as according with "the intention" of the contracting parties; "[b]road as [the] language is," the court explained, the agreement "cannot be construed to" give the insurer any greater recovery. 92 Md., at 478, 48 A., at 362; see also *Knaffl* v. *Knoxville Banking & Trust Co.*, 133 Tenn. 655, 661, 182 S. W. 232, 233 (1916); *Camden Fire Ins. Assn.* v. *Prezioso*, 93 N. J. Eq. 318, 319–320, 116 A. 694, 694 (Ch. 1922). But in none of these cases—nor in any other we can find—did an equity court apply the double-recovery or common-fund rule to override a plain contract term. That is, in none did an equity court do what McCutchen asks of us.

Nevertheless, the United States, appearing as *amicus curiae*, claims that the common-fund rule has a special capacity to trump a conflicting contract. The Government begins its brief foursquare with our (and *Sereboff*'s) analysis: In a suit like this one, to enforce an equitable lien by agreement, "the agreement, not general restitutionary principles of unjust enrichment, provides the measure of relief due." Brief for United States 6. Because that is so, the Government (naturally enough) concludes, McCutchen cannot invoke the double-recovery rule to defeat the plan. But then the Government takes an unexpected turn. "When it comes to the costs incurred" by a beneficiary to obtain money from a third party, "the terms of the plan do not control." *Id.*, at 21. An equity court, the Government contends, has "inherent authority" to apportion litigation costs in accord with the "long-standing equitable common-fund doctrine," even if that conflicts with the parties' contract. *Id.*, at 22.

But if the agreement governs, the agreement governs: The reasons we have given (and the Government mostly ac-

cepts) for looking to the contract's terms do not permit an attorney's-fees exception. We have no doubt that the common-fund doctrine has deep roots in equity. See *Sprague* v. *Ticonic Nat. Bank*, 307 U. S. 161, 164 (1939) (tracing equity courts' authority over fees to the First Judiciary Act). Those roots, however, are set in the soil of unjust enrichment: To allow "others to obtain full benefit from the plaintiff's efforts without contributing . . . to the litigation expenses," we have often noted, "would be to enrich the others unjustly at the plaintiff's expense." *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 392 (1970); see *Boeing*, 444 U. S., at 478; *Trustees* v. *Greenough*, 105 U. S. 527, 532 (1882); *supra*, at 96, and n. 4. And as we have just explained, principles of unjust enrichment give way when a court enforces an equitable lien by agreement. See *supra*, at 98. The agreement itself becomes the measure of the parties' equities; so if a contract abrogates the common-fund doctrine, the insurer is not unjustly enriched by claiming the benefit of its bargain. That is why the Government, like McCutchen, fails to produce a single case in which an equity court applied the common-fund rule (any more than the double-recovery rule) when a contract provided to the contrary. Even in equity, when a party sought to enforce a lien by agreement, all provisions of that agreement controlled. So too, then, in a suit like this one.

The result we reach, based on the historical analysis our prior cases prescribe, fits lock and key with ERISA's focus on what a plan provides. The section under which this suit is brought "does not, after all, authorize 'appropriate equitable relief' *at large*," *Mertens*, 508 U. S., at 253 (quoting § 1132(a)(3)); rather, it countenances only such relief as will enforce "*the terms of the plan*" or the statute, § 1132(a)(3) (emphasis added). That limitation reflects ERISA's principal function: to "protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 148 (1985). The statutory scheme, we have often noted, "is

built around reliance on the face of written plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U. S. 73, 83 (1995). "Every employee benefit plan shall be established and maintained pursuant to a written instrument," § 1102(a)(1), and an administrator must act "in accordance with the documents and instruments governing the plan" insofar as they accord with the statute, § 1104(a)(1)(D). The plan, in short, is at the center of ERISA. And precluding McCutchen's equitable defenses from overriding plain contract terms helps it to remain there.

III

Yet McCutchen's arguments are not all for naught. If the equitable rules he describes cannot trump a reimbursement provision, they still might aid in properly construing it. And for US Airways' plan, the common-fund doctrine (though not the double-recovery rule) serves that function. The plan is silent on the allocation of attorney's fees, and in those circumstances, the common-fund doctrine provides the appropriate default. In other words, if US Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so—and here it did not.[7]

[7] The dissent faults us for addressing this issue, but we think it adequately preserved and presented. The language the dissent highlights in McCutchen's brief in opposition, indicating that the plan clearly abrogates the common-fund doctrine, comes from his description of *US Airways*' claim in the District Court. See *post*, at 106–107 (opinion of SCALIA, J.); Brief in Opposition 5. *McCutchen's* argument in that court urged the very position we adopt—that the common-fund doctrine applies because the plan is silent. See App. to Pet. for Cert. 30a; Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment in No. 2:08–cv–1593 (WD Pa., Dec. 4, 2011), Doc. 33, pp. 12–13 ("If [US Airways] wanted to exclude a deduction for attorney fees, it easily could have so expressed"). To be sure, McCutchen shifted ground on appeal because the District Court ruled that Third Circuit precedent foreclosed his contract-based argument, see App. to Pet. for Cert. 31a; the Court of Appeals' decision then put front-and-center his alternative contention that the common-fund rule trumps a contract. But both claims have the same

Ordinary principles of contract interpretation point toward this conclusion. Courts construe ERISA plans, as they do other contracts, by "looking to the terms of the plan" as well as to "other manifestations of the parties' intent." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 113 (1989). The words of a plan may speak clearly, but they may also leave gaps. And so a court must often "look outside the plan's written language" to decide what an agreement means. *CIGNA Corp.* v. *Amara*, 563 U. S. 421, 436 (2011); see *Curtiss-Wright*, 514 U. S., at 80–81. In undertaking that task, a court properly takes account of background legal rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise. See *Wal-Mart Stores, Inc. Assoc. Health & Welfare Plan* v. *Wells*, 213 F. 3d 398, 402 (CA7 2000) (Posner, J.) ("[C]ontracts . . . are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' [contrary] intent"); 11 R. Lord, Williston on Contracts §31:7 (4th ed. 2012); Restatement (Second) of Contracts §221 (1979). Indeed, ignoring those rules is likely to frustrate the parties' intent and produce perverse consequences.

The reimbursement provision at issue here precludes looking to the double-recovery rule in this manner. Both the contract term and the equitable principle address the same problem: how to apportion, as between an insurer and a beneficiary, a third party's payment to recompense an injury. But the allocation formulas they prescribe differ markedly.

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basis (the nature and function of the common-fund doctrine), which the parties have disputed throughout this litigation. And similarly, the question we decide here is included in the question presented. The principal clause of that question asks whether a court may use "equitable principles to rewrite contractual language." Pet. for Cert. i. We answer "not rewrite, but inform"—a reply well within the question's scope.

According to the plan, US Airways has first claim on the entire recovery—as the plan description states, on "any monies recovered from [the] third party"; McCutchen receives only whatever is left over (if anything). See *supra*, at 93. By contrast, the double-recovery rule would give *McCutchen* first dibs on the portion of the recovery compensating for losses that the plan did not cover (*e. g.*, future earnings or pain and suffering); US Airways' claim would attach only to the share of the recovery for medical expenses. See *supra*, at 96. The express contract term, in short, contradicts the background equitable rule; and where that is so, for all the reasons we have given, the agreement must govern.

By contrast, the plan provision here leaves space for the common-fund rule to operate. That equitable doctrine, as earlier noted, addresses not how to allocate a third-party recovery, but instead how to pay for the costs of obtaining it. See *supra*, at 96. And the contract, for its part, says nothing specific about that issue. The District Court below thus erred when it found that the plan clearly repudiated the common-fund rule. See *supra*, at 93. To be sure, the plan's allocation formula—first claim on the recovery goes to US Airways—*might* operate on every dollar received from a third party, even those covering the beneficiary's litigation costs. But alternatively, that formula could apply to only the true recovery, after the costs of obtaining it are deducted. (Consider, for comparative purposes, how an income tax is levied on net, not gross, receipts.) See Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597, 1606–1607 (1974) ("[T]he claim for legal services is a first charge on the fund and must be satisfied before any distribution occurs"). The plan's terms fail to select between these two alternatives: whether the recovery to which US Airways has first claim is every cent the third party paid or, instead, the money the beneficiary took away.

Given that contractual gap, the common-fund doctrine provides the best indication of the parties' intent. No one can doubt that the common-fund rule would govern here in the absence of a contrary agreement. This Court has "recognized consistently" that someone "who recovers a common fund for the benefit of persons other than himself" is due "a reasonable attorney's fee from the fund as whole." *Boeing Co.*, 444 U. S., at 478. We have understood that rule as "reflect[ing] the traditional practice in courts of equity." *Ibid.*; see *Sprague*, 307 U. S., at 164–166; *supra*, at 100. And we have applied it in a wide range of circumstances as part of our inherent authority. See *Boeing Co.*, 444 U. S., at 474, 478; *Hall* v. *Cole*, 412 U. S. 1, 6–7, and n. 7 (1973); *Mills*, 396 U. S., at 389–390, 392; *Sprague*, 307 U. S., at 166; *Central Railroad & Banking Co. of Ga.* v. *Pettus*, 113 U. S. 116, 126–127 (1885); *Greenough*, 105 U. S., at 528, 531–533. State courts have done the same; the "overwhelming majority" routinely use the common-fund rule to allocate the costs of third-party recoveries between insurers and beneficiaries. 8A Appleman § 4903.85, at 335 (1981); see Annot., 2 A. L. R. 3d 1441, §§ 2–3 (1965 and Supp. 2012). A party would not typically expect or intend a plan saying nothing about attorney's fees to abrogate so strong and uniform a background rule. And that means a court should be loath to read such a plan in that way.[8]

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[8] For that reason, almost every state court that has confronted the issue has done what we do here: apply the common-fund doctrine in the face of a contract giving an insurer a general right to recoup funds from an insured's third-party recovery, without specifically addressing attorney's fees. See, *e. g.*, *Ex parte State Farm Mut. Auto. Ins. Co.*, 105 So. 3d 1199, 1212, and n. 6 (Ala. 2012); *York Ins. Group of Me.* v. *Van Hall*, 1997 ME 230, ¶8, 704 A. 2d 366, 369; *Barreca* v. *Cobb*, 1995–1651, pp. 2–3, 5, and n. 5 (La. 2/28/96), 668 So. 2d 1129, 1131–1132, and n. 5; *Federal Kemper Ins. Co.* v. *Arnold*, 183 W. Va. 31, 33–34, 393 S. E. 2d 669, 671–672 (1990); *State Farm Mut. Auto. Ins. Co.* v. *Clinton*, 267 Ore. 653, 661–662, 518 P. 2d 645, 649 (1974); *Northern Buckeye Educ. Council Group Health Benefits Plan* v. *Lawson*, 154 Ohio App. 3d 659, 669, 2003-Ohio-5196, 798 N. E. 2d 667, 675; *Lancer Corp.* v. *Murillo*, 909 S. W. 2d 122, 126–127, and n. 2 (Tex.

The rationale for the common-fund rule reinforces that conclusion. Third-party recoveries do not often come free: To get one, an insured must incur lawyer's fees and expenses. Without cost sharing, the insurer free rides on its beneficiary's efforts—taking the fruits while contributing nothing to the labor. Odder still, in some cases—indeed, in this case—the beneficiary is made worse off by pursuing a third party. Recall that McCutchen spent $44,000 (representing a 40% contingency fee) to get $110,000, leaving him with a real recovery of $66,000. But US Airways claimed $66,866 in medical expenses. That would put McCutchen $866 in the hole; in effect, he would pay for the privilege of serving as US Airways' collection agent. We think McCutchen would not have foreseen that result when he signed on to the plan. And we doubt if even US Airways should want it. When the next McCutchen comes along, he is not likely to relieve US Airways of the costs of recovery. See *Blackburn* v. *Sundstrand Corp.*, 115 F. 3d 493, 496 (CA7 1997) (Easterbrook, J.) ("[I]f . . . injured persons could not charge legal costs against recoveries, people like [McCutchen] would in the future have every reason" to make different judgments about bringing suit, "throwing on plans the burden and expense of collection"). The prospect of generating those strange results again militates against reading a general reimbursement provision—like the one here—for more than it is worth. Only if US Airways' plan expressly addressed the costs of recovery would it alter the common-fund doctrine.

App. 1995); *Breslin* v. *Liberty Mut. Ins. Co.*, 134 N. J. Super. 357, 362, 341 A. 2d 342, 344 (App. Div. 1975); *Hospital Service Corp. of R. I.* v. *Pennsylvania Ins. Co.*, 101 R. I. 708, 710, 716, 227 A. 2d 105, 108, 111 (1967); *National Union Fire Ins. Co.* v. *Grimes*, 278 Minn. 45, 46–47, 51, 153 N. W. 2d 152, 153, 156 (1967); *Foremost Life Ins. Co.* v. *Waters*, 125 Mich. App. 799, 801, 805, 337 N. W. 2d 29, 30, 32 (1983) (citing *Foremost Life Ins. Co.* v. *Waters*, 88 Mich. App. 599, 602, 278 N. W. 2d 688, 689 (1979)); *Lee* v. *State Farm Mut. Auto. Ins. Co.*, 57 Cal. App. 3d 458, 462, 469, 129 Cal. Rptr. 271, 273–274, 278 (1976).

IV

Our holding today has two parts, one favoring US Airways, the other McCutchen. First, in an action brought under § 502(a)(3) based on an equitable lien by agreement, the terms of the ERISA plan govern. Neither general principles of unjust enrichment nor specific doctrines reflecting those principles—such as the double-recovery or common-fund rules—can override the applicable contract. We therefore reject the Third Circuit's decision. But second, the common-fund rule informs interpretation of US Airways' reimbursement provision. Because that term does not advert to the costs of recovery, it is properly read to retain the common-fund doctrine. We therefore also disagree with the District Court's decision. In light of these rulings, we vacate the judgment below and remand the case for further proceedings consistent with this opinion.

It is so ordered.

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

I agree with Parts I and II of the Court's opinion, which conclude that equity cannot override the plain terms of the contract.

The Court goes on in Parts III and IV, however, to hold that the terms are *not* plain and to apply the "common-fund" doctrine to fill that "contractual gap," *ante*, at 104. The problem with this is that we granted certiorari on a question that presumed the contract's terms were unambiguous—namely, "where the plan's terms give it an absolute right to full reimbursement." Pet. for Cert. i. Respondents interpreted "full reimbursement" to mean what it plainly says—reimbursement of *all* the funds the plan had expended. In their brief in opposition to the petition they conceded that, under the contract, "a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third-party, *without any contri-*

bution to attorney's fees and expenses." Brief in Opposition 5 (emphasis added). All the parties, as well as the Solicitor General, have treated that concession as valid. See Brief for Petitioner 18, and n. 6; Brief for Respondents 29; Brief for United States as *Amicus Curiae* 21. The Court thus has no business deploying against petitioner an argument that was neither preserved, see *Baldwin* v. *Reese*, 541 U. S. 27, 34 (2004), nor fairly included within the question presented, see *Yee* v. *Escondido*, 503 U. S. 519, 535 (1992).

I would reverse the judgment of the Third Circuit.

Syllabus

KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND KIOBEL, ET AL. *v.* ROYAL DUTCH PETROLEUM CO. ET AL.

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

No. 10–1491. Argued February 28, 2012—Reargued October 1, 2012—Decided April 17, 2013

Petitioners, Nigerian nationals residing in the United States, filed suit in federal court under the Alien Tort Statute, alleging that respondents—certain Dutch, British, and Nigerian corporations—aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. The District Court dismissed several of petitioners' claims, but on interlocutory appeal, the Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. This Court granted certiorari, and ordered supplemental briefing on whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

Held: The presumption against extraterritoriality applies to claims under the ATS, and nothing in the statute rebuts that presumption. Pp. 114–125.

(a) Passed as part of the Judiciary Act of 1789, the ATS is a jurisdictional statute that creates no causes of action. It permits federal courts to "recognize private claims [for a modest number of international law violations] under federal common law." *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 732. In contending that a claim under the ATS does not reach conduct occurring in a foreign sovereign's territory, respondents rely on the presumption against extraterritorial application, which provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255. The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248. It is typically applied to discern whether an Act of Congress regulating conduct applies abroad, see, *e. g.*, *id.*, at 246, but its underlying principles similarly constrain courts when considering

causes of action that may be brought under the ATS. Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in this context, where the question is not what Congress has done but what courts may do. These foreign policy concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "'specific, universal, and obligatory,'" 542 U. S., at 732. Pp. 114–117.

(b) The presumption is not rebutted by the text, history, or purposes of the ATS. Nothing in the ATS's text evinces a clear indication of extraterritorial reach. Violations of the law of nations affecting aliens can occur either within or outside the United States. And generic terms, like "any" in the phrase "any civil action," do not rebut the presumption against extraterritoriality. See, *e. g.*, *Morrison*, *supra*, at 263–264. Petitioners also rely on the common-law "transitory torts" doctrine, but that doctrine is inapposite here; as the Court has explained, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place," *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 479. The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U. S. law to enforce a norm of international law. That question is not answered by the mere fact that the ATS mentions torts.

The historical background against which the ATS was enacted also does not overcome the presumption. When the ATS was passed, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Sosa*, *supra*, at 723, 724. Prominent contemporary examples of the first two offenses—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad. And although the offense of piracy normally occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country, applying U. S. law to pirates does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. A 1795 opinion of Attorney General William Bradford regarding the conduct of U. S. citizens on both the high seas and a foreign shore is at best ambiguous about the ATS's extraterritorial application; it does not suffice to counter the weighty concerns underlying the pre-

Syllabus

sumption against extraterritoriality. Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. Pp. 117–124.

621 F. 3d 111, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 125. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 125. BREYER, J., filed an opinion concurring in the judgment, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 127.

Paul L. Hoffman argued and reargued the cause for petitioners. With him on the briefs were *Erwin Chemerinsky* and *Carey R. D'Avino*.

Kathleen M. Sullivan argued and reargued the cause for respondents. With her on the briefs were *Faith E. Gay*, *Sanford I. Weisburst*, *Isaac Nesser*, and *Todd S. Anten*.

Solicitor General Verrilli reargued the cause for the United States as *amicus curiae* urging partial affirmance. With him on the supplemental brief were *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Melissa Arbus Sherry*, and *Robert M. Loeb*. *Deputy Solicitor General Kneedler* argued the cause for the United States as *amicus curiae* urging reversal on the original argument. With him on the briefs were *Solicitor General Verrilli*, *Assistant Attorney General West*, *Ms. Sherry*, *Douglas N. Letter*, *Mr. Loeb*, *Harold Hongju Koh*, and *Cameron F. Kerry*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Lynn K. Rhinehart*, *James B. Coppess*, and *Matthew J. Ginsburg*; for the Association of the Bar of the City of New York by *Stephen L. Kass*; for Australian International Law Scholars by *Donald Kris Anton*, *pro se*; for Former United States Government Counterterrorism and Human Rights Officials by *Ruth Wedgwood*, *Ronald L. Motley*, *Michael E. Elsner*, *Vincent I. Parrett*, *John M. Eubanks*, and *Brian T. Frutig*; for the German Institute for Human Rights et al. by *Richard R. Wiebe*; for International Law Scholars by *Ralph G. Steinhardt*; for Law Professors of Civil Liberties and 42 U. S. C. § 1983 by *Penny M. Venetis*; for The Rutherford Institute by *John*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Petitioners, a group of Nigerian nationals residing in the United States, filed suit in federal court against certain

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W. Whitehead and *Charles I. Lugosi*; for the Yale Law School Center for Global Legal Challenges by *Oona A. Hathaway* and *Jeffrey A. Meyer*; for Abukar Hassan Ahmed et al. by *Pamela S. Karlan*, *Jeffrey L. Fisher*, *Pamela Merchant*, *Andrea Evans*, *Natasha E. Fain*, *L. Kathleen Roberts*, *Thomas C. Goldstein*, and *Kevin K. Russell*; for Volker Beck et al. by *Judith Brown Chomsky*; for Barbara Aronstein Black et al. by *Susan H. Farbstein* and *Tyler R. Giannini*; for David J. Scheffer, by *Mr. Scheffer*, *pro se*; for Thomas J. Schoenbaum, by *Mr. Schoenbaum*, *pro se*; for Former 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* urging affirmance were filed for the Association of German Chambers of Industry and Commerce et al. by *Alan E. Untereiner* and *Mark T. Stancil*; for BP America et al. by *Paul D. Clement*, *Jeffrey M. Harris*, *John B. Bellinger III*, *Lisa S. Blatt*, *Ramon P. Marks*, and *R. Reeves Anderson*; for the Cato Institute by *Owen C. Pell* and *Ilya Shapiro*; for the Chamber of Commerce of the United States of America by *Neal Kumar Katyal*, *Christopher T. Handman*, *Dominic F. Perella*, *Robin S. Conrad*, and *Kate Comerford Todd*; for the Clearing House Association L. L. C. by *Andrew J. Pincus*, *Alex C. Lakatos*, and *Carl J. Summers*; for Coca-Cola Co. et al. by *Kristin Linsley Myles*; for Engility Corp. by *Ari S. Zymelman*; for International Law Professors by *Matthew J. Kemner*, *David M. Rice*, *Troy M. Yoshino*, and *Timothy C. Smith*; for the National Foreign Trade Council et al. by *Seth P. Waxman* and *Jonathan G. Cedarbaum*; for the Product Liability Advisory Counsel, Inc., by *Anne E. Cohen* and *David W. Rivkin*; for Professors of International Law, Foreign Relations Law and Federal Jurisdiction by *Meir Feder* and *Samuel Estreicher*, *pro se*; for the Rio Tinto Group et al. by *Jonathan D. Hacker*, *Anton Metlitsky*, and *Matthew T. Kline*; for the US-China Law Society by *Sienho Yee*; for the Washington Legal Foundation et al. by *Richard A. Samp*; and for Anthony J. Bellia, Jr., et al. by *Christopher J. Paolella*.

Briefs of *amici curiae* were filed for the American Bar Association by *William T. Robinson III*, *Robert P. LoBue*, and *Matthew Funk*; for the American Civil Liberties Union by *Steven R. Shapiro* and *Mitra Ebadolahi*; for the Brennan Center for Justice at NYU School of Law by *Burt Neuborne*; for Certain Plaintiffs in *In re: Terrorist Attacks on September 11, 2001*, by *Carter G. Phillips*, *Richard D. Klinger*, *Jacqueline G. Cooper*, *Stephen A. Cozen*, *Elliott R. Feldman*, *Sean P. Carter*, *James P. Kreindler*, *Justin T. Green*, *Andrew J. Maloney III*, *Messrs. Motley* and *Elsner*,

Dutch, British, and Nigerian corporations. Petitioners sued under the Alien Tort Statute, 28 U. S. C. § 1350, alleging that the corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. The question presented is whether and under what circum-

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Jerry S. Goldman, and *Chris Leonardo*; for Chevron Corp. et al. by *Jack Goldsmith*; for Civil Procedure Professors by *Agnieszka M. Fryszman* and *Maureen E. McOwen*; for Comparative Law Scholars et al. by *Vivian Grosswald Curran* and *Anne Richardson*; for EarthRights International by *Richard L. Herz* and *Marco B. Simons*; for Eleven Jewish Former Residents of Iran Whose Family Members "Disappeared" by *Robert J. Tolchin*; for the European Commission by *Steven Alan Reiss* and *Gregory Silbert*; for the Federal Republic of Germany by *Jeffrey Harris, Max Riederer von Paar*, and *Walter E. Diercks*; for Former State Department Legal Advisers by *Kristin Linsley Myles* and *Daniel P. Collins*; for Genocide Victims of Krajina, Croatia, by *Robert J. Pavich, Ian Levin, John J. Pavich*, and *Anthony A. D'Amato*; for the Government of the Argentine Republic by *Jonathan M. Miller*; for the Government of the Kingdom of the Netherlands et al. by *Donald I. Baker* and *W. Todd Miller*; for the Government of the United Kingdom of Great Britain and Northern Ireland et al. by *Messrs. Baker* and *W. Miller*; for Human Rights First et al. by *Mr. Aceves*; for the Institute for Human Rights and Business et al. by *Jennifer Green*; for International Human Rights Organizations et al. by *Katherine Gallagher* and *Peter Weiss*; for KBR, Inc., by *David B. Rivkin, Jr.*, and *Lee A. Casey*; for Law of Nations Scholars by *Mr. D'Amato*; for Nuremberg Historians et al. by *Jonathan S. Massey*; for OTP Bank by *Thomas G. Corcoran, Jr.*, and *Michael D. Ramsey*; for Professors of Civil Procedure and Federal Courts by *Allan Ides, pro se, Theresa M. Traber*, and *Bert Voorhees*; for Professors of Constitutional and Federal Civil Procedure Law by *Richard A. Edlin*; for the Rutgers Law School Constitutional Litigation Clinic by *Ms. Venetis*; for Victims of the Hungarian Holocaust by *Messrs. Pavich, Levin*, and *Pavich*; for Juan Romagoza Arce et al. by *Mses. Evans, Merchant, Fain*, and *Roberts*; for Diego Asencio et al. by *Douglass Cassel*; for Omer Bartov et al. by *Mses. Green* and *Chomsky* and *Beth Stephens*; for Alex-Geert Castermans et al. by *Gary L. Bostwick*, and *Mses. Fryszman* and *McOwen*; for William R. Casto et al. by *Mr. Giannini* and *Ms. Farbstein*; for Martyn Day et al. by *Michael D. Hausfeld*; for Martin S. Flaherty et al. by *Frederick W. Morris*; for Anton Katz et al. by *Carol A. Sobel*; for Juan E. Méndez by *Deena R. Hurwitz* and *Eric Alan Isaacson*; for Navi Pillay by *David Sloss*; and for John Ruggie et al. by *Vincent F. O'Rourke, Jr.*

stances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States.

I

Petitioners were residents of Ogoniland, an area of 250 square miles located in the Niger delta area of Nigeria and populated by roughly half a million people. When the complaint was filed, respondents Royal Dutch Petroleum Company and Shell Transport and Trading Company, p. l. c., were holding companies incorporated in the Netherlands and England, respectively. Their joint subsidiary, respondent Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), was incorporated in Nigeria, and engaged in oil exploration and production in Ogoniland. According to the complaint, after concerned residents of Ogoniland began protesting the environmental effects of SPDC's practices, respondents enlisted the Nigerian Government to violently suppress the burgeoning demonstrations. Throughout the early 1990's, the complaint alleges, Nigerian military and police forces attacked Ogoni villages, beating, raping, killing, and arresting residents and destroying or looting property. Petitioners further allege that respondents aided and abetted these atrocities by, among other things, providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents' property as a staging ground for attacks.

Following the alleged atrocities, petitioners moved to the United States where they have been granted political asylum and now reside as legal residents. See Supp. Brief for Petitioners 3, and n. 2. They filed suit in the United States District Court for the Southern District of New York, alleging jurisdiction under the Alien Tort Statute and requesting relief under customary international law. The ATS provides, in full, that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed

in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350. According to petitioners, respondents violated the law of nations by aiding and abetting the Nigerian Government in committing (1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction. The District Court dismissed the first, fifth, sixth, and seventh claims, reasoning that the facts alleged to support those claims did not give rise to a violation of the law of nations. The court denied respondents' motion to dismiss with respect to the remaining claims, but certified its order for interlocutory appeal pursuant to § 1292(b).

The Second Circuit dismissed the entire complaint, reasoning that the law of nations does not recognize corporate liability. 621 F. 3d 111 (2010). We granted certiorari to consider that question. 565 U. S. 961 (2011). After oral argument, we directed the parties to file supplemental briefs addressing an additional question: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." 565 U. S. 1244 (2012) (internal quotation marks omitted). We heard oral argument again and now affirm the judgment below, based on our answer to the second question.

II

Passed as part of the Judiciary Act of 1789, the ATS was invoked twice in the late 18th century, but then only once more over the next 167 years. Act of Sept. 24, 1789, § 9, 1 Stat. 77; see *Moxon* v. *The Fanny*, 17 F. Cas. 942 (No. 9,895) (DC Pa. 1793); *Bolchos* v. *Darrel*, 3 F. Cas. 810 (No. 1,607) (DC SC 1795); *O'Reilly de Camara* v. *Brooke*, 209 U. S. 45 (1908); *Khedivial Line, S. A. E.* v. *Seafarers' Int'l Union*, 278 F. 2d 49, 51–52 (CA2 1960) (*per curiam*). The statute

provides district courts with jurisdiction to hear certain claims, but does not expressly provide any causes of action. We held in *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 714 (2004), however, that the First Congress did not intend the provision to be "stillborn." The grant of jurisdiction is instead "best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Id.*, at 724. We thus held that federal courts may "recognize private claims [for such violations] under federal common law." *Id.*, at 732. The Court in *Sosa* rejected the plaintiff's claim in that case for "arbitrary arrest and detention," on the ground that it failed to state a violation of the law of nations with the requisite "definite content and acceptance among civilized nations." *Id.*, at 699, 732 (internal quotation marks omitted).

The question here is not whether petitioners have stated a proper claim under the ATS, but whether a claim may reach conduct occurring in the territory of a foreign sovereign. Respondents contend that claims under the ATS do not, relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp.* v. *AT&T Corp.*, 550 U. S. 437, 454 (2007).

This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (*Aramco*). As this Court has explained:

> "For us to run interference in . . . a delicate field of international relations there must be present the af-

> firmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957).

The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U. S. law that carries foreign policy consequences not clearly intended by the political branches.

We typically apply the presumption to discern whether an Act of Congress regulating conduct applies abroad. See, *e. g., Aramco*, *supra*, at 246 ("These cases present the issue whether Title VII applies extraterritorially to regulate the employment practices of United States employers who employ United States citizens abroad"); *Morrison*, *supra*, at 254 (noting that the question of extraterritorial application was a "merits question," not a question of jurisdiction). The ATS, on the other hand, is "strictly jurisdictional." *Sosa*, 542 U. S., at 713. It does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law. But we think the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.

Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering which claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential [foreign policy] implications . . . of recognizing . . . causes [under the ATS] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.*, at 727;

see also *id.*, at 727–728 ("Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution"); *id.*, at 727 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution"). These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.

These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "'specific, universal, and obligatory.'" *Id.*, at 732 (quoting *In re Estate of Marcos, Human Rights Litigation*, 25 F. 3d 1467, 1475 (CA9 1994)). As demonstrated by Congress's enactment of the Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U. S. C. § 1350, identifying such a norm is only the beginning of defining a cause of action. See *id.*, § 3 (providing detailed definitions for extrajudicial killing and torture); *id.*, § 2 (specifying who may be liable, creating a rule of exhaustion, and establishing a statute of limitations). Each of these decisions carries with it significant foreign policy implications.

The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.

III

Petitioners contend that even if the presumption applies, the text, history, and purposes of the ATS rebut it for causes of action brought under that statute. It is true that Congress, even in a jurisdictional provision, can indicate that it intends federal law to apply to conduct occurring abroad. See, *e. g.*, 18 U. S. C. § 1091(e) (2006 ed., Supp. V) (providing jurisdiction over the offense of genocide "regardless of where

the offense is committed" if the alleged offender is, among other things, "present in the United States"). But to rebut the presumption, the ATS would need to evince a "clear indication of extraterritoriality." *Morrison*, 561 U. S., at 265. It does not.

To begin, nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach. The ATS covers actions by aliens for violations of the law of nations, but that does not imply extraterritorial reach—such violations affecting aliens can occur either within or outside the United States. Nor does the fact that the text reaches "*any* civil action" suggest application to torts committed abroad; it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality. See, *e. g.*, *id.*, at 263–264; *Small* v. *United States*, 544 U. S. 385, 388 (2005); *Aramco*, 499 U. S., at 248–250; *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 287 (1949).

Petitioners make much of the fact that the ATS provides jurisdiction over civil actions for "torts" in violation of the law of nations. They claim that in using that word, the First Congress "necessarily meant to provide for jurisdiction over extraterritorial transitory torts that could arise on foreign soil." Supp. Brief for Petitioners 18. For support, they cite the common-law doctrine that allowed courts to assume jurisdiction over such "transitory torts," including actions for personal injury, arising abroad. See *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 177, 98 Eng. Rep. 1021, 1030 (K. B. 1774) (Lord Mansfield, C. J.) ("[A]ll actions of a transitory nature that arise abroad may be laid as happening in an English county"); *Dennick* v. *Railroad Co.*, 103 U. S. 11, 18 (1881) ("Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties").

Under the transitory torts doctrine, however, "the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place." *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 479 (1912) (majority opinion of Holmes, J.). The question under *Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U. S. law to enforce a norm of international law. The reference to "tort" does not demonstrate that the First Congress "necessarily meant" for those causes of action to reach conduct in the territory of a foreign sovereign. In the end, nothing in the text of the ATS evinces the requisite clear indication of extraterritoriality.

Nor does the historical background against which the ATS was enacted overcome the presumption against application to conduct in the territory of another sovereign. See *Morrison*, *supra*, at 265 (noting that "[a]ssuredly context can be consulted" in determining whether a cause of action applies abroad). We explained in *Sosa* that when Congress passed the ATS, "three principal offenses against the law of nations" had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U. S., at 723, 724; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769). The first two offenses have no necessary extraterritorial application. Indeed, Blackstone—in describing them—did so in terms of conduct occurring within the forum nation. See *ibid.* (describing the right of safe conducts for those "who are here"); 1 *id.*, at 251 (1765) (explaining that safe conducts grant a member of one society "a right to intrude into another"); *id.*, at 245–248 (recognizing the King's power to "receiv[e] ambassadors at home" and detailing their rights in the state "wherein they are appointed to reside"); see also E. de Vattel, Law of Nations 466 (J. Chitty transl. and ed. 1883) ("[O]n his entering

the country to which he is sent, and making himself known, [the ambassador] is under the protection of the law of nations . . . ").

Two notorious episodes involving violations of the law of nations occurred in the United States shortly before passage of the ATS. Each concerned the rights of ambassadors, and each involved conduct within the Union. In 1784, a French adventurer verbally and physically assaulted Francis Barbe Marbois—the Secretary of the French Legation—in Philadelphia. The assault led the French Minister Plenipotentiary to lodge a formal protest with the Continental Congress and threaten to leave the country unless an adequate remedy were provided. *Respublica* v. *De Longchamps*, 1 Dall. 111 (O. T. Phila. 1784); *Sosa*, *supra*, at 716–717, and n. 11. And in 1787, a New York constable entered the Dutch Ambassador's house and arrested one of his domestic servants. See Casto, The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 494 (1986). At the request of Secretary of Foreign Affairs John Jay, the Mayor of New York City arrested the constable in turn, but cautioned that because " 'neither Congress nor our [State] Legislature have yet passed any act respecting a breach of the privileges of Ambassadors,' " the extent of any available relief would depend on the common law. See Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 641–642 (2002) (quoting 3 Dept. of State, The Diplomatic Correspondence of the United States of America 447 (1837)). The two cases in which the ATS was invoked shortly after its passage also concerned conduct within the territory of the United States. See *Bolchos*, 3 F. Cas. 810 (wrongful seizure of slaves from a vessel while in port in the United States); *Moxon*, 17 F. Cas. 942 (wrongful seizure in U. S. territorial waters).

These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be

brought under the statute for violations of the law of nations occurring abroad.

The third example of a violation of the law of nations familiar to the Congress that enacted the ATS was piracy. Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country. See 4 Blackstone, *supra,* at 72 ("The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"). This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application. See, *e. g.*, *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 173–174 (1993) (declining to apply a provision of the Immigration and Nationality Act to conduct occurring on the high seas); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U. S. 428, 440 (1989) (declining to apply a provision of the Foreign Sovereign Immunities Act of 1976 to the high seas). Petitioners contend that because Congress surely intended the ATS to provide jurisdiction for actions against pirates, it necessarily anticipated the statute would apply to conduct occurring abroad.

Applying U. S. law to pirates, however, does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences. Pirates were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction. See 4 Blackstone, *supra,* at 71. We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves. See *Morrison*, 561 U. S., at 265 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that

provision to its terms"); see also *Microsoft Corp.*, 550 U. S., at 455–456.

Petitioners also point to a 1795 opinion authored by Attorney General William Bradford. See Breach of Neutrality, 1 Op. Atty. Gen. 57. In 1794, in the midst of war between France and Great Britain, and notwithstanding the American official policy of neutrality, several U. S. citizens joined a French privateer fleet and attacked and plundered the British colony of Sierra Leone. In response to a protest from the British Ambassador, Attorney General Bradford responded as follows:

> "So far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* within the jurisdiction of the . . . courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in . . . those courts . . . . But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . ." *Id.*, at 58–59.

Petitioners read the last sentence as confirming that "the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign." Supp. Brief for Petitioners 33. Respondents counter that when Attorney General Bradford referred to "these acts of hostility," he meant the acts only insofar as

they took place on the high seas, and even if his conclusion were broader, it was only because the applicable treaty had extraterritorial reach. See Supp. Brief for Respondents 28–30. The Solicitor General, having once read the opinion to stand for the proposition that an "ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not take place in a foreign country," Supp. Brief for United States as *Amicus Curiae* 8, n. 1 (internal quotation marks and brackets omitted), now suggests the opinion "could have been meant to encompass . . . conduct [occurring within the foreign territory]," *id.*, at 8.

Attorney General Bradford's opinion defies a definitive reading and we need not adopt one here. Whatever its precise meaning, it deals with U. S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain. The opinion hardly suffices to counter the weighty concerns underlying the presumption against extraterritoriality.

Finally, there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, "No nation has ever yet pretended to be the custos morum of the whole world . . . ." *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (CC Mass. 1822). It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.

The United States was, however, embarrassed by its potential inability to provide judicial relief to foreign officials injured in the United States. Bradley, 42 Va. J. Int'l L., at 641. Such offenses against ambassadors violated the law of nations, "and if not adequately redressed could rise to an issue of war." *Sosa*, 542 U. S., at 715; cf. The Federalist

No. 80, p. 536 (J. Cooke ed. 1961) (A. Hamilton) ("As the denial or perversion of justice . . . is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned"). The ATS ensured that the United States could provide a forum for adjudicating such incidents. See *Sosa*, *supra*, at 715–718, and n. 11. Nothing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.

Indeed, far from avoiding diplomatic strife, providing such a cause of action could have generated it. Recent experience bears this out. See *Doe* v. *Exxon Mobil Corp.*, 654 F. 3d 11, 77–78 (CADC 2011) (Kavanaugh, J., dissenting in part) (listing recent objections to extraterritorial applications of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, Switzerland, and the United Kingdom). Moreover, accepting petitioners' view would imply that other nations, also applying the law of nations, could hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world. The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.

We therefore conclude that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. "[T]here is no clear indication of extraterritoriality here," *Morrison*, 561 U. S., at 265, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred.

IV

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and

concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *id.*, at 266–273. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring.

The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition. Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), 106 Stat. 73, note following 28 U. S. C. § 1350, and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted. Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

I concur in the judgment and join the opinion of the Court as far as it goes. Specifically, I agree that when Alien Tort Statute (ATS) "claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Ante*, at 124 and this page. This formulation obviously leaves

much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach. I write separately to set out the broader standard that leads me to the conclusion that this case falls within the scope of the presumption.

In *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247 (2010), we explained that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.*, at 266. We also reiterated that a cause of action falls outside the scope of the presumption—and thus is not barred by the presumption—only if the event or relationship that was "the 'focus' of congressional concern" under the relevant statute takes place within the United States. *Ibid.* (quoting *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 255 (1991)). For example, because "the focus of the [Securities] Exchange Act [of 1934] is not upon the place where the deception originated, but upon purchases and sales of securities in the United States," we held in *Morrison* that § 10(b) of the Exchange Act applies "only" to "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." 561 U. S., at 266, 267.

The Court's decision in *Sosa* v. *Alvarez-Machain*, 542 U. S. 692 (2004), makes clear that when the ATS was enacted, "congressional concern" was "'focus[ed],'" *Morrison*, *supra*, at 266, on the "three principal offenses against the law of nations" that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy, *Sosa*, 542 U. S., at 723–724. The Court therefore held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Id.*, at 732. In other words, only conduct that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations can be said to have been

"the 'focus' of congressional concern," *Morrison*, *supra*, at 266, when Congress enacted the ATS. As a result, a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, concurring in the judgment.

I agree with the Court's conclusion but not with its reasoning. The Court sets forth four key propositions of law: First, the "presumption against extraterritoriality applies to claims under" the Alien Tort Statute. *Ante*, at 124. Second, "nothing in the statute rebuts that presumption." *Ibid.* Third, there "is no clear indication of extraterritoria[l application] here," where "all the relevant conduct took place outside the United States" and "where the claims" do not "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Ante*, at 124–125 (internal quotation marks omitted). Fourth, that is in part because "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." *Ante*, at 125.

Unlike the Court, I would not invoke the presumption against extraterritoriality. Rather, guided in part by principles and practices of foreign relations law, I would find jurisdiction under this statute where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind. See *Sosa* v. *Alvarez-Machain*, 542 U. S. 692, 732 (2004)

(" '[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind' " (quoting *Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 890 (CA2 1980); alteration in original)). See also Restatement (Third) of Foreign Relations Law of the United States §§ 402, 403, 404 (1986) (Restatement). In this case, however, the parties and relevant conduct lack sufficient ties to the United States for the Alien Tort Statute (ATS) to provide jurisdiction.

I

A

Our decision in *Sosa* frames the question. In *Sosa*, the Court specified that the ATS, when enacted in 1789, "was intended as jurisdictional." 542 U. S., at 714. We added that the statute gives today's courts the power to apply certain "judge-made" damages law to victims of certain foreign-affairs-related misconduct, including "three specific offenses" to which "Blackstone referred," namely, "violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.*, at 715. We held that the statute provides today's federal judges with the power to fashion "a cause of action" for a "modest number" of claims, "based on the present-day law of nations," and which "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features" of those three "18th-century paradigms." *Id.*, at 724–725.

We further said that, in doing so, a requirement of "exhaust[ion]" of "remedies" might apply. *Id.*, at 733, n. 21. We noted "a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Ibid.* Adjudicating any such claim must, in my view, also be consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its own laws

and their enforcement. *Id.*, at 761 (BREYER, J., concurring in part and concurring in judgment). See also *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 165–169 (2004).

Recognizing that Congress enacted the ATS to permit recovery of damages from pirates and others who violated basic international law norms as understood in 1789, *Sosa* essentially leads today's judges to ask: Who are today's pirates? See 542 U. S., at 724–725 (majority opinion). We provided a framework for answering that question by setting down principles drawn from international norms and designed to limit ATS claims to those that are similar in character and specificity to piracy. *Id.*, at 725.

In this case we must decide the extent to which this jurisdictional statute opens a federal court's doors to those harmed by activities belonging to the limited class that *Sosa* set forth *when those activities take place abroad.* To help answer this question here, I would refer both to *Sosa* and, as in *Sosa*, to norms of international law. See Part II, *infra*.

B

In my view the majority's effort to answer the question by referring to the "presumption against extraterritoriality" does not work well. That presumption "rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison* v. *National Australia Bank Ltd.*, 561 U. S. 247, 255 (2010). See *ante*, at 116. The ATS, however, was enacted with "foreign matters" in mind. The statute's text refers explicitly to "alien[s]," "treat[ies]," and "the law of nations." 28 U. S. C. §1350. The statute's purpose was to address "violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs." *Sosa*, 542 U. S., at 715. And at least one of the three kinds of activities that we found to fall within the statute's scope, namely piracy, *ibid.*, normally takes place abroad.

See 4 W. Blackstone, Commentaries on the Laws of England 72 (1769) (Blackstone).

The majority cannot wish this piracy example away by emphasizing that piracy takes place on the high seas. See *ante*, at 121. That is because the robbery and murder that make up piracy do not normally take place in the water; they take place on a ship. And a ship is like land, in that it falls within the jurisdiction of the nation whose flag it flies. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 20–21 (1963); Restatement § 502, Comment *d* ("[F]lag state has jurisdiction to prescribe with respect to any activity aboard the ship"). Indeed, in the early 19th century Chief Justice Marshall described piracy as an "offenc[e] against the nation under whose flag the vessel sails, and within whose particular jurisdiction all on board the vessel are." *United States* v. *Palmer*, 3 Wheat. 610, 632 (1818). See *United States* v. *Furlong*, 5 Wheat. 184, 197 (1820) (a crime committed "within the jurisdiction" of a foreign state and a crime committed "in the vessel of another nation" are "the same thing").

The majority nonetheless tries to find a distinction between piracy at sea and similar cases on land. It writes, "Applying U. S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the *territorial* jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences." *Ante*, at 121 (emphasis added). But, as I have just pointed out, "[a]pplying U. S. law to pirates" *does* typically involve applying our law to acts taking place within the jurisdiction of another sovereign. Nor can the majority's words "territorial jurisdiction" sensibly distinguish land from sea for purposes of isolating adverse foreign policy risks, as the Barbary Pirates, the War of 1812, the sinking of the *Lusitania*, and the Lockerbie bombing make all too clear.

The majority also writes, "Pirates were fair game wherever found, by any nation, because they generally did not

operate within any jurisdiction." *Ibid.* I very much agree that pirates were fair game "wherever found." Indeed, that is the point. That is why we asked, in *Sosa,* who are today's pirates? Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are "fair game" where they are found. Like those pirates, they are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment." Restatement § 404, Reporters' Note 1, at 256 (quoting *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 556 (ND Ohio 1985); internal quotation marks omitted). See *Sosa*, *supra,* at 732. And just as a nation that harbored pirates provoked the concern of other nations in past centuries, see *infra,* at 134, so harboring "common enemies of all mankind" provokes similar concerns today.

Thus the Court's reasoning, as applied to the narrow class of cases that *Sosa* described, fails to provide significant support for the use of any presumption against extraterritoriality; rather, it suggests the contrary. See also *ante,* at 121 (conceding and citing cases showing that this Court has "generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application").

In any event, as the Court uses its "presumption against extraterritorial application," it offers only limited help in deciding the question presented, namely, " 'under what circumstances the Alien Tort Statute . . . allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States,' " 565 U. S. 1244 (2012). The majority echoes in this jurisdictional context *Sosa*'s warning to use "caution" in shaping federal common-law causes of action. *Ante,* at 116. But it also makes clear that a statutory claim might sometimes "touch and concern the territory of the United States . . . with sufficient force to displace the presumption." *Ante,* at 124–125. It leaves for another day the determination of

just when the presumption against extraterritoriality might be "overcome." *Ante*, at 119.

II

In applying the ATS to acts "occurring within the territory of a[nother] sovereign," I would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp. That grasp, defined by the statute's purposes set forth in *Sosa*, includes compensation for those injured by piracy and its modern-day equivalents, at least where allowing such compensation avoids "serious" negative international "consequences" for the United States. 542 U. S., at 715. And just as we have looked to established international substantive norms to help determine the statute's substantive reach, *id.*, at 729, so we should look to international jurisdictional norms to help determine the statute's jurisdictional scope.

The Restatement is helpful. Section 402 recognizes that, subject to § 403's "reasonableness" requirement, a nation may apply its law (for example, federal common law, see 542 U. S., at 729–730) not only (1) to "conduct" that "takes place [or to persons or things] within its territory" but also (2) to the "activities, interests, status, or relations of its nationals outside as well as within its territory," (3) to "conduct outside its territory that has or is intended to have substantial effect within its territory," and (4) to certain foreign "conduct outside its territory . . . that is directed against the security of the state or against a limited class of other state interests." In addition, § 404 of the Restatement explains that a "state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior.

Considering these jurisdictional norms in light of both the ATS' basic purpose (to provide compensation for those injured by today's pirates) and *Sosa*'s basic caution (to avoid international friction), I believe that the statute provides ju-

risdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

I would interpret the statute as providing jurisdiction only where distinct American interests are at issue. Doing so reflects the fact that Congress adopted the present statute at a time when, as Justice Story put it, "No nation ha[d] ever yet pretended to be the custos morum of the whole world." *United States* v. *La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551) (CC Mass. 1822). That restriction also should help to minimize international friction. Further limiting principles such as exhaustion, *forum non conveniens*, and comity would do the same. So would a practice of courts giving weight to the views of the Executive Branch. See *Sosa*, 542 U. S., at 733, n. 21; *id.*, at 761 (opinion of BREYER, J.).

As I have indicated, we should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of the ATS in light of the statute's basic purposes—in particular that of compensating those who have suffered harm at the hands of, *e. g.*, torturers or other modern pirates. Nothing in the statute or its history suggests that our courts should turn a blind eye to the plight of victims in that "handful of heinous actions." *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 781 (CADC 1984) (Edwards, J., concurring). See generally Leval, The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court, 92 Foreign Affairs 16 (Mar./Apr. 2013). To the contrary, the statute's language, history, and purposes suggest that the statute was to be a weapon in the "war" against those modern pirates

who, by their conduct, have "declar[ed] war against all mankind." 4 Blackstone 71.

International norms have long included a duty not to permit a nation to become a safe harbor for pirates (or their equivalent). See generally A. Bradford, Flying the Black Flag: A Brief History of Piracy 19 (2007) ("Every polis by the sea . . . which was suspected of sponsoring piracy or harboring pirates could be attacked and destroyed by the Athenians"); F. Sanborn, Origins of the Early English Maritime and Commercial Law 313 (1930) ("In 1490 Henry VII made a proclamation against harboring pirates or purchasing goods from them"); N. Risjord, Representative Americans: The Colonists 146 (1981) ("William Markham, Penn's lieutenant governor in the 1690s, was accused of harboring pirates in Philadelphia . . . . Governor Benjamin Fletcher of New York became the target of a royal inquiry after he issued privateering commissions to a band of notorious pirates"); 3 C. Yonge, A Pictorial History of the World's Great Nations 954 (1882) ("[In the early 18th century, t]he government of Connecticut was accused of harboring pirates"); Menefee, Piracy, Terrorism, and the Insurgent Passenger: A Historical and Legal Perspective, in Maritime Terrorism and International Law 43, 51 (N. Ronzitti ed. 1990) (quoting the judge who handled the seizure of the *Chesapeake* during the Civil War as stating that "'piracy *jure gentium* was justiciable by the court of New Brunswick, wherever committed'"); D. Field, Outlines of an International Code, Art. 84, p. 33 (2d ed. 1876) ("*Harboring pirates forbidden.* . . . No nation can receive pirates into its territory, or permit any person within the same to receive, protect, conceal or assist them in any manner; but must punish all persons guilty of such acts" (citing the 1794 treaty between the United States and Great Britain)).

More recently two lower American courts have, in effect, rested jurisdiction primarily upon that kind of concern. In *Filartiga*, 630 F. 2d 876, an alien plaintiff brought a lawsuit

against an alien defendant for damages suffered through acts of torture that the defendant allegedly inflicted in a foreign nation, Paraguay. Neither plaintiff nor defendant was an American national, and the actions underlying the lawsuit took place abroad. The defendant, however, "had . . . resided in the United States for more than nine months" before being sued, having overstayed his visitor's visa. *Id.*, at 878–879. Jurisdiction was deemed proper because the defendant's alleged conduct violated a well-established international law norm, and the suit vindicated our Nation's interest in not providing a safe harbor, free of damages claims, for those defendants who commit such conduct.

In *Marcos*, the plaintiffs were nationals of the Philippines, the defendant was a Philippine national, and the alleged wrongful act, death by torture, took place abroad. *In re Estate of Marcos, Human Rights Litigation*, 25 F. 3d 1467, 1469, 1475 (CA9 1994); *In re Estate of Marcos Human Rights Litigation*, 978 F. 2d 493, 495–496, 500 (CA9 1992). A month before being sued, the defendant, "his family, . . . and others loyal to [him] fled to Hawaii," where the ATS case was heard. *Marcos*, 25 F. 3d, at 1469. As in *Filartiga*, the court found ATS jurisdiction.

And in *Sosa*, we referred to both cases with approval, suggesting that the ATS allowed a claim for relief in such circumstances. 542 U. S., at 732. See also *Flomo* v. *Firestone Natural Rubber Co.*, 643 F. 3d 1013, 1025 (CA7 2011) (Posner, J.) ("*Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained"). Not surprisingly, both before and after *Sosa*, courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application. See, *e. g.*, 643 F. 3d, at 1025 ("[N]o court to our knowledge has ever held that it doesn't apply extraterritorially"); *Sarei* v. *Rio Tinto, PLC*, 671 F. 3d 736, 747 (CA9 2011) (en banc) ("We therefore conclude that the ATS is not limited to conduct occurring within the United States"); *Doe* v. *Exxon Mobil*

Corp., 654 F. 3d 11, 20 (CADC 2011) ("[W]e hold that there is no extraterritoriality bar").

Application of the statute in the way I have suggested is consistent with international law and foreign practice. Nations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad. See E. de Vattel, Law of Nations 162 (J. Chitty transl. and ed. 1883) (§ 76) ("pretty generally observed" practice in "respect to great crimes, which are equally contrary to the laws and safety of all nations," that a sovereign should not "suffer his subjects to molest the subjects of other states, or to do them an injury," but should "compel the transgressor to make reparation for the damage or injury," or be "deliver[ed] . . . up to the offended state, to be there brought to justice").

Many countries permit foreign plaintiffs to bring suits against their own nationals based on unlawful conduct that took place abroad. See, *e. g.*, Brief for Government of the Kingdom of the Netherlands et al. as *Amici Curiae* 19–23 (hereinafter Netherlands Brief) (citing, *inter alia*, *Guerrero* v. *Monterrico Metals PLc*, [2009] EWHC (QB) 2475 (Eng.) (attacking conduct of U. K. companies in Peru); *Lubbe* v. *Cape PLc*, [2000] UKHL 41 (attacking conduct of U. K. companies in South Africa); *Rb. Gravenhage* [Court of the Hague], 30 December 2009, JOR 2010, 41 m. nt. Mr. RGJ de Haan (Oguro/Royal Dutch Shell PLC) (Neth.) (attacking conduct of Dutch respondent in Nigeria)). See also Brief for European Commission as *Amicus Curiae* 11 (It is "uncontroversial" that the "United States may . . . exercise jurisdiction over ATS claims involving conduct committed by its own nationals within the territory of another sovereign, consistent with international law").

Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages. Certain countries, which find "universal" criminal "jurisdiction" to try perpetrators of particularly heinous crimes such as pi-

racy and genocide, see Restatement § 404, also permit private persons injured by that conduct to pursue "*actions civiles*," seeking civil damages in the criminal proceeding. Thompson, Ramasastry, & Taylor, Translating *Unocal*: The Expanding Web of Liability for Business Entities Implicated in International Crimes, 40 Geo. Wash. Int'l L. Rev. 841, 886 (2009). See, *e. g.*, *Ould Dah* v. *France*, App. No. 13113/03 (Eur. Ct. H. R., Mar 30, 2009), 48 I. L. M. 884; Metcalf, Reparations for Displaced Torture Victims, 19 Cardozo J. Int'l & Comp. L. 451, 468–470 (2011). Moreover, the United Kingdom and the Netherlands, while not authorizing such damages actions themselves, tell us that they would have no objection to the exercise of American jurisdiction in cases such as *Filartiga* and *Marcos*. Netherlands Brief 15–16, and n. 23.

At the same time the Senate has consented to treaties obliging the United States to find and punish foreign perpetrators of serious crimes committed against foreign persons abroad. See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U. S. T. 1975, T. I. A. S. No. 8532; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U. S. T. 565, T. I. A. S. No. 7570; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U. S. T. 1641, T. I. A. S. No. 7192; Restatement § 404, Reporters' Note 1, at 257 ("These agreements include an obligation on the parties to punish or extradite offenders, even when the offense was not committed within their territory or by a national"). See also International Convention for the Protection of All Persons from Enforced Disappearance, Art. 9(2), Feb. 6, 2007, 2716 U. N. T. S. 59 (state parties must take measures to establish jurisdiction "when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her"); Convention Against Torture and Other Cruel, Inhuman or Degrading

Treatment or Punishment, Arts. 5(2), 7(1), Dec. 10, 1984, S. Treaty Doc. No. 100–20, pp. 20, 21, 1465 U. N. T. S. 114, 115 (similar); Geneva Convention Relative to the Treatment of Prisoners of War, Art. 129, Aug. 12, 1949, 6 U. S. T. 3418, T. I. A. S. No. 3364 (signatories must "search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts" or "hand such persons over for trial").

And Congress has sometimes authorized civil damages in such cases. See generally note following 28 U. S. C. § 1350 (Torture Victim Protection Act of 1991 (TVPA) (private damages action for torture or extrajudicial killing committed under authority of a foreign nation)); S. Rep. No. 102–249, p. 4 (1991) (ATS "should not be replaced" by TVPA); H. R. Rep. No. 102–367, pt. 1, p. 4 (1991) (TVPA intended to "enhance the remedy already available under" the ATS). But cf. *Mohamad* v. *Palestinian Authority*, 566 U. S. 449 (2012) (TVPA allows suits against only natural persons).

Congress, while aware of the award of civil damages under the ATS—including cases such as *Filartiga* with foreign plaintiffs, defendants, and conduct—has not sought to limit the statute's jurisdictional or substantive reach. Rather, Congress has enacted other statutes, and not only criminal statutes, that allow the United States to prosecute (or allow victims to obtain damages from) foreign persons who injure foreign victims by committing abroad torture, genocide, and other heinous acts. See, *e. g.*, 18 U. S. C. § 2340A(b)(2) (authorizing prosecution of torturers if "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender"); § 1091(e)(2)(D) (2006 ed., Supp. V) (genocide prosecution authorized when, "regardless of where the offense is committed, the alleged offender is . . . present in the United States"); § 2(a), 106 Stat. 73, note following 28 U. S. C. § 1350 (private right of action on behalf of individuals harmed by an act of torture or extrajudicial kill-

ing committed "under actual or apparent authority, or color of law, of any foreign nation"). See also S. Rep. No. 102–249, at 3–4 (purpose to "mak[e] sure that torturers and death squads will no longer have a safe haven in the United States," by "providing a civil cause of action in U. S. courts for torture committed abroad").

Thus, the jurisdictional approach that I would use is analogous to, and consistent with, the approaches of a number of other nations. It is consistent with the approaches set forth in the Restatement. Its insistence upon the presence of some distinct American interest, its reliance upon courts also invoking other related doctrines such as comity, exhaustion, and *forum non conveniens*, along with its dependence (for its workability) upon courts obtaining, and paying particular attention to, the views of the Executive Branch, all should obviate the majority's concern that our jurisdictional example would lead "other nations, also applying the law of nations," to "hale our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world." *Ante*, at 124.

Most importantly, this jurisdictional view is consistent with the substantive view of the statute that we took in *Sosa*. This approach would avoid placing the statute's jurisdictional scope at odds with its substantive objectives, holding out "the word of promise" of compensation for victims of the torturer, while "break[ing] it to the hope."

III

Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie. The defendants are two foreign corporations. Their shares, like those of many foreign corporations, are traded on the New York Stock Exchange. Their only presence in the United States consists of an office in New York City (actually owned by a separate but affiliated company) that helps to explain their business to potential investors. See Supp.

Brief for Petitioners 4, n. 3 (citing *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F. 3d 88, 94 (CA2 2000)); App. 55. The plaintiffs are not United States nationals but nationals of other nations. The conduct at issue took place abroad. And the plaintiffs allege, not that the defendants directly engaged in acts of torture, genocide, or the equivalent, but that they helped others (who are not American nationals) to do so.

Under these circumstances, even if the New York office were a sufficient basis for asserting general jurisdiction, but see *Goodyear Dunlop Tires Operations, S. A.* v. *Brown*, 564 U. S. 915 (2011), it would be farfetched to believe, based solely upon the defendants' minimal and indirect American presence, that this legal action helps to vindicate a distinct American interest, such as in not providing a safe harbor for an "enemy of all mankind." Thus I agree with the Court that here it would "reach too far to say" that such "mere corporate presence suffices." *Ante*, at 125.

I consequently join the Court's judgment but not its opinion.

Syllabus

MISSOURI *v.* McNEELY

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 11–1425. Argued January 9, 2013—Decided April 17, 2013

Respondent McNeely was stopped by a Missouri police officer for speeding and crossing the centerline. After declining to take a breath test to measure his blood-alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a sample. McNeely's BAC tested well above the legal limit, and he was charged with driving while intoxicated (DWI). He moved to suppress the blood test result, arguing that taking his blood without a warrant violated his Fourth Amendment rights. The trial court agreed, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that McNeely's blood alcohol was dissipating, no circumstances suggested that the officer faced an emergency. The State Supreme Court affirmed, relying on *Schmerber* v. *California*, 384 U. S. 757, in which this Court upheld a DWI suspect's warrantless blood test where the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" *id.*, at 770. This case, the state court found, involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and, thus, the nonconsensual warrantless test violated McNeely's right to be free from unreasonable searches of his person.

Held: The judgment is affirmed.

358 S. W. 3d 65, affirmed.

JUSTICE SOTOMAYOR delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, concluding that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. Pp. 148–156, 163–165.

(a) The principle that a warrantless search of the person is reasonable only if it falls within a recognized exception, see, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218, 224, applies here, where the search involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a blood sample to use as evidence in a criminal investigation. One recognized exception "applies when '"the exigencies of the situa-

tion" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable.'" *Kentucky* v. *King*, 563 U. S. 452, 460. This Court looks to the totality of circumstances in determining whether an exigency exists. See *Brigham City* v. *Stuart*, 547 U. S. 398, 406. Applying this approach in *Schmerber*, the Court found a warrantless blood test reasonable after considering all of the facts and circumstances of that case and carefully basing its holding on those specific facts, including that alcohol levels decline after drinking stops and that testing was delayed while officers transported the injured suspect to the hospital and investigated the accident scene. Pp. 148–151.

(b) The State nonetheless seeks a *per se* rule, contending that exigent circumstances necessarily exist when an officer has probable cause to believe a person has been driving under the influence of alcohol because BAC evidence is inherently evanescent. Though a person's blood-alcohol level declines until the alcohol is eliminated, it does not follow that the Court should depart from careful case-by-case assessment of exigency. When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald* v. *United States*, 335 U. S. 451, 456. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts, as in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect, *Richards* v. *Wisconsin*, 520 U. S. 385, 393. Blood testing is different in critical respects from other destruction-of-evidence cases. Unlike a situation where, *e. g.*, a suspect has control over easily disposable evidence, see *Cupp* v. *Murphy*, 412 U. S. 291, 296, BAC evidence naturally dissipates in a gradual and relatively predictable manner. Moreover, because an officer must typically take a DWI suspect to a medical facility and obtain a trained medical professional's assistance before having a blood test conducted, some delay between the time of the arrest or accident and time of the test is inevitable regardless of whether a warrant is obtained. The State's rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence supporting probable cause is simple. The natural dissipation of alcohol in the blood may support an exigency finding in a specific case, as it did in *Schmerber*, but it does not do so categorically. Pp. 151–156.

(c) Because the State sought a *per se* rule here, it did not argue that there were exigent circumstances in this particular case. The arguments and the record thus do not provide the Court with an adequate

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framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. Pp. 163–165.

JUSTICE SOTOMAYOR, joined by JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN, concluded in Part III that other arguments advanced by the State and *amici* in support of a *per se* rule are unpersuasive. Their concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers may make the desire for a bright-line rule understandable, but the Fourth Amendment will not tolerate adoption of an overly broad categorical approach in this context. A fact-intensive, totality-of-the-circumstances approach is hardly unique within this Court's Fourth Amendment jurisprudence. See, *e. g.*, *Illinois* v. *Wardlow*, 528 U. S. 119, 123–125. They also contend that the privacy interest implicated here is minimal. But motorists' diminished expectation of privacy does not diminish their privacy interest in preventing a government agent from piercing their skin. And though a blood test conducted in a medical setting by trained personnel is less intrusive than other bodily invasions, this Court has never retreated from its recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests. Finally, the government's general interest in combating drunk driving does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. Pp. 157–163.

SOTOMAYOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, in which SCALIA, KENNEDY, GINSBURG, and KAGAN, JJ., joined, and an opinion with respect to Parts II–C and III, in which SCALIA, GINSBURG, and KAGAN, JJ., joined. KENNEDY, J., filed an opinion concurring in part, *post*, p. 165. ROBERTS, C. J., filed an opinion concurring in part and dissenting in part, in which BREYER and ALITO, JJ., joined, *post*, p. 166. THOMAS, J., filed a dissenting opinion, *post*, p. 176.

John N. Koester, Jr., argued the cause and filed briefs for petitioner.

Nicole A. Saharsky argued the cause for the United States as *amicus curiae* in support of petitioner. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney*

General Breuer, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Steven R. Shapiro argued the cause for respondent. With him on the brief were *Ezekiel R. Edwards*, *Brandon J. Buskey*, *Stephen C. Wilson*, *Stephen Douglas Bonney*, *Anthony E. Rothert*, and *Grant R. Doty*.*

JUSTICE SOTOMAYOR announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and IV, and an opinion with respect to Parts

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*Briefs of *amici curiae* urging reversal were filed for the State of Delaware et al. by *Joseph R. Biden III*, Attorney General of Delaware, *Paul R. Wallace*, and *Sean P. Lugg* and *Karen V. Sullivan*, Deputy Attorneys General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Irvin B. Nathan* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Leonardo M. Rapadas* of Guam, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Thomas H. Miller* of Iowa, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Jeffrey S. Chiesa* of New Jersey, *Gary King* of New Mexico, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Mark Shurtleff* of Utah, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; and for Mothers Against Drunk Driving by *James C. Ho*.

Briefs of *amici curiae* urging affirmance were filed for Law Professors by *David C. Frederick*, *Michael F. Sturley*, *Lynn E. Blais*, and *Erin Glenn Busby*; and for the National College for DUI Defense et al. by *Jeffrey T. Green*, *Sarah O'Rourke Schrup*, *Leonard R. Stamm*, and *Norman L. Reimer*.

Briefs of *amici curiae* were filed for the National District Attorneys Association et al. by *Michael S. Wright*, *Scott Burns*, and *Albert C. Locher*; and for The Rutherford Institute by *John W. Whitehead*, *Rita M. Dunaway*, and *Douglas R. McKusick*.

II–C and III, in which JUSTICE SCALIA, JUSTICE GINSBURG, and JUSTICE KAGAN join.

In *Schmerber* v. *California*, 384 U. S. 757 (1966), this Court upheld a warrantless blood test of an individual arrested for driving under the influence of alcohol because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Id.*, at 770 (internal quotation marks omitted). The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.

I

While on highway patrol at approximately 2:08 a.m., a Missouri police officer stopped Tyler McNeely's truck after observing it exceed the posted speed limit and repeatedly cross the centerline. The officer noticed several signs that McNeely was intoxicated, including McNeely's bloodshot eyes, his slurred speech, and the smell of alcohol on his breath. McNeely acknowledged to the officer that he had consumed "a couple of beers" at a bar, App. 20, and he appeared unsteady on his feet when he exited the truck. After McNeely performed poorly on a battery of field-sobriety tests and declined to use a portable breath-test device to measure his blood-alcohol concentration (BAC), the officer placed him under arrest.

The officer began to transport McNeely to the station house. But when McNeely indicated that he would again refuse to provide a breath sample, the officer changed course

and took McNeely to a nearby hospital for blood testing. The officer did not attempt to secure a warrant. Upon arrival at the hospital, the officer asked McNeely whether he would consent to a blood test. Reading from a standard implied consent form, the officer explained to McNeely that under state law refusal to submit voluntarily to the test would lead to the immediate revocation of his driver's license for one year and could be used against him in a future prosecution. See Mo. Rev. Stat. §§ 577.020.1, 577.041 (2012). McNeely nonetheless refused. The officer then directed a hospital lab technician to take a blood sample, and the sample was secured at approximately 2:35 a.m. Subsequent laboratory testing measured McNeely's BAC at 0.154 percent, which was well above the legal limit of 0.08 percent. See § 577.012.1.

McNeely was charged with driving while intoxicated (DWI), in violation of § 577.010.[1] He moved to suppress the results of the blood test, arguing in relevant part that, under the circumstances, taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment. The trial court agreed. It concluded that the exigency exception to the warrant requirement did not apply because, apart from the fact that "[a]s in all cases involving intoxication, [McNeely's] blood alcohol was being metabolized by his liver," there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. No. 10CG–CR01849–01 (Cir. Ct. Cape Girardeau Cty., Mo., Div. II, Mar. 3, 2011), App. to Pet. for Cert. 43a. On appeal, the Missouri Court of Appeals stated an intention to reverse but transferred the case directly to the Missouri Supreme Court. No. ED 96402 (June 21, 2011), *id.*, at 24a.

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[1] As a result of his two prior drunk-driving convictions, McNeely was charged with a class D felony under Missouri law, which carries a maximum imprisonment term of four years. See Mo. Rev. Stat. §§ 558.011, 577.023.1(5), 577.023.3 (2012).

The Missouri Supreme Court affirmed. 358 S. W. 3d 65 (2012) (*per curiam*). Recognizing that this Court's decision in *Schmerber* v. *California*, 384 U. S. 757, "provide[d] the backdrop" to its analysis, the Missouri Supreme Court held that "*Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits a nonconsensual, warrantless blood draw." 358 S. W. 3d, at 69, 74. The court further concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." 358 S. W. 3d, at 74. According to the court, exigency depends heavily on the existence of additional "'special facts,'" such as whether an officer was delayed by the need to investigate an accident and transport an injured suspect to the hospital, as had been the case in *Schmerber*. 358 S. W. 3d, at 70, 74. Finding that this was "unquestionably a routine DWI case" in which no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, the court held that the nonconsensual warrantless blood draw violated McNeely's Fourth Amendment right to be free from unreasonable searches of his person. *Id.*, at 74–75.

We granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.[2] See 567 U. S. 968 (2012). We now affirm.

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[2] Compare 358 S. W. 3d 65 (2012) (case below), *State* v. *Johnson*, 744 N. W. 2d 340 (Iowa 2008) (same conclusion), and *State* v. *Rodriguez*, 2007 UT 15, 156 P. 3d 771 (same), with *State* v. *Shriner*, 751 N. W. 2d 538 (Minn. 2008) (holding that the natural dissipation of blood-alcohol evidence alone constitutes a *per se* exigency), *State* v. *Bohling*, 173 Wis. 2d 529, 494 N. W. 2d 399 (1993) (same), *State* v. *Woolery*, 116 Idaho 368, 775 P. 2d 1210 (1989) (same).

II

A

The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, *e. g.*, *United States* v. *Robinson*, 414 U. S. 218, 224 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston* v. *Lee*, 470 U. S. 753, 760 (1985); see also *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616 (1989).

We first considered the Fourth Amendment restrictions on such searches in *Schmerber*, where, as in this case, a blood sample was drawn from a defendant suspected of driving while under the influence of alcohol. 384 U. S., at 758. Noting that "[s]earch warrants are ordinarily required for searches of dwellings," we reasoned that "absent an emergency, no less could be required where intrusions into the human body are concerned," even when the search was conducted following a lawful arrest. *Id.*, at 770. We explained that the importance of requiring authorization by a "'neutral and detached magistrate'" before allowing a law enforcement officer to "invade another's body in search of evidence of guilt is indisputable and great." *Ibid.* (quoting *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948)).

As noted, the warrant requirement is subject to exceptions. "One well-recognized exception," and the one at issue in this case, "applies when the exigencies of the situation make the needs of law enforcement so compelling that a war-

rantless search is objectively reasonable under the Fourth Amendment." *Kentucky* v. *King*, 563 U. S. 452, 460 (2011) (internal quotation marks and brackets omitted). A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, *Michigan* v. *Fisher*, 558 U. S. 45, 47–48 (2009) (*per curiam*), engage in "hot pursuit" of a fleeing suspect, *United States* v. *Santana*, 427 U. S. 38, 42–43 (1976), or enter a burning building to put out a fire and investigate its cause, *Michigan* v. *Tyler*, 436 U. S. 499, 509–510 (1978). As is relevant here, we have also recognized that in some circumstances law enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. See *Cupp* v. *Murphy*, 412 U. S. 291, 296 (1973); *Ker* v. *California*, 374 U. S. 23, 40–41 (1963) (plurality opinion). While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because "there is compelling need for official action and no time to secure a warrant." *Tyler*, 436 U. S., at 509.

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. See *Brigham City* v. *Stuart*, 547 U. S. 398, 406 (2006) (finding officers' entry into a home to provide emergency assistance "plainly reasonable under the circumstances"); *Illinois* v. *McArthur*, 531 U. S. 326, 331 (2001) (concluding that a warrantless seizure of a person to prevent him from returning to his trailer to destroy hidden contraband was reasonable "[i]n the circumstances of the case before us" due to exigency); *Cupp*, 412 U. S., at 296 (holding that a limited warrantless search of a suspect's fingernails to preserve evidence that the suspect was trying to rub off was justified "[o]n the facts of this case"); see also *Richards* v. *Wisconsin*, 520 U. S. 385, 391–396 (1997) (rejecting a *per se* exception to the knock-and-announce requirement for felony drug investigations based

on presumed exigency, and requiring instead evaluation of police conduct "in a particular case"). We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that . . . a warrant . . . provides." *Atwater* v. *Lago Vista*, 532 U. S. 318, 347, n. 16 (2001). Absent that established justification, "the fact-specific nature of the reasonableness inquiry," *Ohio* v. *Robinette*, 519 U. S. 33, 39 (1996), demands that we evaluate each case of alleged exigency based "on its own facts and circumstances," *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 357 (1931).[3]

Our decision in *Schmerber* applied this totality-of-the-circumstances approach. In that case, the petitioner had suffered injuries in an automobile accident and was taken to the hospital. 384 U. S., at 758. While he was there receiving treatment, a police officer arrested the petitioner for driving while under the influence of alcohol and ordered a blood test over his objection. *Id.*, at 758–759. After explaining that the warrant requirement applied generally to searches that intrude into the human body, we concluded that the warrantless blood test "in the present case" was nonetheless permissible because the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.*, at 770 (quoting *Preston* v. *United States*, 376 U. S. 364, 367 (1964)).

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[3] We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case. See, *e. g.*, *California* v. *Acevedo*, 500 U. S. 565, 569–570 (1991) (automobile exception); *United States* v. *Robinson*, 414 U. S. 218, 224–235 (1973) (searches of a person incident to a lawful arrest). By contrast, the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry.

In support of that conclusion, we observed that evidence could have been lost because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." 384 U. S., at 770. We added that "[p]articularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Id.*, at 770–771. "Given these special facts," we found that it was appropriate for the police to act without a warrant. *Id.*, at 771. We further held that the blood test at issue was a reasonable way to recover the evidence because it was highly effective, "involve[d] virtually no risk, trauma, or pain," and was conducted in a reasonable fashion "by a physician in a hospital environment according to accepted medical practices." *Ibid.* And in conclusion, we noted that our judgment that there had been no Fourth Amendment violation was strictly based "on the facts of the present record." *Id.*, at 772.

Thus, our analysis in *Schmerber* fits comfortably within our case law applying the exigent circumstances exception. In finding the warrantless blood test reasonable in *Schmerber*, we considered all of the facts and circumstances of the particular case and carefully based our holding on those specific facts.

B

The State properly recognizes that the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances. Brief for Petitioner 28–29. But the State nevertheless seeks a *per se* rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the

officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

It is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated. See *Skinner*, 489 U. S., at 623; *Schmerber*, 384 U. S., at 770–771. Testimony before the trial court in this case indicated that the percentage of alcohol in an individual's blood typically decreases by approximately 0.015 percent to 0.02 percent per hour once the alcohol has been fully absorbed. App. 47. More precise calculations of the rate at which alcohol dissipates depend on various individual characteristics (such as weight, gender, and alcohol tolerance) and the circumstances in which the alcohol was consumed. See Stripp, Forensic and Clinical Issues in Alcohol Analysis, in Forensic Chemistry Handbook 435, 437–441 (L. Kobilinsky ed. 2012). Regardless of the exact elimination rate, it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in *Schmerber*, as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. 384 U. S., at 770–771.

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald* v. *United States*, 335 U. S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a

showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative"). We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect. *Richards*, 520 U. S., at 393.

The context of blood testing is different in critical respects from other destruction-of-evidence cases in which the police are truly confronted with a "'now or never'" situation. *Roaden* v. *Kentucky*, 413 U. S. 496, 505 (1973). In contrast to, for example, circumstances in which the suspect has control over easily disposable evidence, see *Georgia* v. *Randolph*, 547 U. S. 103, 116, n. 6 (2006); *Cupp*, 412 U. S., at 296, BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner. Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant. See *State* v. *Shriner*, 751 N. W. 2d 538, 554 (Minn. 2008) (Meyer, J., dissenting). This reality undermines the force of the State's contention, endorsed by the dissent, see *post*, at 181 (opinion of THOMAS, J.), that we should recognize a categorical exception to the warrant requirement because BAC evidence "is actively being destroyed with every minute that passes," Brief for Petitioner 27. Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such a circumstance, there would

be no plausible justification for an exception to the warrant requirement.

The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple. The Federal Rules of Criminal Procedure were amended in 1977 to permit federal magistrate judges to issue a warrant based on sworn testimony communicated by telephone. See 91 Stat. 319. As amended, the law now allows a federal magistrate judge to consider "information communicated by telephone or other reliable electronic means." Fed. Rule Crim. Proc. 4.1. States have also innovated. Well over a majority of States allow police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.[4]

[4] See Ala. Rule Crim. Proc. 3.8(b) (2012–2013); Alaska Stat. § 12.35.015 (2012); Ariz. Rev. Stat. Ann. §§ 13–3914(C), 13–3915(D), (E) (West 2010); Ark. Code Ann. § 16–82–201 (2005); Cal. Penal Code Ann. § 1526(b) (West 2011); Colo. Rule Crim. Proc. 41(c)(3) (2012); Ga. Code Ann. § 17–5–21.1 (2008); Haw. Rules Penal Proc. 41(h)–(i) (2013); Idaho Code §§ 19–4404, 19–4406 (Lexis 2004); Ind. Code § 35–33–5–8 (2012); Iowa Code §§ 321J.10(3), 462A.14D(3) (2009) (limited to specific circumstances involving accidents); Kan. Stat. Ann. §§ 22–2502(a), 22–2504 (2011 Cum. Supp.); La. Code Crim. Proc. Ann., Arts. 162.1(B), (D) (West 2003); Mich. Comp. Laws Ann. §§ 780.651(2)–(6) (West 2006); Minn. Rules Crim. Proc. 33.05, 36.01–36.08 (2010 and Supp. 2013); Mont. Code Ann. §§ 46–5–221, 46–5–222 (2011); Neb. Rev. Stat. §§ 29–814.01, 29–814.03, 29–814.05 (2008); Nev. Rev. Stat. §§ 179.045(2), (4) (2011); N. H. Rev. Stat. Ann. § 595–A:4–a (West Supp. 2012); N. J. Rule Crim. Proc. 3:5–3(b) (2013); N. M. Rules Crim. Proc. 5–211(F)(3), (G)(3) (Supp. 2012); N. Y. Crim. Proc. Law Ann. §§ 690.35(1), 690.36(1), 690.40(3), 690.45(1), (2) (West 2009); N. C. Gen. Stat. Ann. § 15A–245(a)(3) (Lexis 2011); N. D. Rules Crim. Proc. 41(c)(2)–(3) (2012–2013); Ohio Rules Crim. Proc. 41(C)(1)–(2) (2011); Okla. Stat., Tit. 22, §§ 1223.1, 1225(B) (West 2011); Ore. Rev. Stat. §§ 133.545(5)–(6) (2011); Pa. Rules Crim. Proc. 203(A), (C) (2012); S. D. Codified Laws §§ 23A–35–4.2, 23A–35–5, 23A–35–6 (2004); Utah Rule Crim. Proc. 40(l) (2012); Vt. Rules Crim. Proc. 41(c)(4), (g)(2) (Supp. 2012); Va. Code Ann. § 19.2–54

And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.[5]

We by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. See Fed. Rule Crim. Proc. 4.1(b)(3). And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency. That is particularly so in this context, where BAC evidence is lost gradually and relatively predictably.[6]

(Lexis Supp. 2012); Wash. Super. Ct. Crim. Rule 2.3(c) (2002); Wis. Stat. § 968.12(3) (2007–2008); Wyo. Stat. Ann. § 31–6–102(d) (2011); see generally 2 W. LaFave, Search and Seizure § 4.3(b), pp. 511–516, and n. 29 (4th ed. 2004) (describing oral search warrants and collecting state laws). Missouri requires that search warrants be in writing and does not permit oral testimony, thus excluding telephonic warrants. Mo. Stat. §§ 542.276.2(1), 542.276.3 (2012). State law does permit the submission of warrant applications "by facsimile or other electronic means." § 542.276.3.

[5] During the suppression hearing in this case, McNeely entered into evidence a search-warrant form used in drunk-driving cases by the prosecutor's office in Cape Girardeau County, where the arrest took place. App. 61–69. The arresting officer acknowledged that he had used such forms in the past and that they were "readily available." *Id.*, at 41–42.

[6] The dissent claims that a "50-state survey [is] irrelevant to the actual disposition of this case" because Missouri requires written warrant applications. *Post*, at 181–182. But the *per se* exigency rule that the State seeks and the dissent embraces would apply nationally because it treats

Of course, there are important countervailing concerns. While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions about the accuracy of the calculation. For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant-application process. But adopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions "to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement." *State* v. *Rodriguez*, 2007 UT 15, ¶46, 156 P. 3d 771, 779.

In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

C

In an opinion concurring in part and dissenting in part, The Chief Justice agrees that the State's proposed *per se* rule is overbroad because "[f]or exigent circumstances to justify a warrantless search . . . there must . . . be 'no time to secure a warrant.' " *Post*, at 171 (quoting *Tyler*, 436 U. S., at 509). But The Chief Justice then goes on to suggest his own categorical rule under which a warrantless blood draw is permissible if the officer could not secure a warrant (or reasonably believed he could not secure a warrant) in the

"the body's natural metabolization of alcohol" as a sufficient basis for a warrantless search everywhere and always. *Post*, at 176. The technological innovations in warrant procedures that many States have adopted are accordingly relevant to show that the *per se* rule is overbroad.

time it takes to transport the suspect to a hospital or similar facility and obtain medical assistance. *Post*, at 171. Although we agree that delay inherent to the blood-testing process is relevant to evaluating exigency, see *supra*, at 153–154, we decline to substitute THE CHIEF JUSTICE's modified *per se* rule for our traditional totality-of-the-circumstances analysis.

For one thing, making exigency completely dependent on the window of time between an arrest and a blood test produces odd consequences. Under THE CHIEF JUSTICE's rule, if a police officer serendipitously stops a suspect near an emergency room, the officer may conduct a nonconsensual warrantless blood draw even if all agree that a warrant could be obtained with very little delay under the circumstances (perhaps with far less delay than an average ride to the hospital in the jurisdiction). The rule would also distort law enforcement incentives. As with the State's *per se* rule, THE CHIEF JUSTICE's rule might discourage efforts to expedite the warrant process because it categorically authorizes warrantless blood draws so long as it takes more time to secure a warrant than to obtain medical assistance. On the flip side, making the requirement of independent judicial oversight turn exclusively on the amount of time that elapses between an arrest and BAC testing could induce police departments and individual officers to minimize testing delay to the detriment of other values. THE CHIEF JUSTICE correctly observes that "[t]his case involves medical personnel drawing blood at a medical facility, not police officers doing so by the side of the road." *Post*, at 171, n. 2. But THE CHIEF JUSTICE does not say that roadside blood draws are necessarily unreasonable, and if we accepted THE CHIEF JUSTICE's approach, they would become a more attractive option for the police.

III

The remaining arguments advanced in support of a *per se* exigency rule are unpersuasive.

The State and several of its *amici*, including the United States, express concern that a case-by-case approach to exigency will not provide adequate guidance to law enforcement officers deciding whether to conduct a blood test of a drunk-driving suspect without a warrant. The Chief Justice and the dissent also raise this concern. See *post*, at 166, 175 (opinion of Roberts, C. J.); *post*, at 181–182 (opinion of Thomas, J.). While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality-of-the-circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments. See, *e. g.*, *Illinois* v. *Wardlow*, 528 U. S. 119, 123–125 (2000) (whether an officer has reasonable suspicion to make an investigative stop and to pat down a suspect for weapons under *Terry* v. *Ohio*, 392 U. S. 1 (1968)); *Robinette*, 519 U. S., at 39–40 (whether valid consent has been given to search); *Tennessee* v. *Garner*, 471 U. S. 1, 8–9, 20 (1985) (whether force used to effectuate a seizure, including deadly force, is reasonable). As in those contexts, we see no valid substitute for careful case-by-case evaluation of reasonableness here.[7]

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[7] The dissent contends that officers in the field will be unable to apply the traditional totality-of-the-circumstances test in this context because they will not know all of the relevant facts at the time of an arrest. See *post*, at 181. But because "[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction," *post*, at 173 (opinion of Roberts, C. J.), we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances. Reviewing courts in turn should assess those judgments "'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Ryburn* v. *Huff*, 565 U. S. 469, 477 (2012) (*per curiam*).

Next, the State and the United States contend that the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal. That is so, they claim, both because motorists have a diminished expectation of privacy and because our cases have repeatedly indicated that blood testing is commonplace in society and typically involves "virtually no risk, trauma, or pain." *Schmerber*, 384 U. S., at 771. See also *post*, at 177, and n. 1 (opinion of THOMAS, J.).

But the fact that people are "accorded less privacy in . . . automobiles because of th[e] compelling governmental need for regulation," *California* v. *Carney*, 471 U. S. 386, 392 (1985), does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin. As to the nature of a blood test conducted in a medical setting by trained personnel, it is concededly less intrusive than other bodily invasions we have found unreasonable. See *Winston*, 470 U. S., at 759–766 (surgery to remove a bullet); *Rochin* v. *California*, 342 U. S. 165, 172–174 (1952) (induced vomiting to extract narcotics capsules ingested by a suspect violated the Due Process Clause). For that reason, we have held that medically drawn blood tests are reasonable in appropriate circumstances. See *Skinner*, 489 U. S., at 618–633 (upholding warrantless blood testing of railroad employees involved in certain train accidents under the "special needs" doctrine); *Schmerber*, 384 U. S., at 770–772. We have never retreated, however, from our recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests.

Finally, the State and its *amici* point to the compelling governmental interest in combating drunk driving and contend that prompt BAC testing, including through blood testing, is vital to pursuit of that interest. They argue that is particularly so because, in addition to laws that make it illegal to operate a motor vehicle under the influence of alcohol, all 50 States and the District of Columbia have enacted laws that make it *per se* unlawful to operate a motor vehicle with

a BAC of over 0.08 percent. See National Highway Traffic Safety Admin. (NHTSA), Alcohol and Highway Safety: A Review of the State of Knowledge 167 (No. 811374, Mar. 2011) (NHTSA Review).[8] To enforce these provisions, they reasonably assert, accurate BAC evidence is critical. See also *post*, at 169–170 (opinion of Roberts, C. J.); *post*, at 179 (opinion of Thomas, J.).

"No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).

But the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. To the extent that the State and its *amici* contend that applying the traditional Fourth Amendment totality-of-the-circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in preventing and prosecuting drunk-driving offenses, we are not convinced.

As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC

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[8] Pursuant to congressional directive, the NHTSA conditions federal highway grants on States' adoption of laws making it a *per se* offense to operate a motor vehicle with a BAC of 0.08 percent or greater. See 23 U. S. C. § 163(a); 23 CFR § 1225.1 (2012). Several federal prohibitions on drunk driving also rely on the 0.08 percent standard. *E. g.*, 32 CFR §§ 234.17(c)(1)(ii), 1903.4(b)(1)(i)–(ii); 36 CFR § 4.23(a)(2). In addition, 32 States and the District of Columbia have adopted laws that impose heightened penalties for operating a motor vehicle at or above a BAC of 0.15 percent. See NHTSA Review 175.

evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. See NHTSA Review 173; *supra*, at 146 (describing Missouri's implied consent law). Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. See NHTSA Review 173–175; see also *South Dakota* v. *Neville*, 459 U. S. 553, 554, 563–564 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether.[9] Among these States, several lift restrictions on

[9] See Ala. Code § 32–5–192(c) (2010); Alaska Stat. §§ 28.35.032(a), 28.35.035(a) (2012); Ariz. Rev. Stat. Ann. § 28–1321(D)(1) (West 2012); Ark. Code Ann. §§ 5–65–205(a)(1), 5–65–208(a)(1) (Supp. 2011); Conn. Gen. Stat. §§ 14–227b(b), 14–227c(b) (2011); Fla. Stat. § 316.1933(1)(a) (2006); Ga. Code Ann. §§ 40–5–67.1(d), (d.1) (2011); Haw. Rev. Stat. § 291E–15 (2009 Cum. Supp.), §§ 291E–21(a), 291E–33 (2007), § 291E–65 (2009 Cum. Supp.); Iowa Code §§ 321J.9(1), 321J.10(1), 321J.10A(1) (2009); Kan. Stat. Ann. §§ 8–1001(b), (d) (2012 Cum. Supp.); Ky. Rev. Stat. Ann. § 189A.105(2) (Lexis Supp. 2012); La. Rev. Stat. Ann. §§ 32:666.A(1)(a)(i), (2) (West Supp. 2013); Md. Transp. Code Ann. §§ 16–205.1(b)(1), (c)(1) (Lexis 2012); Mass. Gen. Laws, ch. 90, §§ 24(1)(e), (f)(1) (West 2010); Mich. Comp. Laws Ann. § 257.625d(1) (West 2006); Miss. Code Ann. § 63–11–21 (1973–2004); Mont. Code Ann. §§ 61–8–402(4), (5) (2011); Neb. Rev. Stat. § 60–498.01(2) (2012 Cum. Supp.), § 60–6,210 (2010); N. H. Rev. Stat. Ann. §§ 265–A:14(I), 265–A:16 (West 2012 Cum. Supp.); N. M. Stat. § 66–8–111(A) (Supp. 2012); N. Y. Veh. & Traf. Law Ann. §§ 1194(2)(b)(1), 1194(3) (West 2011); N. D. Cent. Code

nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order.[10] Cf. *Bullcoming* v. *New Mexico*, 564 U. S. 647, 652 (2011) (noting that the blood test was obtained pursuant to a warrant after the petitioner refused a breath test). We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them. And in fact, field studies in States that permit nonconsensual blood testing pursuant to a warrant have suggested that, although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence. See NHTSA, Use of Warrants for Breath Test Refusal: Case Studies 36–38 (No. 810852, Oct. 2007).

To be sure, "States [may] choos[e] to protect privacy beyond the level that the Fourth Amendment requires." *Virginia* v. *Moore*, 553 U. S. 164, 171 (2008). But widespread

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Ann. §39–20–01.1(1) (Lexis Supp. 2011), §39–20–04(1) (Lexis 2008); Okla. Stat., Tit. 47, §753 (2011); Ore. Rev. Stat. §813.100(2) (2011); 75 Pa. Cons. Stat. §1547(b)(1) (2004); R. I. Gen. Laws §§31–27–2.1(b), 31–27–2.9(a) (Lexis 2010); S. C. Code Ann. §56–5–2950(B) (Supp. 2011); Tenn. Code Ann. §§55–10–406(a)(4), (f) (2012); Tex. Transp. Code Ann. §§724.012(b), 724.013 (West 2011); Vt. Stat. Ann., Tit. 23, §§1202(b), (f) (2007); Wash. Rev. Code §§46.20.308(2)–(3), (5) (2012); W. Va. Code Ann. §17C–5–7 (Lexis Supp. 2012); Wyo. Stat. Ann. §31–6–102(d) (Lexis 2011).

[10] See Ariz. Rev. Stat. Ann. §28–1321(D)(1) (West 2012); Ga. Code Ann. §§40–5–67.1(d), (d.1) (2011); Ky. Rev. Stat. Ann. §189A.105(2)(b) (Lexis Supp. 2012); Mich. Comp. Laws Ann. §257.625d(1) (West 2006); Mont. Code Ann. §61–8–402(5) (2011); N. M. Stat. §66–8–111(A) (Supp. 2012); N. Y. Veh. & Traf. Law Ann. §§1194(2)(b)(1), 1194(3) (West 2011); Ore. Rev. Stat. §813.320(2)(b) (2011); R. I. Gen. Laws §31–27–2.9(a) (Lexis 2010); Tenn. Code Ann. §55–10–406(a)(4) (2012); Vt. Stat. Ann., Tit. 23, §1202(f) (2007); Wash. Rev. Code §46.20.308(1) (2012); W. Va. Code Ann. §17C–5–7 (Lexis Supp. 2012) (as interpreted in *State* v. *Stone*, 229 W. Va. 271, 283–284, 728 S. E. 2d 155, 167–168 (2012)); Wyo. Stat. Ann. §31–6–102(d) (2011); see also *State* v. *Harris*, 763 N. W. 2d 269, 273–274 (Iowa 2009) (*per curiam*) (recognizing that Iowa law imposes a warrant requirement subject to a limited case-specific exigency exception).

state restrictions on nonconsensual blood testing provide further support for our recognition that compelled blood draws implicate a significant privacy interest. They also strongly suggest that our ruling today will not "severely hamper effective law enforcement." *Garner*, 471 U. S., at 19.

IV

The State argued before this Court that the fact that alcohol is naturally metabolized by the human body creates an exigent circumstance in every case. The State did not argue that there were exigent circumstances in this particular case because a warrant could not have been obtained within a reasonable amount of time. In his testimony before the trial court, the arresting officer did not identify any other factors that would suggest he faced an emergency or unusual delay in securing a warrant. App. 40. He testified that he made no effort to obtain a search warrant before conducting the blood draw even though he was "sure" a prosecuting attorney was on call and even though he had no reason to believe that a magistrate judge would have been unavailable. *Id.*, at 39, 41–42. The officer also acknowledged that he had obtained search warrants before taking blood samples in the past without difficulty. *Id.*, at 42. He explained that he elected to forgo a warrant application in this case only because he believed it was not legally necessary to obtain a warrant. *Id.*, at 39–40. Based on this testimony, the trial court concluded that there was no exigency and specifically found that, although the arrest took place in the middle of the night, "a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant." App. to Pet. for Cert. 43a.[11]

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[11] No findings were made by the trial court concerning how long a warrant would likely have taken to issue under the circumstances. The minimal evidence presented on this point was not uniform. A second patrol officer testified that in a typical DWI case, it takes between 90 minutes and 2 hours to obtain a search warrant following an arrest. App.

The Missouri Supreme Court in turn affirmed that judgment, holding first that the dissipation of alcohol did not establish a *per se* exigency, and second that the State could not otherwise satisfy its burden of establishing exigent circumstances. 358 S. W. 3d, at 70, 74–75. In petitioning for certiorari to this Court, the State challenged only the first holding; it did not separately contend that the warrantless blood test was reasonable regardless of whether the natural dissipation of alcohol in a suspect's blood categorically justifies dispensing with the warrant requirement. See Pet. for Cert. i.

Here and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect.

Although the Missouri Supreme Court referred to this case as "unquestionably a routine DWI case," 358 S. W. 3d, at 74, the fact that a particular drunk-driving stop is "routine" in the sense that it does not involve "'special facts,'" *ibid.*, such as the need for the police to attend to a car accident, does not mean a warrant is not required. Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

53–54. McNeely, however, also introduced an exhibit documenting six recent search-warrant applications for blood testing in Cape Girardeau County that had shorter processing times. *Id.*, at 70.

Because this case was argued on the broad proposition that drunk-driving cases present a *per se* exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed. But that inquiry ought not to be pursued here where the question is not properly before this Court. Having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision, we affirm its judgment.

* * *

We hold that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

The judgment of the Missouri Supreme Court is affirmed.

It is so ordered.

JUSTICE KENNEDY, concurring in part.

I join Parts I, II–A, II–B, and IV of the opinion for the Court.

For the reasons stated below this case does not call for the Court to consider in detail the issue discussed in Part II–C and the separate opinion by THE CHIEF JUSTICE.

As to Part III, much that is noted with respect to the statistical and survey data will be of relevance when this

issue is explored in later cases. The repeated insistence in Part III that every case be determined by its own circumstances is correct, of course, as a general proposition; yet it ought not to be interpreted to indicate this question is not susceptible of rules and guidelines that can give important, practical instruction to arresting officers, instruction that in any number of instances would allow a warrantless blood test in order to preserve the critical evidence.

States and other governmental entities which enforce the driving laws can adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials. And this Court, in due course, may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today.

As the opinion of the Court is correct to note, the instant case, by reason of the way in which it was presented and decided in the state courts, does not provide a framework where it is prudent to hold any more than that always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment.

Chief Justice Roberts, with whom Justice Breyer and Justice Alito join, concurring in part and dissenting in part.

A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test. I have no quarrel with the Court's "totality of the circumstances" approach as a general matter; that is what our cases require. But the circumstances in drunk driving cases are often typical, and the Court should be able to offer guidance on how police should handle cases like the one before us.

In my view, the proper rule is straightforward. Our cases establish that there is an exigent circumstances exception

to the warrant requirement. That exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. The natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.

I

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That language does not state that warrants are required prior to searches, but this Court has long held that warrants must generally be obtained. See *Kentucky* v. *King*, 563 U. S. 452, 459 (2011). We have also held that bodily intrusions like blood draws constitute searches and are subject to the warrant requirement. See *Schmerber* v. *California*, 384 U. S. 757, 767, 770 (1966).

However, "the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006), and thus "the warrant requirement is subject to certain reasonable exceptions," *King*, 563 U. S., at 459. One of those exceptions is known as the "exigent circumstances exception," which "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under

the Fourth Amendment." *Id.*, at 460 (internal quotation marks and alterations omitted).

Within the exigent circumstances exception, we have identified several sets of exigent circumstances excusing the need for a warrant. For example, there is an emergency aid exception to the warrant requirement. In *Brigham City*, *supra*, at 403, we held that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." There is also a fire exception to the warrant requirement. In *Michigan* v. *Tyler*, 436 U. S. 499, 509 (1978), we held that "[a] burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' " And there is a hot pursuit exception to the warrant requirement as well. In *United States* v. *Santana*, 427 U. S. 38 (1976), and *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294 (1967), we recognized "the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons." *Santana*, *supra*, at 42. In each of these cases, the requirement that we base our decision on the "totality of the circumstances" has not prevented us from spelling out a general rule for the police to follow.

The exigency exception most on point here is the one for imminent destruction of evidence. We have affirmed on several occasions that "law enforcement officers may make a warrantless entry onto private property . . . to prevent the imminent destruction of evidence." *Brigham City*, *supra*, at 403 (citing *Ker* v. *California*, 374 U. S. 23, 40 (1963) (plurality opinion)); see also, *e. g.*, *King*, *supra*, at 460. For example, in *Ker*, the police had reason to believe that the defendant was in possession of marijuana and was expecting police pursuit. We upheld the officers' warrantless entry into the defendant's home, with the plurality explaining that the drugs "could be quickly and easily destroyed" or "distrib-

uted or hidden before a warrant could be obtained at that time of night." 374 U. S., at 40, 42.

As an overarching principle, we have held that if there is a "compelling need for official action and no time to secure a warrant," the warrant requirement may be excused. *Tyler*, *supra*, at 509. The question here is whether and how this principle applies in the typical case of a police officer stopping a driver on suspicion of drunk driving.

II

A

The reasonable belief that critical evidence is being destroyed gives rise to a compelling need for blood draws in cases like this one. Here, in fact, there is not simply a belief that any alcohol in the bloodstream will be destroyed; it is a biological certainty. Alcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour. Stripp, Forensic and Clinical Issues in Alcohol Analysis, in Forensic Chemistry Handbook 435, 440 (L. Kobilinsky ed. 2012). Evidence is literally disappearing by the minute. That certainty makes this case an even stronger one than usual for application of the exigent circumstances exception.

And that evidence is important. A serious and deadly crime is at issue. According to the Department of Transportation, in 2011, one person died every 53 minutes due to drinking and driving. National Highway Traffic Safety Admin. (NHTSA), Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012). No surprise then that drinking and driving is punished severely, including with jail time. See generally Dept. of Justice, Bureau of Justice Statistics, L. Maruschak, Special Report, DWI Offenders Under Correctional Supervision (1999). McNeely, for instance, faces up to four years in prison. See App. 22–23 (citing Mo. Rev. Stat. §§ 558.011, 577.010, 577.023 (2012)).

Evidence of a driver's blood alcohol concentration (BAC) is crucial to obtain convictions for such crimes. All 50

States and the District of Columbia have laws providing that it is *per se* illegal to drive with a BAC of 0.08 percent or higher. Most States also have laws establishing additional penalties for drivers who drive with a "high BAC," often defined as 0.15 percent or above. NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws, pp. vii, x–xviii (No. 811673, Oct. 2012). BAC evidence clearly matters. And when drivers refuse breathalyzers, as McNeely did here, a blood draw becomes necessary to obtain that evidence.

The need to prevent the imminent destruction of BAC evidence is no less compelling because the incriminating alcohol dissipates over a limited period of time, rather than all at once. As noted, the concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment. The officer is unlikely to know precisely when the suspect consumed alcohol or how much; all he knows is that critical evidence is being steadily lost. Fire can spread gradually, but that does not lessen the need and right of the officers to respond immediately. See *Tyler*, 436 U. S. 499.

McNeely contends that there is no compelling need for a warrantless blood draw, because if there is some alcohol left in the blood by the time a warrant is obtained, the State can use math and science to work backwards and identify a defendant's BAC at the time he was driving. See Brief for Respondent 44–46. But that's not good enough. We have indicated that exigent circumstances justify warrantless entry when drugs are about to be flushed down the toilet. See, *e. g.*, *King*, 563 U. S., at 461–462. We have not said that, because there could well be drug paraphernalia elsewhere in the home, or because a defendant's co-conspirator might testify to the amount of drugs involved, the drugs themselves are not crucial and there is no compelling need for warrantless entry.

The same approach should govern here. There is a compelling need to search because alcohol—the nearly conclusive evidence of a serious crime—is dissipating from the bloodstream. The need is no less compelling because the police might be able to acquire second-best evidence some other way.[1]

B

For exigent circumstances to justify a warrantless search, however, there must also be "no time to secure a warrant." *Tyler*, 436 U. S., at 509; see *Schmerber*, 384 U. S., at 771 (warrantless search legal when "there was no time to seek out a magistrate and secure a warrant"). In this respect, obtaining a blood sample from a suspected drunk driver differs from other exigent circumstances cases.

Importantly, there is typically delay between the moment a drunk driver is stopped and the time his blood can be drawn. Drunk drivers often end up in an emergency room, but they are not usually pulled over in front of one. In most exigent circumstances situations, police are just outside the door to a home. Inside, evidence is about to be destroyed, a person is about to be injured, or a fire has broken out. Police can enter promptly and must do so to respond effectively to the emergency. But when police pull a person over on suspicion of drinking and driving, they cannot test his blood right away.[2] There is a time-consuming obstacle to

[1] And that second-best evidence may prove useless. When experts have worked backwards to identify a defendant's BAC at the time he was driving, defense attorneys have objected to that evidence, courts have at times rejected it, and juries may be suspicious of it. See, *e. g.*, 1 D. Nichols & F. Whited, Drinking/Driving Litigation § 2:9, pp. 2–130 to 2–137 (2d ed. 2006) (noting counsel objections to such evidence); *State* v. *Eighth Judicial District Court*, 127 Nev. 927, 267 P. 3d 777 (2011) (affirming rejection of such evidence); L. Taylor & S. Oberman, Drunk Driving Defense § 6.03 (7th ed. 2010) (describing ways to undermine such evidence before a jury).

[2] This case involves medical personnel drawing blood at a medical facility, not police officers doing so by the side of the road. See *Schmerber* v. *California*, 384 U. S. 757, 771–772 (1966) ("Petitioner's blood was taken by

their search, in the form of a trip to the hospital and perhaps a wait to see a medical professional. In this case, for example, approximately 25 minutes elapsed between the time the police stopped McNeely and the time his blood was drawn. App. 36, 38.

As noted, the fact that alcohol dissipates gradually from the bloodstream does not diminish the compelling need for a search—critical evidence is still disappearing. But the fact that the dissipation persists for some time means that the police—although they may not be able to do anything about it right away—may still be able to respond to the ongoing destruction of evidence later on.

There might, therefore, be time to obtain a warrant in many cases. As the Court explains, police can often request warrants rather quickly these days. At least 30 States provide for electronic warrant applications. See *ante*, at 153–155, and n. 4. In many States, a police officer can call a judge, convey the necessary information, and be authorized to affix the judge's signature to a warrant. See, *e. g.*, Ala. Rule Crim. Proc. 3.8(b) (2012–2013); Alaska Stat. § 12.35.015 (2012); Idaho Code §§ 19–4404, 19–4406 (Lexis 2004); Minn. Rules Crim. Proc. 36.01–36.08 (2010); Mont. Code Ann. § 46–5–222 (2012); see generally NHTSA, Use of Warrants for Breath Test Refusal: Case Studies 6–32 (No. 810852, Oct. 2007) (overview of procedures in Arizona, Michigan, Oregon, and Utah). Utah has an e-warrant procedure where a police

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a physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of the stationhouse"); Brief for Respondent 53, and n. 21 (describing roadside blood draws in Arizona). A plurality of the Court suggests that my approach could make roadside blood draws a more attractive option for police, but such a procedure would pose practical difficulties and, as the Court noted in *Schmerber*, would raise additional and serious Fourth Amendment concerns. See *ante*, at 157.

officer enters information into a system, the system notifies a prosecutor, and upon approval the officer forwards the information to a magistrate, who can electronically return a warrant to the officer. Utah, e-Warrants: Cross Boundary Collaboration 1 (2008). Judges have been known to issue warrants in as little as five minutes. Bergreen, Faster Warrant System Hailed, Salt Lake Tribune, Dec. 26, 2008, p. B1, col. 1. And in one county in Kansas, police officers can e-mail warrant requests to judges' iPads; judges have signed such warrants and e-mailed them back to officers in less than 15 minutes. Benefiel, DUI Search Warrants: Prosecuting DUI Refusals, 9 Kansas Prosecutor 17, 18 (Spring 2012). The police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction.

III

A

In a case such as this, applying the exigent circumstances exception to the general warrant requirement of the Fourth Amendment seems straightforward: If there is time to secure a warrant before blood can be drawn, the police must seek one. If an officer could reasonably conclude that there is not sufficient time to seek and receive a warrant, or he applies for one but does not receive a response before blood can be drawn, a warrantless blood draw may ensue. See *Tyler*, *supra*, at 509; see also *Illinois* v. *Rodriguez*, 497 U. S. 177, 185–186 (1990) ("in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by . . . police officer[s] conducting a search or seizure under one of the exceptions to the warrant requirement . . . is not that they always be correct, but that they always be reasonable"); *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968) ("police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure").

Requiring police to apply for a warrant if practicable increases the likelihood that a neutral, detached judicial officer will review the case, helping to ensure that there is probable cause for any search and that any search is reasonable. We have already held that forced blood draws can be constitutional—that such searches can be reasonable—but that does not change the fact that they are significant bodily intrusions. See *Schmerber*, 384 U. S., at 770 (upholding a warrantless forced blood draw but noting the "importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt" as "indisputable and great"). Requiring a warrant whenever practicable helps ensure that when blood draws occur, they are indeed justified.

At the same time, permitting the police to act without a warrant to prevent the imminent destruction of evidence is well established in Fourth Amendment law. There is no reason to preclude application of that exception in drunk driving cases simply because it may take the police some time to be able to respond to the undoubted destruction of evidence, or because the destruction occurs continuously over an uncertain period.

And that is so even in situations where police have requested a warrant but do not receive a timely response. An officer who reasonably concluded there was no time to secure a warrant may have blood drawn from a suspect upon arrival at a medical facility. There is no reason an officer should be in a worse position, simply because he sought a warrant prior to his arrival at the hospital.

B

The Court resists the foregoing, contending that the question presented somehow inhibits such a focused analysis in this case. See *ante*, at 163–165. It does not. The question presented is whether a warrantless blood draw is permissible under the Fourth Amendment "based upon the natural dissi-

pation of alcohol in the bloodstream." Pet. for Cert. i. The majority answers "It depends," and so do I. The difference is that the majority offers no additional guidance, merely instructing courts and police officers to consider the totality of the circumstances. I believe more meaningful guidance can be provided about how to handle the typical cases, and nothing about the question presented prohibits affording that guidance.

A plurality of the Court also expresses concern that my approach will discourage state and local efforts to expedite the warrant application process. See *ante*, at 157. That is not plausible: Police and prosecutors need warrants in a wide variety of situations, and often need them quickly. They certainly would not prefer a slower process, just because that might obviate the need to ask for a warrant in the occasional drunk driving case in which a blood draw is necessary. The plurality's suggestion also overlooks the interest of law enforcement in the protection a warrant provides.

The Court is correct when it says that every case must be considered on its particular facts. But the pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations. Simply put, when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer, whether a warrant is required for a blood draw should come down to whether there is time to secure one.

Schmerber itself provides support for such an analysis. The Court there made much of the fact that "there was no time to seek out a magistrate and secure a warrant." 384 U. S., at 771. It did so in an era when cell phones and e-mail were unknown. It follows quite naturally that if cell phones and e-mail mean that there is time to contact a magistrate and secure a warrant, that must be done. At the same time, there is no need to jettison the well-established exception for the imminent destruction of evidence, when the officers are in a position to do something about it.

* * *

Because the Missouri courts did not apply the rule I describe above, and because this Court should not do so in the first instance, I would vacate and remand for further proceedings in the Missouri courts.

JUSTICE THOMAS, dissenting.

This case requires the Court to decide whether the Fourth Amendment prohibits an officer from obtaining a blood sample without a warrant when there is probable cause to believe that a suspect has been driving under the influence of alcohol. Because the body's natural metabolization of alcohol inevitably destroys evidence of the crime, it constitutes an exigent circumstance. As a result, I would hold that a warrantless blood draw does not violate the Fourth Amendment.

I

A

The Fourth Amendment states that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Before a search occurs, "a warrant must generally be secured," *Kentucky* v. *King*, 563 U. S. 452, 459 (2011), but "this presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is "reasonableness,"'" *ibid.* (quoting *Brigham City* v. *Stuart*, 547 U. S. 398, 403 (2006); alteration in original).

The presence of "exigent circumstances" is one such exception to the warrant requirement. Exigency applies when "'the needs of law enforcement [are] so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" 563 U. S., at 460 (quoting *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978); second alteration in original). Thus, when exigent circumstances are present, officers may take actions that would typically require a warrant,

such as entering a home in hot pursuit of a fleeing suspect. 563 U. S., at 460. As relevant in this case, officers may also conduct a warrantless search when they have probable cause to believe that failure to act would result in "'imminent destruction of evidence.'" *Ibid.* (quoting *Brigham City*, *supra*, at 403).

B

Once police arrest a suspect for drunk driving, each passing minute eliminates probative evidence of the crime. The human liver eliminates alcohol from the bloodstream at a rate of approximately 0.015 percent to 0.020 percent per hour, *ante*, at 152, with some heavy drinkers as high as 0.022 percent per hour, Brief for Petitioner 21 (citing medical studies), depending on, among other things, a person's sex, weight, body type, and drinking history. *Ante*, at 152; Brief for United States as *Amicus Curiae* 23. The Court has acknowledged this fact since *Schmerber* v. *California*, 384 U. S. 757, 770 (1966) ("We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system"). In that case, the Court recognized that destruction of evidence is inherent in drunk-driving cases and held that an officer investigating a drunk-driving crime "might reasonably [believe] that he [is] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threaten[s] 'the destruction of evidence.'" *Ibid.* (quoting *Preston* v. *United States*, 376 U. S. 364, 367 (1964)). The Court explained that drawing a person's blood is "a highly effective means of determining the degree to which [he] is under the influence of alcohol" and is a reasonable procedure because blood tests are "commonplace" and "involv[e] virtually no risk, trauma, or pain."[1] 384 U. S., at

[1] Neither party has challenged this determination, which this Court has reaffirmed several times. See, *e. g.*, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 625 (1989); *Winston* v. *Lee*, 470 U. S. 753, 761–763 (1985).

771. The Court, therefore, held that dissipation of alcohol in the blood constitutes an exigency that allows a blood draw without a warrant.

The rapid destruction of evidence acknowledged by the parties, the majority, and *Schmerber*'s exigency determination occurs in *every* situation where police have probable cause to arrest a drunk driver. In turn, that destruction of evidence implicates the exigent-circumstances doctrine. See *Cupp* v. *Murphy*, 412 U. S. 291 (1973). In *Cupp*, officers questioning a murder suspect observed a spot on the suspect's finger that they believed might be dried blood. *Id.*, at 292. After the suspect began making obvious efforts to remove the spots from his hands, the officers took samples without obtaining either his consent or a warrant. *Id.*, at 296. Following a Fourth Amendment challenge to this search, the Court held that the "ready destructibility of the evidence" and the suspect's observed efforts to destroy it "justified the police in subjecting him to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." *Ibid.*

In this case, a similar exigency is present. Just as the suspect's efforts to destroy "highly evanescent evidence" gave rise to the exigency in *Cupp*, the natural metabolization of blood alcohol concentration (BAC) creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances.

A hypothetical involving classic exigent circumstances further illustrates the point. Officers are watching a warehouse and observe a worker carrying bundles from the warehouse to a large bonfire and throwing them into the blaze. The officers have probable cause to believe the bundles contain marijuana. Because there is only one person carrying the bundles, the officers believe it will take hours to completely destroy the drugs. During that time the officers likely could obtain a warrant. But it is clear that the officers need not sit idly by and watch the destruction of evidence

while they wait for a warrant. The fact that it will take time for the evidence to be destroyed and that *some* evidence may remain by the time the officers secure a warrant are not relevant to the exigency. However, the ever-diminishing quantity of drugs may have an impact on the severity of the crime and the length of the sentence. See, *e. g.*, 21 U. S. C. § 841(b)(1)(D) (2006 ed., Supp. V) (lower penalties for less than 50 kilograms of marijuana); United States Sentencing Commission, Guidelines Manual § 2D1.1(c) (Nov. 2012) (drug quantity table tying base offense level to drug amounts). Conducting a warrantless search of the warehouse in this situation would be entirely reasonable.

The same obtains in the drunk-driving context. Just because it will take time for the evidence to be completely destroyed does not mean there is no exigency. Congress has conditioned federal highway grants on States' adoption of laws penalizing the operation of a motor vehicle "with a blood alcohol concentration of 0.08 percent or greater." 23 U. S. C. § 163(a). See also 23 CFR § 1225.1 (2012). All 50 States have acceded to this condition. National Highway Traffic Safety Admin. (NHTSA), Alcohol and Highway Safety: A Review of the State of Knowledge 167 (No. 811374, Mar. 2011) (NHTSA State Review); Mo. Rev. Stat. §§ 577.012(1)–(2) (2012) (establishing Missouri's 0.08 percent BAC standard). Moreover, as of 2005, 32 States and the District of Columbia imposed additional penalties for BAC levels of 0.15 percent or higher. NHTSA State Review 175. Missouri is one such State. See, *e. g.*, Mo. Rev. Stat. §§ 577.010(3)–(4), 577.012(4)–(5) (suspended sentence unavailable even for first offenders with BAC above 0.15 percent unless they complete drug treatment; mandatory jail time if treatment is not completed). As a result, the level of intoxication directly bears on enforcement of these laws. Nothing in the Fourth Amendment requires officers to allow evidence essential to enforcement of drunk-driving laws to be destroyed while they wait for a warrant to issue.

II

In today's decision, the Court elides the certainty of evidence destruction in drunk-driving cases and focuses primarily on the time necessary for destruction. In doing so, it turns the exigency inquiry into a question about the amount of evidentiary destruction police must permit before they may act without a warrant. That inquiry is inconsistent with the actual exigency at issue: the uncontested destruction of evidence due to metabolization of alcohol. See Part I, *supra*. Moreover, the Court's facts-and-circumstances analysis will be difficult to administer, a particularly important concern in the Fourth Amendment context.

The Court's judgment reflects nothing more than a vague notion that everything will come out right most of the time so long as the delay is not too lengthy. *Ante*, at 155 (justifying delays in part because "BAC evidence is lost gradually and relatively predictably"); *ante*, at 153 (same, quoting Brief for Petitioner 27). But hard percentage lines have meaningful legal consequences in the drunk-driving context. The fact that police will be able to retrieve *some* evidence before it is all destroyed is simply not relevant to the exigency inquiry.

The majority believes that, absent special facts and circumstances, some destruction of evidence is acceptable. See *ante*, at 152 ("sufficient for our purposes to note that . . . *significant* delay in testing will negatively affect the probative value" (emphasis added)). This belief must rest on the assumption that whatever evidence remains once a warrant is obtained will be sufficient to prosecute the suspect. But that assumption is clearly wrong. Suspects' initial levels of intoxication and the time necessary to obtain warranted blood draws will vary widely from case to case. Even a slight delay may significantly affect probative value in borderline cases of suspects who are moderately intoxicated or suspects whose BAC is near a statutory threshold that triggers a more serious offense. See *supra*, at 179 (discussing

laws penalizing heightened BAC levels). Similarly, the time to obtain a warrant can be expected to vary, and there is no reason to believe it will do so in a predictable fashion.

Further, the Court nowhere explains how an officer in the field is to apply the facts-and-circumstances test it adopts. First, officers do not have the facts needed to assess how much time can pass before too little evidence remains. They will never know how intoxicated a suspect is at the time of arrest. Otherwise, there would be no need for testing. Second, they will not know how long it will take to roust a magistrate from his bed, reach the hospital, or obtain a blood sample once there. As the Minnesota Supreme Court recognized in rejecting arguments like those adopted by the Court today:

> "[T]he officer has no control over how long it would take to travel to a judge or the judge's availability. The officer also may not know the time of the suspect's last drink, the amount of alcohol consumed, or the rate at which the suspect will metabolize alcohol. Finally, an officer cannot know how long it will take to obtain the blood sample once the suspect is brought to the hospital. Under a totality of the circumstances test, an officer would be called upon to speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable." *State* v. *Shriner*, 751 N. W. 2d 538, 549 (2008) (footnote omitted).

The Court should not adopt a rule that requires police to guess whether they will be able to obtain a warrant before "too much" evidence is destroyed, for the police lack reliable information concerning the relevant variables.[2]

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[2] Because the Court's position is likely to result in delay in obtaining BAC evidence, it also increases the likelihood that prosecutors will be forced to estimate the amount of alcohol in a defendant's bloodstream

This case demonstrates the uncertainty officers face with regard to the delay caused by obtaining a warrant. The arresting officer clearly had probable cause to believe respondent was drunk, but there was no way for the officer to quantify the level of intoxication to determine how quickly he needed to act in order to obtain probative evidence. Another officer testified at respondent's trial that it typically took 1½ to 2 hours to obtain a drunk-driving warrant at night in Cape Girardeau County, Missouri. See App. 53–54. Respondent submitted an exhibit summarizing six late afternoon and nighttime drunk-driving search warrants that suggests the time may be shorter. Brief for Respondent 56; App. 70. Ultimately this factual tiff is beside the point; the spotty evidence regarding timing itself illustrates the fact that delays in obtaining warrants are unpredictable and potentially lengthy. A rule that requires officers (and ultimately courts) to balance transportation delays, hospital availability, and access to magistrates is not a workable rule for cases where natural processes inevitably destroy the evidence with every passing minute.

The availability of telephonic warrant applications is not an answer to this conundrum. See *ante*, at 154–155, and n. 4. For one thing, Missouri still requires written warrant applications and affidavits, Mo. Rev. Stat. §§ 542.276.2(1), 542.276.3 (2012), rendering the Court's 50-state survey irrelevant to the actual disposition of this case. *Ante*, at 154–155, n. 4. But even if telephonic applications were available in Missouri, the same difficulties would arise. As the majority correctly recognizes, "[w]arrants inevitably take some time

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using BAC numbers obtained hours later. In practice, this backwards extrapolation is likely to devolve into a battle of the experts, as each side seeks to show that stale evidence supports its position. There is no need for this outcome. Police facing inevitable destruction situations need not forgo collecting the most accurate available evidence simply because they might be able to use an expert witness and less persuasive evidence to approximate what they lost.

for police officers or prosecutors to complete and for magistrate judges to review." *Ante*, at 155. During that time, evidence is destroyed, and police who have probable cause to believe a crime has been committed should not have to guess how long it will take to secure a warrant.

* * *

For the foregoing reasons, I respectfully dissent.

Syllabus

MONCRIEFFE *v.* HOLDER, ATTORNEY GENERAL

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

No. 11–702. Argued October 10, 2012—Decided April 23, 2013

Under the Immigration and Nationality Act (INA), a noncitizen convicted of an "aggravated felony" is not only deportable, 8 U. S. C. § 1227(a)(2)(A)(iii), but also ineligible for discretionary relief. The INA lists as an "aggravated felony" "illicit trafficking in a controlled substance," § 1101(a)(43)(B), which, as relevant here, includes the conviction of an offense that the Controlled Substances Act (CSA) makes punishable as a felony, *i. e.*, by more than one year's imprisonment, see 18 U. S. C. §§ 924(c)(2), 3559(a)(5). A conviction under state law "constitutes a 'felony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U. S. 47, 60.

Petitioner Moncrieffe, a Jamaican citizen here legally, was found by police to have 1.3 grams of marijuana in his car. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. The Federal Government sought to deport him, reasoning that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a CSA offense, 21 U. S. C. § 841(a), punishable by up to five years' imprisonment, § 841(b)(1)(D). An Immigration Judge ordered Moncrieffe removed, and the Board of Immigration Appeals affirmed. The Fifth Circuit denied Moncrieffe's petition for review, rejecting his reliance on § 841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration, and holding that the felony provision, § 841(b)(1)(D), provides the default punishment for his offense.

Held: If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the INA. Pp. 190–207.

(a) Under the categorical approach generally employed to determine whether a state offense is comparable to an offense listed in the INA, see, *e. g.*, *Nijhawan* v. *Holder*, 557 U. S. 29, 33–38, the noncitizen's actual conduct is irrelevant. Instead "the state statute defining the crime of conviction" is examined to see whether it fits within the "generic" federal definition of a corresponding aggravated felony. *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 186. The state offense is a categorical

match only if a conviction of that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard* v. *United States*, 544 U. S. 13, 24 (plurality opinion). Because this Court examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, before determining whether even those acts are encompassed by the generic federal offense. *Johnson* v. *United States*, 559 U. S. 133, 137. Pp. 190–191.

(b) The categorical approach applies here because "illicit trafficking in a controlled substance" is a "generic crim[e]." *Nijhawan*, 557 U. S., at 37. Thus, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct. Possession of marijuana with intent to distribute is clearly a federal crime. The question is whether Georgia law necessarily proscribes conduct punishable as a felony under the CSA. Title 21 U. S. C. § 841(b)(1)(D) provides that, with certain exceptions, a violation of the marijuana distribution statute is punishable by "a term of imprisonment of not more than 5 years." However, one of those exceptions, § 841(b)(4), provides that "any person who violates [the statute] by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, *i. e.*, as a misdemeanant. These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, the other not. The fact of a conviction under Georgia's statute, standing alone, does not reveal whether either remuneration or more than a small amount was involved, so Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Thus, the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Pp. 192–195.

(c) The Government's contrary arguments are unpersuasive. The Government contends that § 841(b)(4) is irrelevant because it is merely a mitigating sentencing factor, not an element of the offense. But that understanding is inconsistent with *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, which recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too. The Government also asserts that any marijuana distribution conviction is presumptively a felony, but the CSA makes neither the felony nor the misdemeanor provision the default. The Government's approach would lead to the absurd result that a conviction under a statute that punishes misdemeanor conduct only, such as § 841(b)(4) itself, would nevertheless be a categorical aggravated felony.

Syllabus

The Government's proposed remedy for this anomaly—that noncitizens be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration—is inconsistent with both the INA's text and the categorical approach. The Government's procedure would require the Nation's overburdened immigration courts to conduct precisely the sort of *post hoc* investigation into the facts of predicate offenses long deemed undesirable, and would require uncounseled noncitizens to locate witnesses years after the fact.

Finally, the Government's concerns about the consequences of this decision are exaggerated. Escaping aggravated felony treatment does not mean escaping deportation, because any marijuana distribution offense will still render a noncitizen deportable as a controlled substances offender. Having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, but the Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a more serious drug trafficker. Pp. 195–206.

662 F. 3d 387, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. THOMAS, J., *post*, p. 207, and ALITO, J., *post*, p. 210, filed dissenting opinions.

Thomas C. Goldstein argued the cause for petitioner. With him on the briefs were *Kevin K. Russell*, *Amy Howe*, *Tejinder Singh*, *Pamela S. Karlan*, *Jeffrey L. Fisher*, and *Angel L. Arias*.

Pratik A. Shah argued the cause for respondent. With him on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Donald E. Keener*, and *W. Manning Evans*.*

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*Briefs of *amici curiae* urging reversal were filed for the Center on the Administration of Criminal Law, New York University School of Law, by *Wayne L. Stoner*, *Anna E. Lumelsky*, and *Rachel E. Barkow*; for Human Rights First by *Linda T. Coberly* and *Gene C. Schaerr*; for the National Immigrant Justice Center et al. by *William Lynch Schaller*, *Angela Vigil*, and *Charles Roth*; and for Muneer I. Ahmad et al. by *Alina Das*.

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Immigration and Nationality Act (INA), 66 Stat. 163, 8 U. S. C. § 1101 *et seq.*, provides that a noncitizen who has been convicted of an "aggravated felony" may be deported from this country. The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case. Among the crimes that are classified as aggravated felonies, and thus lead to these harsh consequences, are illicit drug trafficking offenses. We must decide whether this category includes a state criminal statute that extends to the social sharing of a small amount of marijuana. We hold it does not.

I

A

The INA allows the Government to deport various classes of noncitizens, such as those who overstay their visas, and those who are convicted of certain crimes while in the United States, including drug offenses. § 1227. Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for certain forms of discretionary relief from removal, like asylum (if he has a well-founded fear of persecution in his home country) and cancellation of removal (if, among other things, he has been lawfully present in the United States for a number of years). §§ 1158, 1229b. But if a noncitizen has been convicted of one of a narrower set of crimes classified as "aggravated felonies," then he is not only deportable, § 1227(a)(2)(A)(iii), but also ineligible for these discretionary forms of relief. See §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i); §§ 1229b(a)(3), (b)(1)(C).[1]

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[1] In addition to asylum, a noncitizen who fears persecution may seek withholding of removal, 8 U. S. C. § 1231(b)(3)(A), and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 114; 8 CFR § 1208.17(a) (2012). These forms of relief require the noncitizen to show a greater likelihood

The INA defines "aggravated felony" to include a host of offenses. § 1101(a)(43). Among them is "illicit trafficking in a controlled substance." § 1101(a)(43)(B). This general term is not defined, but the INA states that it "includ[es] a drug trafficking crime (as defined in section 924(c) of title 18)." *Ibid.* In turn, 18 U. S. C. § 924(c)(2) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act," or two other statutes not relevant here. The chain of definitions ends with § 3559(a)(5), which provides that a "felony" is an offense for which the "maximum term of imprisonment authorized" is "more than one year." The upshot is that a noncitizen's conviction of an offense that the Controlled Substances Act (CSA) makes punishable by more than one year's imprisonment will be counted as an "aggravated felony" for immigration purposes. A conviction under either state or federal law may qualify, but a "state offense constitutes a 'felony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U. S. 47, 60 (2006).

B

Petitioner Adrian Moncrieffe is a Jamaican citizen who came to the United States legally in 1984, when he was three. During a 2007 traffic stop, police found 1.3 grams of marijuana in his car. This is the equivalent of about two or three marijuana cigarettes. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga. Code Ann. § 16–13–30(j)(1) (2007). Under a Georgia statute providing more lenient treatment to first-time offenders,

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of persecution or torture at home than is necessary for asylum, but the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility. A conviction of an aggravated felony has no effect on CAT eligibility, but will render a noncitizen ineligible for withholding of removal if he "has been sentenced to an aggregate term of imprisonment of at least 5 years" for any aggravated felonies. 8 U. S. C. § 1231(b)(3)(B).

§ 42–8–60(a) (1997), the trial court withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether.[2] App. to Brief for Petitioner 11–15.

Alleging that this Georgia conviction constituted an aggravated felony, the Federal Government sought to deport Moncrieffe. The Government reasoned that possession of marijuana with intent to distribute is an offense under the CSA, 21 U. S. C. § 841(a), punishable by up to five years' imprisonment, § 841(b)(1)(D), and thus an aggravated felony. An Immigration Judge agreed and ordered Moncrieffe removed. App. to Pet. for Cert. 14a–18a. The Board of Immigration Appeals (BIA) affirmed that conclusion on appeal. *Id.*, at 10a–13a.

The Court of Appeals denied Moncrieffe's petition for review. The court rejected Moncrieffe's reliance upon § 841(b)(4), a provision that, in effect, makes marijuana distribution punishable only as a misdemeanor if the offense involves a small amount of marijuana for no remuneration. It held that in a federal criminal prosecution, "the default sentencing range for a marijuana distribution offense is the CSA's felony provision, § 841(b)(1)(D), rather than the misdemeanor provision." 662 F. 3d 387, 392 (CA5 2011). Because Moncrieffe's Georgia offense penalized possession of marijuana with intent to distribute, the court concluded that it was "equivalent to a federal felony." *Ibid.*

We granted certiorari, 566 U. S. 920 (2012), to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both § 841's felony provision and its misdemeanor provision, such as a statute that punishes all

[2] The parties agree that this resolution of Moncrieffe's Georgia case is nevertheless a "conviction" as the INA defines that term, 8 U. S. C. § 1101(a)(48)(A). See Brief for Petitioner 6, n. 2; Brief for Respondent 5, n. 2.

marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that "proscribes conduct punishable as a felony under" the CSA.[3] *Lopez*, 549 U. S., at 60. We now reverse.

II

A

When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. See, *e. g.*, *Nijhawan* v. *Holder*, 557 U. S. 29, 33–38 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 185–187 (2007). Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. *Id.*, at 186 (citing *Taylor* v. *United States*, 495 U. S. 575, 599–600 (1990)). By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard* v. *United States*, 544 U. S. 13, 24 (2005) (plurality opinion). Whether the noncitizen's actual conduct involved such facts "is quite irrelevant." *United States ex rel. Guarino* v. *Uhl*, 107 F. 2d 399, 400 (CA2 1939) (L. Hand, J.).

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume

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[3] Compare 662 F. 3d 387 (CA5 2011) (case below), *Garcia* v. *Holder*, 638 F. 3d 511 (CA6 2011) (is an aggravated felony), and *Julce* v. *Mukasey*, 530 F. 3d 30 (CA1 2008) (same), with *Martinez* v. *Mukasey*, 551 F. 3d 113 (CA2 2008) (is not an aggravated felony), and *Wilson* v. *Ashcroft*, 350 F. 3d 377 (CA3 2003) (same).

that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Johnson* v. *United States*, 559 U. S. 133, 137 (2010); see *Guarino*, 107 F. 2d, at 400. But this rule is not without qualification. First, our cases have addressed state statutes that contain several different crimes, each described separately, and we have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or "'some comparable judicial record' of the factual basis for the plea." *Nijhawan*, 557 U. S., at 35 (quoting *Shepard*, 544 U. S., at 26). Second, our focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense; there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U. S., at 193.

This categorical approach has a long pedigree in our Nation's immigration law. See Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N. Y. U. L. Rev. 1669, 1688–1702, 1749–1752 (2011) (tracing judicial decisions back to 1913). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U. S. C. § 1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is "the relevant statutory hook."[4] *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, 580 (2010); see *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 862 (CA2 1914).

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[4] *Carachuri-Rosendo* construed a different provision of the INA that concerns cancellation of removal, which also requires determining whether the noncitizen has been "*convicted* of any aggravated felony." 8 U. S. C. § 1229b(a)(3) (emphasis added). Our analysis is the same in both contexts.

B

The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]." *Nijhawan*, 557 U. S., at 37. So the categorical approach applies. *Ibid.* As we have explained, *supra*, at 188, this aggravated felony encompasses all state offenses that "proscrib[e] conduct punishable as a felony under [the CSA]," *Lopez*, 549 U. S., at 60. In other words, to satisfy the categorical approach, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct.

Moncrieffe was convicted under a Georgia statute that makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga. Code Ann. § 16–13–30(j)(1). We know from his plea agreement that Moncrieffe was convicted of the last of these offenses. App. to Brief for Petitioner 11; *Shepard*, 544 U. S., at 26. We therefore must determine whether possession of marijuana with intent to distribute is "necessarily" conduct punishable as a felony under the CSA.

We begin with the relevant conduct criminalized by the CSA. There is no question that it is a federal crime to "possess with intent to . . . distribute . . . a controlled substance," 21 U. S. C. § 841(a)(1), one of which is marijuana, § 812(c).[5] So far, the state and federal provisions correspond. But this is not enough, because the generically defined federal crime is "any felony punishable under the Controlled Substances Act," 18 U. S. C. § 924(c)(2), not just any "offense under the

[5] In full, 21 U. S. C. § 841(a)(1) provides:

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

CSA." Thus we must look to what punishment the CSA imposes for this offense.

Section 841 is divided into two subsections that are relevant here: (a), titled "Unlawful acts," which includes the offense just described, and (b), titled "Penalties." Subsection (b) tells us how "any person who violates subsection (a)" shall be punished, depending on the circumstances of his crime (*e. g.*, the type and quantity of controlled substance involved, whether it is a repeat offense).[6] Subsection (b)(1)(D) provides that if a person commits a violation of subsection (a) involving "less than 50 kilograms of marihuana," then "such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years," *i. e.*, as a felon. But one of the exceptions is important here. Paragraph (4) provides: "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, 21 U. S. C. § 844, which

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[6] In pertinent part, §§ 841(b)(1)(D) and (b)(4) (2006 ed. and Supp. V) provide:

"Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

. . . . . .

"[(1)](D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. . . .

. . . . . .

"(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18."

for our purposes means as a misdemeanant.[7] These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, and one not. The only way to know whether a marijuana distribution offense is "punishable as a felony" under the CSA, *Lopez*, 549 U. S., at 60, is to know whether the conditions described in paragraph (4) are present or absent.

A conviction under the same Georgia statute for "sell[ing]" marijuana, for example, would seem to establish remuneration. The presence of remuneration would mean that paragraph (4) is not implicated, and thus that the conviction is necessarily for conduct punishable as a felony under the CSA (under paragraph (1)(D)). In contrast, the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, see, *e. g.*, *Taylor* v. *State*, 260 Ga. App. 890, 581 S. E. 2d 386, 388 (2003) (6.6 grams), and that "distribution" does not require remuneration, see, *e. g.*, *Hadden* v. *State*, 181 Ga. App. 628, 628–629, 353 S. E. 2d 532, 533–534 (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve

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[7] Although paragraph (4) speaks only of "distributing" marijuana, the parties agree that it also applies to "the more inchoate offense of possession with intent to distribute that drug." *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 699, n. 2 (BIA 2012); see Brief for Petitioner 6, n. 2; Brief for Respondent 8, n. 5.

The CSA does not define "small amount." The BIA has suggested that 30 grams "serve[s] as a useful guidepost," *Castro Rodriguez*, 25 I. & N. Dec., at 703, noting that the INA exempts from deportable controlled substances offenses "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U. S. C. § 1227(a)(2)(B)(i). The meaning of "small amount" is not at issue in this case, so we need not, and do not, define the term.

facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

III

A

The Government advances a different approach that leads to a different result. In its view, § 841(b)(4)'s misdemeanor provision is irrelevant to the categorical analysis because paragraph (4) is merely a "mitigating exception" to the CSA offense, not one of the "elements" of the offense. Brief for Respondent 12. And because possession with intent to distribute marijuana is "presumptive[ly]" a felony under the CSA, the Government asserts, any state offense with the same elements is presumptively an aggravated felony. *Id.*, at 37. These two contentions are related, and we reject both of them.

First, the Government reads our cases to hold that the categorical approach is concerned only with the "elements" of an offense, so § 841(b)(4) "is not relevant" to the categorical analysis. *Id.*, at 20. It is enough to satisfy the categorical inquiry, the Government suggests, that the "elements" of Moncrieffe's Georgia offense are the same as those of the CSA offense: (1) possession (2) of marijuana (a controlled substance), (3) with intent to distribute it. But that understanding is inconsistent with *Carachuri-Rosendo*, our only decision to address both "elements" and "sentencing factors." There we recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too. See 560 U. S., at 567–568. In that case the relevant CSA offense was simple possession, which "becomes a 'felony punishable under the [CSA]' only because the sentencing factor of recidivism authorizes additional punishment beyond one year, the criterion for a felony." *Id.*, at 583 (Scalia, J., concurring in judgment). We therefore called

the generic federal offense "recidivist simple possession," even though such a crime is not actually "a separate offense" under the CSA, but rather an "'amalgam'" of offense elements and sentencing factors. *Id.*, at 567, and n. 3, 572 (majority opinion).

In other words, not only must the state offense of conviction meet the "elements" of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony. Here, the facts giving rise to the CSA offense establish a crime that may be either a felony or a misdemeanor, depending upon the presence or absence of certain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well.

The Government attempts to distinguish *Carachuri-Rosendo* on the ground that the sentencing factor there was a "narrow" aggravating exception that turned a misdemeanor into a felony, whereas here § 841(b)(4) is a narrow mitigation exception that turns a felony into a misdemeanor. Brief for Respondent 40–43. This argument hinges upon the Government's second assertion: that any marijuana distribution conviction is "presumptively" a felony. But that is simply incorrect, and the Government's argument collapses as a result. Marijuana distribution is neither a felony nor a misdemeanor until we know whether the conditions in paragraph (4) attach: Section 841(b)(1)(D) makes the crime punishable by five years' imprisonment "*except* as provided" in paragraph (4), and § 841(b)(4) makes it punishable as a misdemeanor "*[n]otwithstanding* paragraph (1)(D)" when only "a small amount of marihuana for no remuneration" is involved. (Emphasis added.) The CSA's text makes neither provision the default. Rather, each is drafted to be exclusive of the other.

Like the BIA and the Fifth Circuit, the Government believes the felony provision to be the default because, in practice, that is how federal criminal prosecutions for marijuana

distribution operate. See 662 F. 3d, at 391–392; *Matter of Aruna*, 24 I. & N. Dec. 452, 456–457 (2008); Brief for Respondent 18–23. It is true that every Court of Appeals to have considered the question has held that a defendant is eligible for a 5-year sentence under § 841(b)(1)(D) if the Government proves he possessed marijuana with the intent to distribute it, and that the Government need not negate the § 841(b)(4) factors in each case. See, *e. g.*, *United States* v. *Outen*, 286 F. 3d 622, 636–639 (CA2 2002) (describing § 841(b)(4) as a "mitigating exception"); *United States* v. *Hamlin*, 319 F. 3d 666, 670–671 (CA4 2003) (collecting cases). Instead, the burden is on the defendant to show that he qualifies for the lesser sentence under § 841(b)(4). Cf. *id.*, at 671.

We cannot discount § 841's text, however, which creates no default punishment, in favor of the procedural overlay or burdens of proof that would apply in a hypothetical federal criminal prosecution. In *Carachuri-Rosendo*, we rejected the Fifth Circuit's "'hypothetical approach,'" which examined whether conduct "'could have been punished as a felony' 'had [it] been prosecuted in federal court.'" 560 U. S., at 572, 573.[8] The outcome in a hypothetical prosecution is not the relevant inquiry. Rather, our "more focused, categorical inquiry" is whether the record of conviction of the predicate

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[8] JUSTICE ALITO states that the statute "obviously" requires examination of whether "conduct associated with the state offense . . . *would have* supported a qualifying conviction under the federal CSA." *Post*, at 212 (dissenting opinion) (emphasis added); see also *post*, at 217. But this echoes the Fifth Circuit's approach in *Carachuri-Rosendo*. As noted in the text, our opinion explicitly rejected such reasoning based on conditional perfect formulations. See also, *e. g.*, *Carachuri-Rosendo*, 560 U. S., at 580 (criticizing approach that "focuses on facts known to the immigration court that *could have* but did not serve as the basis for the state conviction and punishment" (emphasis altered)). Instead, as we have explained, *supra*, at 196, our holding depended upon the fact that Carachuri-Rosendo's conviction did not establish the fact necessary to distinguish between misdemeanor and felony punishment under the CSA. The same is true here.

offense necessarily establishes conduct that the CSA, on its own terms, makes punishable as a felony. *Id.*, at 580.

The analogy to a federal prosecution is misplaced for another reason. The Court of Appeals cases the Government cites distinguished between elements and sentencing factors to determine which facts must be proved to a jury, in light of the Sixth Amendment concerns addressed in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). The courts considered which "provision . . . states a complete crime upon the fewest *facts*," *Outen*, 286 F. 3d, at 638, which was significant after *Apprendi* to identify what a jury had to find before a defendant could receive § 841(b)(1)(D)'s maximum 5-year sentence. But those concerns do not apply in this context. Here we consider a "generic" federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge, nor who has the burden of proving which facts in a federal prosecution.[9]

Because of these differences, we made clear in *Carachuri-Rosendo* that, for purposes of the INA, a generic federal offense may be defined by reference to both "'"elements" in the traditional sense'" and sentencing factors. 560 U. S., at 567–568, n. 3, 572; see also *id.*, at 584 (opinion of SCALIA, J.) (describing the generic federal offense there as "the [CSA] felony of possession-plus-recidivism"). Indeed, the distinction between "elements" and "sentencing factors" did not exist when Congress added illicit drug trafficking to the list of aggravated felonies, Anti-Drug Abuse Act of 1988, 102

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[9] The Government also cites 21 U. S. C. § 885(a)(1), which provides that the Government need not "negative any exemption or exception set forth" in the CSA, and instead "the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." Brief for Respondent 21. Even assuming § 841(b)(4) is such an "exception," § 885(a)(1) applies, by its own terms, only to "any trial, hearing, or other proceeding under" the CSA itself, not to the rather different proceedings under the INA.

Stat. 4469–4470, and most courts at the time understood both § 841(b)(1)(D) and § 841(b)(4) to contain sentencing factors that draw the line between a felony and a misdemeanor. See, *e. g.*, *United States* v. *Campuzano*, 905 F. 2d 677, 679 (CA2 1990). *Carachuri-Rosendo* controls here.

Finally, there is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is "just what the English language tells us not to expect," and that leaves us "very wary of the Government's position." *Lopez*, 549 U. S., at 54. Consider a conviction under a New York statute that provides: "A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, *without consideration*, [marihuana] of an aggregate weight of *two grams or less*; or one cigarette containing marihuana." N. Y. Penal Law Ann. § 221.35 (West 2008) (emphasis added). This statute criminalizes only the distribution of a small amount of marijuana for no remuneration, and so all convictions under the statute would fit within the CSA misdemeanor provision, § 841(b)(4). But the Government would categorically deem a conviction under this statute to be an aggravated felony, because the statute contains the corresponding "elements" of (1) distributing (2) marijuana, and the Government believes all marijuana distribution offenses are punishable as felonies.

The same anomaly would result in the case of a noncitizen convicted of a misdemeanor in federal court under §§ 841(a) and (b)(4) directly. Even in that case, under the Government's logic, we would need to treat the federal misdemeanor conviction as an aggravated felony, because the conviction establishes elements of an offense that is presumptively a felony. This cannot be. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors," only to have courts presume felony treatment and ignore the very factors that distinguish felonies from misdemeanors. *Lopez*, 549 U. S., at 58.

B

Recognizing that its approach leads to consequences Congress could not have intended, the Government hedges its argument by proposing a remedy: Noncitizens should be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration, just as a federal criminal defendant could do at sentencing. Brief for Respondent 35–39. This is the procedure adopted by the BIA in *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 702 (2012), and endorsed by JUSTICE ALITO's dissent, *post*, at 220.

This solution is entirely inconsistent with both the INA's text and the categorical approach. As noted, the relevant INA provisions ask what the noncitizen was "convicted of," not what he did, and the inquiry in immigration proceedings is limited accordingly. 8 U. S. C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3); see *Carachuri-Rosendo*, 560 U. S., at 576. The Government cites no statutory authority for such case-specific factfinding in immigration court, and none is apparent in the INA. Indeed, the Government's main categorical argument would seem to preclude this inquiry: If the Government were correct that "the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony," Brief for Respondent 37, then all marijuana distribution convictions would categorically be convictions of the drug trafficking aggravated felony, mandatory deportation would follow under the statute, and there would be no room for the Government's follow-on factfinding procedure. The Government cannot have it both ways.

Moreover, the procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves "practical" purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials con-

ducted long after the fact. *Chambers* v. *United States*, 555 U. S. 122, 125 (2009); see also *Mylius*, 210 F., at 862–863. Yet the Government's approach would have our Nation's overburdened immigration courts entertain and weigh testimony from, for example, the friend of a noncitizen who may have shared a marijuana cigarette with him at a party, or the local police officer who recalls to the contrary that cash traded hands. And, as a result, two noncitizens, each "convicted of" the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge. The categorical approach was designed to avoid this "potential unfairness." *Taylor*, 495 U. S., at 601; see also *Mylius*, 210 F., at 863.

Furthermore, the minitrials the Government proposes would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, § 1226(c)(1)(B), where they have little ability to collect evidence. See Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 Geo. J. Legal Ethics 3, 5–10 (2008); Brief for National Immigrant Justice Center et al. as *Amici Curiae* 5–18; Brief for Immigration Law Professors as *Amici Curiae* 27–32. A noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution. The Government's suggestion that the CSA's procedures could readily be replicated in immigration proceedings is therefore misplaced. Cf. *Carachuri-Rosendo*, 560 U. S., at 579 (rejecting the Government's argument that procedures governing determination of the recidivism sentencing factor could "be satisfied during the immigration proceeding").

The Government defends its proposed immigration court proceedings as "a subsequent step *outside the categorical approach* in light of Section 841(b)(4)'s 'circumstance-specific'

nature." Brief for Respondent 37. This argument rests upon *Nijhawan*, in which we considered another aggravated felony, "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U. S. C. § 1101(a)(43)(M)(i). We held that the $10,000 threshold was not to be applied categorically as a required component of a generic offense, but instead called for a "circumstance-specific approach" that allows for an examination, in immigration court, of the "particular circumstances in which an offender committed the crime on a particular occasion." *Nijhawan*, 557 U. S., at 38–40. The Government suggests the § 841(b)(4) factors are like the monetary threshold, and thus similarly amenable to a circumstance-specific inquiry.

We explained in *Nijhawan*, however, that unlike the provision there, "illicit trafficking in a controlled substance" is a "generic crim[e]" to which the categorical approach applies, not a circumstance-specific provision. *Id.*, at 37; see also *Carachuri-Rosendo*, 560 U. S., at 576–578, n. 11. That distinction is evident in the structure of the INA. The monetary threshold is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved '*in*' the commission of the offense of conviction." *Nijhawan*, 557 U. S., at 39. Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings. But where, as here, the INA incorporates other criminal statutes wholesale, we have held it "must refer to generic crimes," to which the categorical approach applies. *Id.*, at 37.

Finally, the Government suggests that the immigration court's task would not be so daunting in some cases, such as those in which a noncitizen was convicted under the New York statute previously discussed or convicted directly under § 841(b)(4). True, in those cases, the record of conviction might reveal on its face that the predicate offense was

punishable only as a misdemeanor. But most States do not have stand-alone offenses for the social sharing of marijuana, so minitrials concerning convictions from the other States, such as Georgia, would be inevitable.[10] The Government suggests that even in these other States, the record of conviction may often address the § 841(b)(4) factors, because noncitizens "will be advised of the immigration consequences of a conviction," as defense counsel is required to do under *Padilla* v. *Kentucky*, 559 U. S. 356 (2010), and as a result counsel can build an appropriate record when the facts are fresh. Brief for Respondent 38. Even assuming defense counsel "will" do something simply because it is required of effective counsel (an assumption experience does not always bear out), this argument is unavailing because there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts, such as remuneration, that are irrelevant to the offense charged.

In short, to avoid the absurd consequences that would flow from the Government's narrow understanding of the categorical approach, the Government proposes a solution that largely undermines the categorical approach. That the only cure is worse than the disease suggests the Government is simply wrong.

C

The Government fears the consequences of our decision, but its concerns are exaggerated. The Government ob-

[10] In addition to New York, it appears that 13 other States have separate offenses for § 841(b)(4) conduct. See Cal. Health & Safety Code Ann. § 11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. § 18–18–406(5) (2012); Fla. Stat. § 893.13(3) (2010); Ill. Comp. Stat., ch. 720, §§ 550/3, 550/4, 550/6 (West 2010); Iowa Code § 124.410 (2009); Minn. Stat. § 152.027(4)(a) (2010); N. M. Stat. Ann. § 30–31–22(E) (Supp. 2011); Ohio Rev. Code Ann. § 2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. § 475.860(3) (2011); Pa. Stat. Ann., Tit. 35, § 780–113(a)(31) (Purdon Supp. 2012); S. D. Codified Laws § 22–42–7 (Supp. 2012); Tex. Health & Safety Code Ann. § 481.120(b)(1) (West 2010); W. Va. Code Ann. § 60A–4–402(c) (Lexis 2010).

serves that, like Georgia, about half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana. *Id.*, at 26–28. As a result, the Government contends, noncitizens convicted of marijuana distribution offenses in those States will avoid "aggravated felony" determinations, purely because their convictions do not resolve whether their offenses involved federal felony conduct or misdemeanor conduct, even though many (if not most) prosecutions involve either remuneration or larger amounts of marijuana (or both).

Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal. See *Carachuri-Rosendo*, 560 U. S., at 581. Any marijuana distribution offense, even a misdemeanor, will still render a noncitizen deportable as a controlled substances offender. 8 U. S. C. § 1227(a)(2)(B)(i). At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria. §§ 1158(b), 1229b(a)(1)–(2). But those forms of relief are discretionary. The Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a member of one "of the world's most dangerous drug cartels," *post*, at 210 (opinion of ALITO, J.), just as he may deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons. As a result, "to the extent that our rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Carachuri-Rosendo*, 560 U. S., at 581.

In any event, serious drug traffickers may be adjudicated aggravated felons regardless, because they will likely be convicted under greater "trafficking" offenses that necessarily establish that more than a small amount of marijuana was involved. See, *e. g.*, Ga. Code Ann. § 16–13–31(c)(1) (Supp.

2012) (separate provision for trafficking in more than 10 pounds of marijuana). Of course, some offenders' conduct will fall between § 841(b)(4) conduct and the more serious conduct required to trigger a "trafficking" statute. Brief for Respondent 30. Those offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive result is little more than an attack on the categorical approach itself.[11] We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions. See *supra*, at 200. And we err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor. See *Carachuri-Rosendo*, 560 U. S., at 581; *Leocal* v. *Ashcroft*, 543 U. S. 1, 11, n. 8 (2004).

Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like § 1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U. S. C. § 921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas-*

[11] Similarly, JUSTICE ALITO's dissent suggests that he disagrees with the first premises of the categorical approach. He says it is a "strange and disruptive resul[t]" that "defendants convicted in different States for committing the same criminal conduct" might suffer different collateral consequences depending upon how those States define their statutes of conviction. *Post*, at 218. Yet that is the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant "commit[s]," but rather what facts are necessarily established by a conviction for the state offense. Different state offenses will necessarily establish different facts. Some will track the "uniform" federal definition of the generic offense, and some will not. *Taylor* v. *United States*, 495 U. S. 575, 590 (1990). Whatever disparity this may create as between defendants whose real-world conduct was the same, it ensures that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law. This was *Taylor*'s chief concern in adopting the categorical approach. See *id.*, at 599–602.

Alvarez requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U. S., at 193. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms. Further, the Government points to § 1101(a)(43)(P), which makes passport fraud an aggravated felony, except when the noncitizen shows he committed the offense to assist an immediate family member. But that exception is provided in the INA itself. As we held in *Nijhawan*, a circumstance-specific inquiry would apply to that provision, so it is not comparable. 557 U. S., at 37–38.

* * *

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the 'commonsense conception' " of these terms. *Carachuri-Rosendo*, 560 U. S., at 573 (quoting *Lopez*, 549 U. S., at 53). Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, "does not fit easily into the 'everyday understanding' " of "trafficking," which " 'ordinarily . . . means some sort of commercial dealing.' " *Carachuri-Rosendo*, 560 U. S., at 574 (quoting *Lopez*, 549 U. S., at 53–54). Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an "aggravated felony." We hold that it may not be. If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA. The contrary judgment of the Court of Ap-

peals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

A plain reading of 18 U. S. C. § 924(c)(2) identifies two requirements that must be satisfied for a state offense to qualify as a "felony punishable under the Controlled Substances Act [(CSA)]." "First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]." *Lopez* v. *Gonzales*, 549 U. S. 47, 61 (2006) (THOMAS, J., dissenting). Moncrieffe's offense of possession of marijuana with intent to distribute satisfies both elements. No one disputes that Georgia punishes Moncrieffe's offense as a felony. See Ga. Code Ann. § 16–13–30(j)(2) (Supp. 2012) ("Except as otherwise provided in subsection (c) of Code Section 16–13–31 or in Code Section 16–13–2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years").[1] And, the offense is "punishable under the [CSA]," 18 U. S. C. § 924(c)(2), because it involved "possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U. S. C. § 841(a)(1). Accordingly, Moncrieffe's offense is a "drug trafficking crime," 18 U. S. C. § 924(c)(2), which consti-

[1] Section 16–13–31(c) (Supp. 2012) increases the punishment for trafficking in marijuana, while § 16–13–2(b) (2011) decreases the punishment for simple possession of one ounce or less of marijuana. Neither provision is applicable to Moncrieffe's offense of possession of marijuana with intent to distribute.

The Court correctly points out that Moncrieffe was sentenced pursuant to § 16–13–2(a) because he was a first-time offender. *Ante*, at 188–189. That provision does not alter the felony status of the offense. Rather, it gives courts discretion to impose probation instead of imprisonment and to do so without entering a conviction. As the majority recognizes, petitioner has waived any argument that he was not convicted for purposes of the Immigration and Nationality Act. *Ante*, at 189, n. 2.

tutes an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U. S. C. § 1101(a)(43)(B).[2]

The Court rejected the plain meaning of 18 U. S. C. § 924(c)(2) in *Lopez*. 549 U. S., at 50. There, the defendant was convicted of a state felony, but his offense would have been a misdemeanor under the CSA. *Id.*, at 53. The Court held that the offense did not constitute a " 'felony punishable under the [CSA]' " because it was not "punishable *as a felony* under that federal law." *Id.*, at 60 (quoting § 924(c)(2); emphasis added). I dissented in *Lopez* and warned that an inquiry into whether a state offense would constitute a felony in a hypothetical federal prosecution would cause "significant inconsistencies." *Id.*, at 63. I explained that one such inconsistency would arise if an alien defendant never convicted of an actual state felony were subject to deportation based on a hypothetical federal prosecution. *Id.*, at 67.

This precise issue arose in *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563 (2010). Instead of following the logic of *Lopez*, however, the Court contorted the law to avoid the harsh result compelled by that decision. In *Carachuri-Rosendo*, the defendant was convicted of a crime that the State categorized as a misdemeanor, but his offense would have been a felony under the CSA because he had a prior conviction. 560 U. S., at 567–568, 570–571. The Court held that the offense did not constitute an "aggravated felony" because the state prosecutor had not charged the existence of a prior conviction and, thus, the defendant was not "*actually convicted* of a crime that is itself punishable as a felony under federal law." *Id.*, at 582. Concurring in the judgment, I

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[2] See 8 U. S. C. § 1227(a)(2)(A)(iii) (providing that aliens convicted of an "aggravated felony" after admission are deportable); § 1229b(a)(3) (providing that aliens convicted of an "aggravated felony" are ineligible for cancellation of removal); § 1101(a)(43)(B) (defining "aggravated felony" as "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. § 924(c)])"); 18 U. S. C. § 924(c)(2) (defining "drug trafficking crime" as "any felony punishable under the [CSA]").

explained that the Court's decision was inconsistent with *Lopez* because the defendant's conduct was punishable as a felony under the CSA, but that *Lopez* was wrongly decided and that a proper reading of § 924(c)(2) supported the Court's result. 560 U. S., at 585. Carachuri-Rosendo's crime of conviction was a state-law misdemeanor and, as a result, it did not qualify as a "felony punishable under the [CSA]." See *ibid.*

I declined to apply *Lopez* in *Carachuri-Rosendo*, and I am unwilling to apply it here. Indeed, the Court itself declined to follow the logic of *Lopez* to its natural end in *Carachuri-Rosendo.* And, now the majority's ill-advised approach once again leads to an anomalous result. It is undisputed that, for federal sentencing purposes, Moncrieffe's offense would constitute a federal felony unless he could prove that he distributed only a small amount of marijuana for no remuneration. Cf. *United States* v. *Outen*, 286 F. 3d 622, 637–639 (CA2 2002) (Sotomayor, J.) (agreeing with the Government that 21 U. S. C. § 841(b)(4) is a mitigating exception to the "default provision" under § 841(b)(1)(D) and that it need not negate the § 841(b)(4) factors to support a sentence under § 841(b)(1)(D)). But, the Court holds that, for purposes of the INA, Moncrieffe's offense would necessarily correspond to a federal misdemeanor, regardless of whether he could in fact prove that he distributed only a small amount of marijuana for no remuneration. *Ante*, at 196–197 (asserting that neither § 841(b)(1)(D) nor § 841(b)(4) is the "default" provision). The Court's decision, thus, has the effect of treating a substantial number of state felonies as federal misdemeanors, even when they would result in federal felony convictions.

The majority notes that "[t]his is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as . . . an 'aggravated felony.'" *Ante*, at 206. The Court has brought this upon itself. The only principle uniting *Lopez*, *Carachuri-Rosendo*, and the decision today appears to be

that the Government consistently loses. If the Court continues to disregard the plain meaning of § 924(c)(2), I expect that these types of cases will endlessly—and needlessly—recur.

I respectfully dissent.

JUSTICE ALITO, dissenting.

The Court's decision in this case is not supported by the language of the Immigration and Nationality Act (INA) or by this Court's precedents, and it leads to results that Congress clearly did not intend.

Under the INA, aliens[1] who are convicted of certain offenses may be removed from this country, 8 U. S. C. § 1227(a)(2) (2006 ed. and Supp. V), but in many instances, the Attorney General (acting through the Board of Immigration Appeals (BIA)) has the discretion to cancel removal, §§ 1229b(a), (b). Aliens convicted of especially serious crimes, however, are ineligible for cancellation of removal. § 1229b(a)(3) (2006 ed.). Among the serious crimes that carry this consequence is "illicit trafficking in a controlled substance." § 1101(a)(43)(B).

Under the Court's holding today, however, drug traffickers in about half the States are granted a dispensation. In those States, even if an alien is convicted of possessing tons of marijuana with the intent to distribute, the alien is eligible to remain in this country. Large-scale marijuana distribution is a major source of income for some of the world's most dangerous drug cartels, Dept. of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2, 7 (2011), but the Court now holds that an alien convicted of

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[1] "Alien" is the term used in the relevant provisions of the INA, and this term does not encompass all noncitizens. Compare 8 U. S. C. § 1101(a)(3) (defining "alien" to include "any person not a citizen or national of the United States") with § 1101(a)(22) (defining "national of the United States"). See also *Miller* v. *Albright*, 523 U. S. 420, 467, n. 2 (1998) (GINSBURG, J., dissenting).

participating in such activity may petition to remain in this country.

The Court's decision also means that the consequences of a conviction for illegal possession with intent to distribute will vary radically depending on the State in which the case is prosecuted. Consider, for example, an alien who is arrested near the Georgia-Florida border in possession of a large supply of marijuana. Under the Court's holding, if the alien is prosecuted and convicted in Georgia for possession with intent to distribute, he is eligible for cancellation of removal. But if instead he is caught on the Florida side of the line and is convicted in a Florida court—where possession with intent to distribute a small amount of marijuana for no remuneration is covered by a separate statutory provision, compare Fla. Stat. § 893.13(3) (2010) with § 893.13(1)(a)(2)—the alien is likely to be ineligible. Can this be what Congress intended?

I

Certainly the text of the INA does not support such a result. In analyzing the relevant INA provisions, the starting point is 8 U. S. C. § 1229b(a)(3), which provides that a lawful permanent resident alien subject to removal may apply for discretionary cancellation of removal if he has not been convicted of any "aggravated felony." The term "aggravated felony" encompasses "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. § 924(c)])." 8 U. S. C. § 1101(a)(43)(B). And this latter provision defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act [(CSA)] (21 U. S. C. 801 et seq.)." 18 U. S. C. § 924(c)(2). Thus "any felony punishable under the [CSA]" is an "aggravated felony."

Where an alien has a prior federal conviction, it is a straightforward matter to determine whether the conviction was for a "felony punishable under the [CSA]." But 8 U. S. C. § 1101(a)(43) introduces a complication. That provi-

sion states that the statutory definition of "aggravated felony" "applies to an offense described in this paragraph *whether in violation of Federal or State law.*" (Emphasis added.) As noted, the statutory definition of "aggravated felony" includes a "felony punishable under the [CSA]," and therefore § 1101(a)(43)(B) makes it necessary to determine what is meant by a state "offense" that is a "felony punishable under the [CSA]."

What § 1101(a)(43) obviously contemplates is that the BIA or a court will identify conduct associated with the state offense and then determine whether that conduct would have supported a qualifying conviction under the federal CSA.[2] Identifying and evaluating this relevant conduct is the question that confounds the Court's analysis. Before turning to that question, however, some preliminary principles should be established.

In *Lopez* v. *Gonzales*, 549 U. S. 47, 50 (2006), we held that felony status is controlled by federal, not state, law. As a result, once the relevant conduct is identified, it must be determined whether proof of that conduct would support a felony conviction under the CSA. The federal definition of a felony is a crime punishable by imprisonment for more than one year. 18 U. S. C. §§ 3559(a)(1)–(5). Consequently, if the

[2] The Court's disagreement with this proposition, *ante*, at 197, n. 8, is difficult to understand. If, as § 1101(a)(43) quite plainly suggests and the Court has held, a state conviction can qualify as an "aggravated felony," we must determine what is meant by a state "offense" that is a "felony punishable under the [CSA]." There is no way to do this other than by identifying a set of relevant conduct and asking whether, based on that conduct, the alien could have been convicted of a felony if prosecuted under the CSA in federal court. In rejecting what it referred to as a "hypothetical approach," the *Carachuri-Rosendo* Court was addressing an entirely different question, specifically, *which* set of conduct is relevant. *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563, 572, 580 (2010). We held that the relevant set of conduct consisted of that which was in fact charged and proved in the state-court proceeding, not the set of conduct that could have been proved in a hypothetical federal proceeding.

proof of the relevant conduct would support a conviction under the CSA for which the maximum term of imprisonment is more than one year, the state conviction qualifies as a conviction for an "aggravated felony."

II

This brings us to the central question presented in this case: how to determine and evaluate the conduct that constitutes the state "offense." One possibility is that actual conduct is irrelevant, and that only the elements of the state crime for which the alien was convicted matter. We have called this the "categorical approach," *Taylor* v. *United States*, 495 U. S. 575, 600 (1990), and we have *generally* used this approach in determining whether a state conviction falls within a federal definition of a crime, see *id.*, at 600–601 ("Section 924(e)(2)(B)(i) defines 'violent felony' as any crime punishable by imprisonment for more than a year that 'has as an element'—not any crime that, in a particular case, involves—the use or threat of force. Read in this context, the phrase 'is burglary' in § 924(e)(2)(B)(ii) most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct"). But, as will be discussed below, we have also departed in important ways from a pure categorical approach.

The Court's opinion in this case conveys the impression that its analysis is based on the categorical approach, but that is simply not so. On the contrary, a pure categorical approach leads very quickly to the conclusion that petitioner's Georgia conviction was a conviction for an "aggravated felony."

The elements of the Georgia offense were as follows: knowledge, possession of marijuana, and the intent to distribute it. Ga. Code Ann. § 16–13–30(j)(1) (2007); *Jackson* v. *State*, 295 Ga. App. 427, 435, n. 28, 671 S. E. 2d 902, 909, n. 28 (2009). Proof of those elements would be sufficient to support a conviction under 21 U. S. C. § 841(a), and the maxi-

mum punishment for that offense is imprisonment for up to five years, § 841(b)(1)(D) (2006 ed., Supp. V), more than enough to qualify for felony treatment. Thus, under a pure categorical approach, petitioner's Georgia conviction would qualify as a conviction for an "aggravated felony" and would render him ineligible for cancellation of removal.

The Court departs from this analysis because § 841(b)(4) (2006 ed.) provides a means by which a defendant convicted of violating § 841(a) may lower the maximum term of imprisonment to no more than one year. That provision states that "any person who violates [§ 841(a)] by distributing a small amount of marihuana for no remuneration shall be treated as" a defendant convicted of simple possession, and a defendant convicted of that lesser offense faces a maximum punishment of one year's imprisonment (provided that the defendant does not have a prior simple-possession conviction), § 844 (2006 ed. and Supp. V). Reading this provision together with § 841(a), the Court proceeds as if the CSA created a two-tiered possession-with-intent-to-distribute offense: a base offense that is punishable as a misdemeanor and a second-tier offense (possession with intent to distribute more than a "small amount" of marijuana or possession with intent to distribute for remuneration) that is punishable as a felony.

If the CSA actually created such a two-tiered offense, the pure categorical approach would lead to the conclusion that petitioner's Georgia conviction was not for an "aggravated felony." The elements of the Georgia offense would not suffice to prove the second-tier offense, which would require proof that petitioner possessed more than a "small amount" of marijuana or that he intended to obtain remuneration for its distribution. Instead, proof of the elements of the Georgia crime would merely establish a violation of the base offense, which would be a misdemeanor.

The CSA, however, does not contain any such two-tiered provision. And § 841(b)(4) does not alter the elements of the

§ 841(a) offense. As the Court notes, every Court of Appeals to consider the question has held that § 841(a) is the default offense and that § 841(b)(4) is only a mitigating sentencing guideline, see *United States* v. *Outen*, 286 F. 3d 622, 636–639 (CA2 2002) (Sotomayor, J.) (describing § 841(b)(4) as a "mitigating exception"); *United States* v. *Hamlin*, 319 F. 3d 666, 670 (CA4 2003) (collecting cases), and the Court does not disagree, *ante*, at 196–198.

Confirmation of this interpretation is provided by the use of the term "small amount" in § 841(b)(4). If § 841(b)(4) had been meant to alter the elements of § 841(a), Congress surely would not have used such a vague term. Due process requires that the elements of a criminal statute be defined with specificity. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 393 (1926). Accordingly, it is apparent that § 841(b)(4) does not modify the elements of § 841(a) but instead constitutes what is in essence a mandatory sentencing guideline. Under this provision, if a defendant is convicted of violating § 841(a), the defendant may attempt to prove that he possessed only a "small amount" of marijuana and that he did not intend to obtain remuneration for its distribution. If the defendant succeeds in convincing the sentencing judge, the maximum term of imprisonment is lowered to one year.

In sum, contrary to the impression that the Court's opinion seeks to convey, the Court's analysis does not follow the pure categorical approach.

III

Nor is the Court's analysis supported by prior case law. The Court claims that its approach follows from our decision in *Carachuri-Rosendo* v. *Holder*, 560 U. S. 563 (2010), but that case—unlike the Court's opinion—faithfully applied the pure categorical approach.

In *Carachuri-Rosendo*, the alien had been convicted in a Texas court for simple possession of a controlled substance. *Id.*, at 570–571. At the time of that conviction, Carachuri-Rosendo had a prior state conviction for simple

possession, but this fact was not charged or proved at his trial and was apparently not taken into account in setting his sentence, which was 10 days in jail. *Ibid.* Arguing that Carachuri-Rosendo was ineligible for cancellation of removal, the Government maintained that his second simple-possession conviction qualified under the INA as a conviction for an "aggravated felony." *Id.*, at 570. This was so, the Government contended, because, if Carachuri-Rosendo's second simple-possession prosecution had been held in federal court, he could have been punished by a sentence of up to two years due to his prior simple-possession conviction. *Ibid.*

This more severe sentence, however, would have required the federal prosecutor to file a formal charge alleging the prior conviction; Carachuri-Rosendo would have been given the opportunity to defend against that charge; and the heightened sentence could not have been imposed unless the court found that the prior conviction had occurred. *Id.*, at 578.

Our rejection of the Government's argument thus represented a straightforward application of the pure categorical approach. The elements of the Texas offense for which Carachuri-Rosendo was convicted were knowledge or intent, possession of a controlled substance without a prescription, and nothing more. *Id.*, at 570–571; Tex. Health & Safety Code Ann. §§ 481.117(a), (b) (West 2010). Proof of a prior simple-possession conviction was not required, and no such proof appears to have been offered. The maximum penalty that could have been imposed under federal law for simple possession (without proof of a prior simple-possession conviction) was one year's imprisonment. Thus, proof in federal court of the elements of the Texas offense would not have permitted a felony-length sentence, and consequently the state conviction did not qualify as a felony punishable under the CSA.

IV

Unsupported by either the categorical approach or our prior cases, the decision of the Court rests instead on the Court's belief—which I share—that the application of the pure categorical approach in this case would lead to results that Congress surely did not intend.

Suppose that an alien who is found to possess two marijuana cigarettes is convicted in a state court for possession with intent to distribute based on evidence that he intended to give one of the cigarettes to a friend. Under the pure categorical approach, this alien would be regarded as having committed an "aggravated felony." But this classification is plainly out of step with the CSA's assessment of the severity of the alien's crime because under the CSA the alien could obtain treatment as a misdemeanant by taking advantage of 21 U. S. C. § 841(b)(4).

For this reason, I agree with the Court that such an alien should not be treated as having committed an "aggravated felony." In order to avoid this result, however, it is necessary to depart from the categorical approach, and that is what the Court has done. But the particular way in which the Court has departed has little to recommend it.

To begin, the Court's approach is analytically confused. As already discussed, the Court treats § 841(b)(4) as if it modified the elements of § 841(a), when in fact § 841(b)(4) does no such thing. And the Court obviously knows this because it does not suggest that § 841(b)(4) changes the elements of § 841(a) for criminal law purposes.[3]

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[3] The Court defends its interpretation of 21 U. S. C. §§ 841(a), (b)(4) by arguing that *Carachuri-Rosendo*, 560 U. S. 563, rejected any recourse to a "hypothetical approach" for determining how a criminal prosecution likely would have proceeded, see *ante*, at 197, and that is true enough. But, as discussed above, see n. 2, *supra*, just because the categorical approach does not require conjecture as to whether a hypothetical federal prosecutor would be likely to charge and prove a prior conviction does not mean

In addition, the Court's approach leads to the strange and disruptive results noted at the beginning of this opinion. As an initial matter, it leads to major drug trafficking crimes in about half the States being excluded from the category of "illicit trafficking in a controlled substance." Moreover, it leads to significant disparities between equally culpable defendants. We adopted the categorical approach to avoid disparities in our treatment of defendants convicted in different States for committing the same criminal conduct. See *Taylor*, 495 U. S., at 590–591 (rejecting the view that state law determined the meaning of "burglary" because "[t]hat would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary' "). Yet the Court reintroduces significant disparity into our treatment of drug offenders. All of this can be avoided by candidly acknowledging that the categorical approach is not the be-all and end-all.

When Congress wishes to make federal law dependent on certain prior state convictions, it faces a difficult task. The INA provisions discussed above confront this problem, and their clear objective is to identify categories of criminal conduct that evidence such a high degree of societal danger that an alien found to have engaged in such conduct should not be allowed to obtain permission to remain in this country. Since the vast majority of crimes are prosecuted in the state courts, Congress naturally looked to state, as well as federal, convictions as a metric for identifying these dangerous aliens.

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that it also precludes analysis of the structure of the federal criminal statute at hand. Indeed, our categorical-approach cases have done little else. See, *e. g.*, *Carachuri-Rosendo*, *supra*, at 578 (discussing procedural protections Carachuri-Rosendo would have enjoyed had he been prosecuted federally); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 185, 189–194 (2007) (the term "theft offense" in 8 U. S. C. § 1101(a)(43)(G) includes the crime of aiding and abetting a theft offense).

But state criminal codes vary widely, and some state crimes are defined so broadly that they encompass both very serious and much less serious cases. In cases involving such state provisions, a pure categorical approach may frustrate Congress' objective.

The Court has said that the categorical approach finds support in the term "conviction." *Id.*, at 600; *Shepard* v. *United States*, 544 U. S. 13, 19 (2005). But the Court has never held that a pure categorical approach is dictated by the use of that term,[4] and I do not think that it is. In ordinary speech, when it is said that a person was convicted of or for doing something, the "something" may include facts that go beyond the bare elements of the relevant criminal offense. For example, it might be said that an art thief was convicted of or for stealing a Rembrandt oil painting even though neither the identity of the artist nor the medium used in the painting are elements of the standard offense of larceny. See 3 W. LaFave, Substantive Criminal Law § 19.1(a) (2d ed. 2003).

For these reasons, departures from the categorical approach are warranted, and this Court has already sanctioned such departures in several circumstances. See *Taylor*, *supra*, at 602 (modified categorical approach); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 193 (2007) (categorical approach does not exclude state-law convictions unless there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime"); *Nijhawan* v. *Holder*, 557 U. S. 29, 32 (2009) (interpreting an enumerated "aggravated felony" in 8 U. S. C. § 1101(a)(43) not to be a generic crime).

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[4] Instead, the Court adopted the categorical approach based on a combination of factors, including judicial efficiency. See *Taylor*, 495 U. S., at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was").

Consistent with the flexibility that the Court has already recognized, I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court or that, taking a realistic view, were clearly proved. Such a look beyond the elements is particularly appropriate in a case like this, which involves a civil proceeding before an expert agency that regularly undertakes factual inquiries far more daunting than any that would be involved here. See, *e. g., Negusie* v. *Holder*, 555 U. S. 511 (2009).

Applying this approach in the present case, what we find is that the Georgia statute under which petitioner was convicted broadly encompasses both relatively minor offenses (possession of a small amount of marijuana with the intent to share) and serious crimes (possession with intent to distribute large amounts of marijuana in exchange for millions of dollars of profit). We also find that petitioner had the opportunity before the BIA to show that his criminal conduct fell into the category of relatively minor offenses carved out by § 841(b)(4). Administrative Record 16–26. The BIA takes the entirely sensible view that an alien who is convicted for possession with intent to distribute may show that his conviction was not for an "aggravated felony" by proving that his conduct fell within § 841(b)(4). *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 701–702 (2012). Petitioner, for whatever reason, availed himself only of the opportunity to show that his conviction had involved a small amount of marijuana and did not present evidence—or even contend—that his offense had not involved remuneration. Administrative Record 16–26, 37. As a result, I think we have no alternative but to affirm the decision of the Court of Appeals, which in turn affirmed the BIA.

Syllabus

McBURNEY ET AL. *v.* YOUNG, DEPUTY COMMISSIONER AND DIRECTOR, VIRGINIA DIVISION OF CHILD SUPPORT ENFORCEMENT, ET AL.

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

No. 12–17. Argued February 20, 2013—Decided April 29, 2013

Virginia's Freedom of Information Act (FOIA or Act) grants Virginia citizens access to all public records, but grants no such right to non-Virginians. Petitioners McBurney and Hurlbert, citizens of States other than Virginia, filed records requests under the Act. After each petitioner's request was denied, they filed a 42 U. S. C. § 1983 suit seeking declaratory and injunctive relief for violations of the Privileges and Immunities Clause and, in Hurlbert's case, the dormant Commerce Clause. The District Court granted Virginia's motion for summary judgment, and the Fourth Circuit affirmed.

Held:

1. Virginia's FOIA does not violate the Privileges and Immunities Clause, which protects only those privileges and immunities that are "fundamental." See *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U. S. 371, 382, 388. Pp. 226–234.

(a) Hurlbert alleges that Virginia's FOIA abridges his fundamental right to earn a living in his chosen profession—obtaining property records on behalf of his clients. While the Privileges and Immunities Clause protects the right of citizens to "ply their trade, practice their occupation, or pursue a common calling," *Hicklin* v. *Orbeck*, 437 U. S. 518, 524, the Court has struck down laws as violating this privilege only when they were enacted for the protectionist purpose of burdening out-of-state citizens. See, *e. g.*, *Toomer* v. *Witsell*, 334 U. S. 385, 395, 397. The Virginia FOIA's citizen/noncitizen distinction has a non-protectionist aim. Virginia's FOIA exists to provide a mechanism for Virginia citizens to obtain an accounting from their public officials; non-citizens have no comparable need. Moreover, the distinction between citizens and noncitizens recognizes that citizens alone foot the bill for the fixed costs underlying recordkeeping in the Commonwealth. Any effect the Act has of preventing citizens of other States from making a profit by trading on information contained in state records is incidental. Pp. 227–229.

Syllabus

(b) Hurlbert also alleges that Virginia's FOIA abridges the right to own and transfer property in the Commonwealth. The right to take, hold, and dispose of property has long been seen as one of the privileges of citizenship. See, *e. g.*, *Paul* v. *Virginia*, 8 Wall. 168, 180. However, Virginia law does not prevent noncitizens from obtaining documents necessary to the transfer of property. Records—like title and mortgage documents—maintained by the clerk of each circuit court are available to inspection by any person. Real estate tax assessment records are considered nonconfidential and are often posted online, a practice followed by the county from which Hurlbert sought records. Requiring a noncitizen to obtain records through the clerk's office or on the Internet, instead of through a burdensome FOIA process, cannot be said to impose a significant burden on the ability to own or transfer property in Virginia. Pp. 229–231.

(c) McBurney alleges that Virginia's FOIA impermissibly burdens his access to public proceedings. The Privileges and Immunities Clause "secures citizens of one state the right to resort to the courts of another, equally with the citizens of the latter state," *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 535, but that "requirement is satisfied if the nonresident is given access . . . upon terms which . . . are reasonable and adequate for the enforcing of any rights he may have, even though they may not be . . . the same in extent as those accorded to resident citizens," *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 562. Virginia's FOIA clearly does not deprive noncitizens of "reasonable and adequate" access to state courts. Virginia's court rules provide noncitizens access to nonprivileged documents needed in litigation, and Virginia law gives citizens and noncitizens alike access to judicial records and to records pertaining directly to them. For example, McBurney utilized Virginia's Government Data Collection and Dissemination Practices Act to receive much of the information he had sought in his FOIA request. Pp. 231–232.

(d) Petitioners' sweeping claim that the Virginia FOIA violates the Privileges and Immunities Clause because it denies them the right to access public information on equal terms with state citizens is rejected because the right to access public information is not a "fundamental" privilege or immunity of citizenship. The Court has repeatedly stated that the Constitution does not guarantee the existence of FOIA laws. See, *e. g.*, *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 40. Moreover, no such right was recognized at common law or in the early Republic. Nor is such a sweeping right "basic to the maintenance or well-being of the Union." *Baldwin*, *supra*, at 388. Pp. 232–234.

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2. Virginia's FOIA does not violate the dormant Commerce Clause. The "common thread" among this Court's dormant Commerce Clause cases is that "the State interfered with the natural functioning of the interstate market either through prohibition or thorough burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806. Virginia's FOIA, by contrast, neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Accordingly, this is not properly viewed as a dormant Commerce Clause case. Even shoehorned into the Court's dormant Commerce Clause framework, however, Hurlbert's claim would fail. Insofar as there is a "market" for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. A State does not violate the dormant Commerce Clause when, having created a market through a state program, it "limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve." *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 442. Pp. 234–237.

667 F. 3d 454, affirmed.

ALITO, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 237.

Deepak Gupta argued the cause for petitioners. With him on the briefs were *Gregory A. Beck*, *Jonathan E. Taylor*, and *Brian Wolfman*.

E. Duncan Getchell, Jr., Solicitor General of Virginia, argued the cause for respondents. With him on the brief were *Kenneth T. Cuccinelli II*, Attorney General, *Patricia L. West*, Chief Deputy Attorney General, *Michael H. Brady*, Assistant Attorney General, *Joseph P. Rapisarda, Jr.*, and *Benjamin A. Thorp IV*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Patrick J. Carome*; for the Coalition for Sensible Public Records Access et al. by *Paul Bender*, *Christopher A. Mohr*, and *Michael R. Klipper*; for the Institute for Justice by *William R. Maurer* and *William H. Mellor III*; for Judicial Watch, Inc., et al. by *James F. Peterson*; for Public Justice, P. C., by *Leah M. Nicholls*, *Arthur H. Bryant*, and *Leslie A. Bailey*; and for the Reporters Committee for Freedom of the Press et al. by *Bruce D. Brown*.

Briefs of *amici curiae* urging affirmance were filed for Local Government Attorneys of Virginia, Inc., et al. by *R. Lucas Hobbs*; and for the

JUSTICE ALITO delivered the opinion of the Court.

In this case, we must decide whether the Virginia Freedom of Information Act, Va. Code Ann. §2.2–3700 *et seq.*, violates either the Privileges and Immunities Clause of Article IV of the Constitution or the dormant Commerce Clause. The Virginia Freedom of Information Act (FOIA or Act), provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth," but it grants no such right to non-Virginians. §2.2–3704(A) (Lexis 2011).

Petitioners, who are citizens of other States, unsuccessfully sought information under the Act and then brought this constitutional challenge. We hold, however, that petitioners' constitutional rights were not violated. By means other than the state FOIA, Virginia made available to petitioners most of the information that they sought, and the Commonwealth's refusal to furnish the additional information did not abridge any constitutionally protected privilege or immunity. Nor did Virginia violate the dormant Commerce Clause. The state FOIA does not regulate commerce in any meaningful sense, but instead provides a service that is related to state citizenship. For these reasons, we affirm the decision of the Court of Appeals rejecting petitioners' constitutional claims.

I

Petitioners Mark J. McBurney and Roger W. Hurlbert are citizens of Rhode Island and California, respectively. McBurney and Hurlbert each requested documents under the Virginia FOIA, but their requests were denied because of their citizenship.

McBurney is a former resident of Virginia whose ex-wife is a Virginia citizen. After his ex-wife defaulted on her child support obligations, McBurney asked the Common-

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National Conference of State Legislatures et al. by *Stuart A. Raphael* and *Lisa E. Soronen.*

wealth's Division of Child Support Enforcement to file a petition for child support on his behalf. The agency complied, but only after a 9-month delay. McBurney attributes that delay to agency error and says that it cost him nine months of child support. To ascertain the reason for the agency's delay, McBurney filed a Virginia FOIA request seeking "all emails, notes, files, memos, reports, letters, policies, [and] opinions" pertaining to his family, along with all documents "regarding [his] application for child support" and all documents pertaining to the handling of child support claims like his. App. in No. 11–1099 (CA4), p. 39A. The agency denied McBurney's request on the ground that he was not a Virginia citizen. McBurney later requested the same documents under Virginia's Government Data Collection and Dissemination Practices Act, Va. Code Ann. § 2.2–3800 *et seq.*, and through that request he received most of the information he had sought that pertained specifically to his own case. He did not, however, receive any general policy information about how the agency handled claims like his.

Hurlbert is the sole proprietor of Sage Information Services, a business that requests real estate tax records on clients' behalf from state and local governments across the United States. In 2008, Hurlbert was hired by a land/title company to obtain real estate tax records for properties in Henrico County, Virginia. He filed a Virginia FOIA request for the documents with the Henrico County Real Estate Assessor's Office, but his request was denied because he was not a Virginia citizen.

Petitioners filed suit under Rev. Stat. § 1979, 42 U. S. C. § 1983, seeking declaratory and injunctive relief for violations of the Privileges and Immunities Clause and, in Hurlbert's case, the dormant Commerce Clause. The District Court granted Virginia's motion for summary judgment, *McBurney* v. *Cuccinelli*, 780 F. Supp. 2d 439 (ED Va. 2011), and the Court of Appeals affirmed, 667 F. 3d 454 (CA4 2012).

Like Virginia, several other States have enacted freedom of information laws that are available only to their citizens. See, *e. g.*, Ala. Code § 36–12–40 (2012 Cum. Supp.); Ark. Code Ann. § 25–19–105 (2011 Supp.); Del. Code Ann., Tit. 29, § 10003 (2012 Cum. Supp.); Mo. Rev. Stat. § 109.180 (2012); N. H. Rev. Stat. Ann. § 91–A:4 (2012 West Cum. Sup.); N. J. Stat. Ann. § 47:1A–1 (West 2003); Tenn. Code Ann. § 10–7–503 (2012). In *Lee* v. *Minner*, 458 F. 3d 194 (2006), the Third Circuit held that this feature of Delaware's FOIA violated the Privileges and Immunities Clause. We granted certiorari to resolve this conflict. 568 U. S. 936 (2012).

II

Under the Privileges and Immunities Clause, "[t]he Citizens of each State [are] entitled to all Privileges and Immunities of Citizens in the several States." U. S. Const., Art. IV, § 2, cl. 1. We have said that "[t]he object of the Privileges and Immunities Clause is to 'strongly . . . constitute the citizens of the United States [as] one people,' by 'plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Lunding* v. *New York Tax Appeals Tribunal*, 522 U. S. 287, 296 (1998) (quoting *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869)). This does not mean, we have cautioned, that "state citizenship or residency may never be used by a State to distinguish among persons." *Baldwin* v. *Fish and Game Comm'n of Mont.*, 436 U. S. 371, 383 (1978). "Nor must a State always apply all its laws or all its services equally to anyone, resident or nonresident, who may request it so to do." *Ibid.* Rather, we have long held that the Privileges and Immunities Clause protects only those privileges and immunities that are "fundamental." See, *e. g.*, *id.*, at 382, 388.

Petitioners allege that Virginia's citizens-only FOIA provision violates four different "fundamental" privileges or immunities: the opportunity to pursue a common calling, the

ability to own and transfer property, access to the Virginia courts, and access to public information. The first three items on that list, however, are not abridged by the Virginia FOIA, and the fourth—framed broadly—is not protected by the Privileges and Immunities Clause.

A

Hurlbert argues that Virginia's citizens-only FOIA provision abridges his ability to earn a living in his chosen profession, namely, obtaining property records from state and local governments on behalf of clients. He is correct that the Privileges and Immunities Clause protects the right of citizens to "ply their trade, practice their occupation, or pursue a common calling." *Hicklin* v. *Orbeck*, 437 U. S. 518, 524 (1978); *Supreme Court of N. H.* v. *Piper*, 470 U. S. 274, 280 (1985) ("'[O]ne of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State'"). But the Virginia FOIA does not abridge Hulbert's ability to engage in a common calling in the sense prohibited by the Privileges and Immunities Clause. Rather, the Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens. See, *e. g.*, *Hicklin*, *supra* (striking down as a violation of noncitizens' privileges and immunities an "Alaska Hire" statute containing a resident hiring preference for all employment related to the development of the State's oil and gas resources); *Toomer* v. *Witsell*, 334 U. S. 385, 395, 397 (1948) (striking down a South Carolina statute imposing a $2,500 license fee on out-of-state shrimping boats and only a $25 fee on in-state shrimping boats where petitioners alleged that the "purpose and effect of this statute . . . [was] not to conserve shrimp, but to exclude non-residents and thereby create a commercial monopoly for South Carolina residents," and the "record cas[t] some doubt on" the State's counteras-

sertion that the statute's "obvious purpose was to conserve its shrimp supply"); *United Building & Constr. Trades Council of Camden Cty.* v. *Mayor and Council of Camden*, 465 U. S. 208 (1984) (New Jersey municipal ordinance requiring that at least 40% of employees of contractors and subcontractors working on city construction projects be city residents facially burdened out-of-state citizens' ability to pursue a common calling). In each case, the clear aim of the statute at issue was to advantage in-state workers and commercial interests at the expense of their out-of-state counterparts.

Virginia's FOIA differs sharply from those statutes. By its own terms, Virginia's FOIA was enacted to "ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Va. Code Ann. § 2.2–3700(B) (Lexis 2011). Hurlbert does not allege—and has offered no proof—that the challenged provision of the Virginia FOIA was enacted in order to provide a competitive economic advantage for Virginia citizens. Cf. *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 67 (2003) (piercing a professedly nondiscriminatory statute to find economic protectionism). Rather, it seems clear that the distinction that the statute makes between citizens and noncitizens has a distinctly nonprotectionist aim. The state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power (*i. e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power. See Va. Const., Art. I, § 2; Va. Code Ann. § 2.2–3700(B). In addition, the provision limiting the use of the state FOIA to Virginia citizens recognizes that Virginia taxpayers foot the bill for the fixed costs underlying recordkeeping in the Commonwealth. Tr. of Oral Arg. 53–54. The challenged provision of the state FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other

States from making a profit by trading on information contained in state records. While the Clause prohibits a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen.

B

Hurlbert next alleges that the challenged provision of the Virginia FOIA abridges the right to own and transfer property in the Commonwealth. Like the right to pursue a common calling, the right to "take, hold and dispose of property, either real or personal," has long been seen as one of the privileges of citizenship. See *Corfield* v. *Coryell*, 6 F. Cas. 546, 552 (No. 3,230) (CC ED Pa. 1825); see also *Paul*, 8 Wall., at 180 (listing "the acquisition and enjoyment of property" among the privileges of citizenship). Thus, if a State prevented out-of-state citizens from accessing records—like title documents and mortgage records—that are necessary to the transfer of property, the State might well run afoul of the Privileges and Immunities Clause. Cf. *State* v. *Grimes*, 29 Nev. 50, 85, 84 P. 1061, 1073 (1906) ("*Caveat emptor* being the rule with us in the absence of a special agreement, it is just and essential to the protection of persons intending to purchase or take incumbrances that they be allowed the right of inspection"); *Jackson ex dem. Center* v. *Campbell*, 19 Johns. 281, 283 (N. Y. 1822) (the "plain intention" of the State's property records system was "to give notice, through the medium of the county records, to persons about to purchase").

Virginia, however, does not prevent citizens of other States from obtaining such documents. Under Virginia law, "any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof." Va. Code Ann. §17.1–208 (Lexis

2010). Such records and papers include records of property transfers, like title documents, § 55–106 (Lexis 2012); notices of federal tax liens and other federal liens against property, § 55–142.1; notices of state tax liens against property, § 58.1–314 (Lexis 2009) (state taxes generally), § 58.1–908 (estate tax liens), § 58.1–1805 (state taxes generally), § 58.1–2021(A) (liens filed by agencies other than the Tax Commission); and notice of mortgages and other encumbrances, § 8.01–241 (Lexis Supp. 2012).

A similar flaw undermines Hurlbert's claim that Virginia violates the Privileges and Immunities Clause by preventing citizens of other States from accessing real estate tax assessment records. It is true that those records, while available to Virginia citizens under the state FOIA, are not required by statute to be made available to noncitizens. See *Associated Tax Service, Inc.* v. *Fitzpatrick*, 236 Va. 181, 183, 187, 372 S. E. 2d 625, 627, 629 (1988).[1] But in fact Virginia and its subdivisions generally make even these less essential records readily available to all. These records are considered nonconfidential under Virginia law and, accordingly, they may be posted online. § 58.1–3122.2 (Lexis 2009). Henrico County, from which Hurlbert sought real estate tax assessments, follows this practice,[2] as does almost every other county in the Commonwealth. Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a

[1] At oral argument, the Solicitor General of Virginia contended that, as a matter of Virginia law, Hurlbert "is entitled to the tax assessment data in the clerk's office." Tr. of Oral Arg. 38. Neither at oral argument nor in its briefs did Virginia cite any Virginia statute providing that real estate tax assessment records be filed in the clerk's office. Virginia Code Ann. § 58.1–3300 (Lexis 2009), which directs that "reassessment" records be filed with the clerk, may be the statute to which counsel referred, but without an official construction of the statute by Virginia's Supreme Court—and, in light of the fact that petitioners have not been afforded an opportunity to rebut its importance—we do not rely upon it here.

[2] See http://www.co.henrico.va.us/finance/disclaimer.html (as visited Apr. 26, 2013, and available in Clerk of Court's case file).

relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia.

C

McBurney alleges that Virginia's citizens-only FOIA provision impermissibly burdens his "access to public proceedings." Brief for Petitioners 42. McBurney is correct that the Privileges and Immunities Clause "secures citizens of one State the right to resort to the courts of another, equally with the citizens of the latter State." *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co.*, 257 U. S. 533, 535 (1922). But petitioners do not suggest that the Virginia FOIA slams the courthouse door on noncitizens; rather, the most they claim is that the law creates "[a]n information asymmetry between adversaries based solely on state citizenship." Brief for Petitioners 42.

The Privileges and Immunities Clause does not require States to erase any distinction between citizens and noncitizens that might conceivably give state citizens some detectable litigation advantage. Rather, the Court has made clear that "the constitutional requirement is satisfied if the nonresident is given access to the courts of the State upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553, 562 (1920).

The challenged provision of the Virginia FOIA clearly does not deprive noncitizens of "reasonable and adequate" access to the Commonwealth's courts. Virginia's rules of civil procedure provide for both discovery, Va. Sup. Ct. Rule 4:1 (2012), and subpoenas *duces tecum*, Rule 4:9. There is no reason to think that those mechanisms are insufficient to provide noncitizens with any relevant, nonprivileged documents needed in litigation.

Moreover, Virginia law gives citizens and noncitizens alike access to judicial records. Va. Code Ann. § 17.1–208; see also *Shenandoah Publishing House, Inc.* v. *Fanning*, 235 Va. 253, 258, 368 S. E. 2d 253, 256 (1988). And if Virginia has in its possession information about any person, whether a citizen of the Commonwealth or of another State, that person has the right under the Government Data Collection and Dissemination Practices Act to inspect that information. § 2.2–3806(A)(3) (Lexis 2011).

McBurney's own case is illustrative. When his FOIA request was denied, McBurney was told that he should request the materials he sought pursuant to the Government Data Collection and Dissemination Practices Act. Upon placing a request under that Act, he ultimately received much of what he sought. Accordingly, Virginia's citizens-only FOIA provision does not impermissibly burden noncitizens' ability to access the Commonwealth's courts.

D

Finally, we reject petitioners' sweeping claim that the challenged provision of the Virginia FOIA violates the Privileges and Immunities Clause because it denies them the right to access public information on equal terms with citizens of the Commonwealth. We cannot agree that the Privileges and Immunities Clause covers this broad right.

This Court has repeatedly made clear that there is no constitutional right to obtain all the information provided by FOIA laws. See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 14 (1978) (plurality opinion) (" 'The Constitution itself is [not] a Freedom of Information Act' "); see also *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. 32, 40 (1999) (the Government could decide "not to give out [this] information at all"); *Sorrell* v. *IMS Health Inc.*, 564 U. S. 552, 588 (2011) (Breyer, J., dissenting) ("[T]his Court has *never* found that the *First Amendment* prohibits the government from restricting the use of information gathered pursuant to a regulatory mandate").

It certainly cannot be said that such a broad right has, "at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." *Corfield*, 6 F. Cas., at 551. No such right was recognized at common law. See H. Cross, The People's Right to Know 25 (1953) ("[T]he courts declared the primary rule that there was no general common law right in all persons (as citizens, taxpayers, electors or merely as persons) to inspect public records or documents"). Most founding-era English cases provided that only those persons who had a personal interest in nonjudicial records were permitted to access them. See, *e. g.*, *King* v. *Shelley*, 3 T. R. 141, 142, 100 Eng. Rep. 498, 499 (K. B. 1789) (Buller, J.) ("[O]ne man has no right to look into another's title deeds and records, when he . . . has no interest in the deeds or rolls himself"); *King* v. *Justices of Staffordshire*, 6 Ad. & E. 84, 101, 112 Eng. Rep. 33, 39 (K. B. 1837) ("The utmost . . . that can be said on the ground of interest, is that the applicants have a rational curiosity to gratify by this inspection, or that they may thereby ascertain facts useful to them in advancing some ulterior measures in contemplation as to regulating county expenditure; but this is merely an interest in obtaining information on the general subject, and would furnish an equally good reason for permitting inspection of the records of any other county: there is not that direct and tangible interest, which is necessary to bring them within the rule on which the Court acts in granting inspection of public documents").

Nineteenth-century American cases, while less uniform, certainly do not support the proposition that a broad-based right to access public information was widely recognized in the early Republic. See, *e. g.*, *Cormack* v. *Wolcott*, 37 Kan. 391, 394, 15 P. 245, 246 (1887) (denying mandamus to plaintiff seeking to compile abstracts of title records; "[a]t common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record"); *Brewer* v. *Watson*, 71 Ala.

299, 305 (1882) ("The individual demanding access to, and inspection of public writings must not only have an interest in the matters to which they relate, a direct, tangible interest, but the inspection must be sought for some specific and legitimate purpose. The gratification of mere curiosity, or motives merely speculative will not entitle him to demand an examination of such writings"); Nadel, What Are "Records" of Agency Which Must Be Made Available Under State Freedom of Information Act, 27 A. L. R. 4th 680, 687, § 2[b] (1984) ("[A]t common law, a person requesting inspection of a public record was required to show an interest therein which would enable him to maintain or defend an action for which the document or record sought could furnish evidence or necessary information").

Nor is such a sweeping right "basic to the maintenance or well-being of the Union." *Baldwin*, 436 U. S., at 388. FOIA laws are of relatively recent vintage. The federal FOIA was enacted in 1966, 80 Stat. 378, 383, and Virginia's counterpart was adopted two years later, 1968 Va. Acts ch. 479, p. 690. There is no contention that the Nation's unity foundered in their absence, or that it is suffering now because of the citizens-only FOIA provisions that several States have enacted.

III

In addition to his Privileges and Immunities Clause claim, Hurlbert contends that Virginia's citizens-only FOIA provision violates the dormant Commerce Clause. The Commerce Clause empowers Congress "[t]o regulate Commerce . . . among the several States." Art. I, § 8, cl. 3. The Commerce Clause does not expressly impose any constraints on "the several States," and several Members of the Court have expressed the view that it does not do so. See *General Motors Corp.* v. *Tracy*, 519 U. S. 278, 312 (1997) (Scalia, J., concurring) ("[T]he so-called 'negative' Commerce Clause is an unjustified judicial intervention, not to be expanded beyond its existing domain"); *United Haulers Assn., Inc.* v. *Oneida-*

Herkimer Solid Waste Management Authority, 550 U. S. 330, 349 (2007) (THOMAS, J., concurring in judgment) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice"). Nonetheless, the Court has long inferred that the Commerce Clause itself imposes certain implicit limitations on state power. See, *e. g.*, *Cooley* v. *Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots*, 12 How. 299, 318–319 (1852); cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 209 (1824) (Marshall, C. J.) (dictum).

Our dormant Commerce Clause jurisprudence "significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *Maine* v. *Taylor*, 477 U. S. 131, 151 (1986). It is driven by a concern about "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 273–274 (1988); see also *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978) ("The crucial inquiry . . . must be directed to determining whether [the challenged statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental").

Virginia's FOIA law neither "regulates" nor "burdens" interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all. The "common thread" among those cases in which the Court has found a dormant Commerce Clause violation is that "the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation." *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S. 794, 806 (1976). Here, by contrast, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies—which would not oth-

erwise exist—of state records. As discussed above, the express purpose of Virginia's FOIA law is to "ensur[e] the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted." Va. Code Ann. § 2.2–3700(B). This case is thus most properly brought under the Privileges and Immunities Clause: It quite literally poses the question whether Virginia can deny out-of-state citizens a benefit that it has conferred on its own citizens. Cf. *Missouri Pacific R. Co.*, 257 U. S., at 535 (analyzing whether the privilege of access to a State's courts must be made available to out-of-state citizens equally with the citizens of the relevant State). Because it does not pose the question of the constitutionality of a state law that interferes with an interstate market through prohibition or burdensome regulations, this case is not governed by the dormant Commerce Clause.

Even shoehorned into our dormant Commerce Clause framework, however, Hurlbert's claim would fail. Insofar as there is a "market" for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it "limits benefits generated by [that] state program to those who fund the state treasury and whom the State was created to serve." *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 442 (1980). "Such policies, while perhaps 'protectionist' in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State." *Ibid.*; cf. *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 341 (2008) ("[A] government function is not susceptible to standard dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause

abhors"). For these reasons, Virginia's citizens-only FOIA provision does not violate the dormant Commerce Clause.

* * *

Because Virginia's citizens-only FOIA provision neither abridges any of petitioners' fundamental privileges and immunities nor impermissibly regulates commerce, petitioners' constitutional claims fail. The judgment below is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion. Though the Court has properly applied our dormant Commerce Clause precedents, I continue to adhere to my view that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute." *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 68 (2003) (opinion concurring in part and dissenting in part) (citation and internal quotation marks omitted).

Per Curiam

BOYER *v.* LOUISIANA

CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

No. 11–9953. Argued January 14, 2013—Decided April 29, 2013
Certiorari dismissed. Reported below: 2010–693 (La. App. 3 Cir. 2/2/11), 56 So. 3d 1119, and 2010–694 (La. App. 3 Cir. 2/2/11), 56 So. 3d 1162.

Richard Bourke argued the cause and filed briefs for petitioner.

Carla S. Sigler argued the cause for respondent. With her on the brief were *John F. DeRosier*, *Karen C. McLellan*, *Thomas R. McCarthy*, and *William S. Consovoy*.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, concurring.

We granted certiorari in this case to decide "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes." Pet. for Cert. i. The premise of that question is that a breakdown in Louisiana's system for paying the attorneys representing petitioner, an indigent defendant who was charged with a capital offense, caused most of the lengthy delay between his arrest and trial. Because the record shows other-

**William F. Sheehan* and *Barbara Bergman* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

Clifford M. Sloan filed a brief for the Constitution Project as *amicus curiae*.

wise, I agree that the writ of certiorari was improvidently granted.

In February 2002, petitioner and his brother were hitchhiking in Calcasieu Parish, Louisiana. Petitioner robbed and murdered a driver who picked them up. After enlisting his brother to help him cover up the crime, petitioner fled to Florida, where he was captured about a month later. The evidence of petitioner's guilt was overwhelming. He gave the police a detailed statement describing the murder; his brother, an eyewitness, agreed to testify about the crime; multiple other members of petitioner's family told police that they had heard petitioner confess; and petitioner's fingerprints were found in the victim's truck.

Louisiana prosecutors announced that they would seek the death penalty, and the state court appointed Thomas Lorenzi, an experienced trial attorney, to serve as petitioner's primary defense counsel. For the next five years, Mr. Lorenzi led petitioner's defense, but he was assisted at all times by at least one highly credentialed but less experienced attorney from the Louisiana Capital Assistance Center (LCAC).

The attorneys from the LCAC were paid by the State, but there was confusion about which branch of the state government was responsible for paying Mr. Lorenzi's fees. The trial court promptly scheduled a hearing on that preliminary matter, but the hearing was repeatedly put off at the urging of the defense. Over the course of more than three years, the defense requested that the hearing be continued on eight separate occasions, causing a total delay of approximately 20 months. The trial court also issued several other continuances without any objection from the defense, delaying the hearing an additional 15 months. And just when it seemed that the hearing would finally be held, Hurricane Rita forced the Calcasieu Parish Courthouse to close.

The trial court held the hearing on March 27, 2006, and at that time it became clear that Mr. Lorenzi's fees could not

be fully paid until the start of the next fiscal year. Ten months later, the State broke the resulting impasse by announcing that it would no longer seek the death penalty. That greatly reduced the complexity and cost of petitioner's defense and allowed his case to proceed. Mr. Lorenzi withdrew, and attorneys from the LCAC accepted the role of lead counsel.

From that point, the case proceeded at a plodding pace. Petitioner filed voluminous pretrial motions, took multiple interlocutory appeals, and twice demanded the recusal of the trial judge. The trial court halted proceedings for 11 months after concluding that petitioner was temporarily incompetent to stand trial. At last, despite petitioner's contention that he needed still more time to prepare, the trial began on September 22, 2009. A jury found petitioner guilty of second-degree murder and armed robbery.

In sum, the record shows that the single largest share of the delay in this case was the direct result of defense requests for continuances, that other defense motions caused substantial additional delay, and that much of the rest of the delay was caused by events beyond anyone's control. It is also quite clear that the delay caused by the defense likely worked in petitioner's favor. The state court observed that petitioner's assertions of his speedy trial right were "more perfunctory than aggressive." 2010–693, p. 34 (La. App. 3 Cir. 2/2/11), 56 So. 3d 1119, 1143. And what started out as a very strong case of first-degree murder ended up, after much delay, in a conviction for lesser offenses.

The dissent would ignore what the record plainly shows based largely on the Louisiana Court of Appeal's observation that "[t]he majority of the seven-year delay was caused by the 'lack of funding.'" *Id.*, at 1142. See *post*, at 245–246, 248 (opinion of SOTOMAYOR, J.). But when this statement is read in context, what it most likely means is not that the delay in question was caused by the State's failure to provide funding but simply that the delay was attributable to the

funding issue. And as noted, most of this delay was caused by the many defense requests for continuances of hearings on the issue of funding. If the defense had not sought and obtained those continuances, the trial might well have commenced at a much earlier date—and might have reached a conclusion far less favorable to the defense.*

We have before us the same record that was before the Court of Appeal, and the record simply does not support the proposition that much—let alone "most"—of the delay was caused by the State's failure to fund the defense. Having taken up this case on the basis of a mistaken factual premise, I agree with the Court's decision to dismiss the writ as improvidently granted.

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

Jonathan Boyer waited in jail for more than seven years from the date of his arrest until the day his case went to trial. The Louisiana Court of Appeal rejected Boyer's claim that this delay violated his right to a speedy trial. In doing so, the court found that most of the delay in Boyer's case was caused by the State's failure to pay for his defense due to a "'funding crisis' experienced by the State of Louisiana." 2010–693, p. 32 (La. App. 3 Cir. 2/2/11), 56 So. 3d 1119, 1142. Nevertheless, the court did not weigh that part of the delay against the State in assessing the merits of Boyer's claim,

*The dissent also claims that "Louisiana conceded below that most of the delay resulted from the lack of funding for Boyer's defense." *Post*, at 248; see *post*, at 245, n. 3. But the dissent's only citation is to the State's argument in the alternative that *even if* the legislature's failure to appropriate funds for the defense caused the delay, that delay should not count against the prosecution for purposes of Louisiana's statutory speedy trial requirement. The State in no way conceded that it caused the delay in this case. Indeed, the very next paragraph of the State's brief argued that "the defendant sought to delay the inception of his trial via his funding motion." App. 317a.

reasoning that it was "'out of the State's control.'" *Id.*, at 1145.

We granted certiorari to decide whether a delay caused by a State's failure to fund counsel for an indigent's defense should be weighed against the State in determining whether there was a deprivation of a defendant's Sixth Amendment right to a speedy trial. 568 U. S. 936 (2012). Rather than dismiss the writ as improvidently granted, I would simply address this question. Our precedents provide a clear answer: Such a delay should weigh against the State. It is important for States to understand that they have an obligation to protect a defendant's constitutional right to a speedy trial. I respectfully dissent.

I

The decision below describes the facts as follows. On February 4, 2002, Boyer and his brother were walking by the side of the road in Sulphur, Louisiana. Bradlee Marsh stopped his truck and gave the two men a ride. Once inside the truck, Boyer demanded money. When Marsh refused, Boyer shot him three times in the head and then took some cash and a silver chain from his person. Marsh eventually died of his wounds. On March, 8, 2002, Boyer was arrested in Jacksonville, Florida, and was indicted in Louisiana for first-degree murder on June 6, 2002, in violation of La. Rev. Stat. Ann. § 14:30 (West 1997). Louisiana sought the death penalty.

Boyer filed a motion to determine the source of funds for his defense in November 2002. A hearing on the motion was held on August 15, 2003, which was continued until a later date. From that point on, "the only matters that came before the trial court concerned the source of funding." 56 So. 3d, at 1142. Boyer and the State filed numerous continuances over the next two years that further postponed the funding hearing.

On July 7, 2005, Boyer filed a motion to quash the indictment as a violation of his right to a speedy trial under the Louisiana Constitution, the State's speedy trial statute, and the Sixth Amendment.[1] This hearing was itself postponed. Among other things, disruptions caused by Hurricanes Katrina and Rita resulted in further delay. When a hearing on the motion to quash was finally held, defense counsel moved to dismiss Boyer's federal speedy trial claim without prejudice.[2] The trial court denied the motion on November 20, 2006, reaching only Boyer's state-law claims. It concluded that under Louisiana's speedy trial statute, such delays could not be attributed to the prosecution because they were "beyond [its] control" and rested instead with the "legislature." App. 703a. The Louisiana Third Circuit Court of Appeal affirmed. 56 So. 3d, at 1142.

On May 21, 2007, Louisiana amended the indictment to reduce the charge to second-degree murder, which is a noncapital offense. See La. Rev. Stat. Ann. § 14:30.1(B) (West 1997). The same day, the State filed a bill of information charging Boyer with armed robbery with a firearm, a violation of § 14:64.

On January 22, 2008, Boyer filed a second motion to quash the indictment and bill of information on the grounds that the pretrial delay violated his right to a speedy trial under the Louisiana Constitution and the Sixth Amendment. The trial court denied the motion. On July 19, 2008, the court found Boyer incompetent to stand trial, but later found his

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[1] Under the relevant statute, "no trial shall be commenced . . . [i]n capital cases after three years from the date of [the] institution of the prosecution." La. Code Crim. Proc. Ann., Art. 578(1) (West 2003). The trial court may dismiss the indictment upon the expiration of the 3-year period. See Art. 581. Boyer brought this motion to quash soon after the limitations period under the statute had elapsed. See 56 So. 3d, at 1142.

[2] Boyer's counsel moved to dismiss the constitutional claim because he lacked the "resources . . . to be able to prove prejudice [in] an evidentiary hearing." App. 688a.

competency restored on April 15, 2009. A trial commenced on September 22, 2009, more than seven years after Boyer's arrest. A week later, the jury entered a verdict finding Boyer guilty of second-degree murder and armed robbery.

The Louisiana Third Circuit Court of Appeal affirmed Boyer's conviction, finding, as relevant here, that there had been no violation of Boyer's right to a speedy trial under the Sixth Amendment. 56 So. 3d, at 1139–1145. Applying our decision in *Barker* v. *Wingo*, 407 U. S. 514 (1972), the court recognized that the more than seven years from the date of arrest to trial was "presumptively prejudicial." 56 So. 3d, at 1144. It then went on to consider the reason for the delay, and found that the "majority of the . . . delay was caused by the 'lack of funding'" for Boyer's defense. *Id.*, at 1142.

The court, however, declined to weigh this period of the delay against the State at all for the purposes of its analysis under *Barker*. 56 So. 3d, at 1145. It found that "[t]he first three years he was incarcerated, [while Boyer] was charged with first degree murder, . . . the progression of the prosecution was *'out of the State's control.'*" *Ibid.* (emphasis added). The Louisiana Supreme Court denied review. 2011–0769 (La. 1/20/12), 78 So. 3d 138, 139.

II

A

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." In *Barker*, we explained that whether there has been a violation of a defendant's right to a speedy trial turns on a balancing test that "compels courts to approach speedy trial cases on an *ad hoc* basis." 407 U. S., at 530. We identified four factors that courts should consider as part of that inquiry. These include the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Ibid.*

While each of the factors is relevant, "[t]he flag all litigants seek to capture is the second factor, the reason for delay." *United States* v. *Loud Hawk*, 474 U. S. 302, 315 (1986). We have explained that "different weights should be assigned to different reasons." *Barker*, 407 U. S., at 531. "A deliberate attempt to delay the trial in order to hamper the defense" is particularly serious, and "should be weighted heavily against the government." *Ibid.* "A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Ibid.* At the other end of the spectrum, "a valid reason, such as a missing witness, should serve to justify appropriate delay." *Ibid.*

B

The Louisiana court found that the "majority of the seven-year delay" in Boyer's case was caused by the "'lack of funding'" made available for the defense, 56 So. 3d, at 1142, and I defer to that factual determination, see *Hernandez* v. *New York*, 500 U. S. 352, 366 (1991) (plurality opinion).[3] The question is whether, once the Louisiana court found that most of the delay in Boyer's case was caused by the State's failure to fund Boyer's defense, the court was required to weigh that period of the delay against the State for the purposes of its analysis under *Barker*. The court's conclusion that for the first three years of Boyer's case, the "progression

[3] Louisiana previously conceded that the delay was caused by a lack of funding. See Brief in Opposition to Defendant's Writ Application in No. KW–07–00085 (La. App. 3 Cir.), App. 317a ("In this case, because the defendant was without properly funded counsel for so long, the State simply could not ethically or legally bring him to trial. The indigent defense representation and funding situation is beyond the ability of the State to control"); see also Brief for Louisiana in No. KA–10–693 etc. (La. App. 3 Cir.), *id.*, at 198a (same).

of the prosecution was 'out of the State's control'" makes clear that it did not. 56 So. 3d, at 1145.

Our reasoning in *Barker*, however, requires that a delay caused by a State's failure to provide funding for an indigent's defense must count against the State, and not the accused. As noted, we held there that even a more "neutral reason" for a delay such as "overcrowded courts" should be weighed against the State, because "the ultimate responsibility for such circumstances" lies squarely with the state system as a whole. 407 U. S., at 531. Applying similar logic, we recently indicated that "[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State" as well. *Vermont* v. *Brillon*, 556 U. S. 81, 94 (2009) (internal quotation marks and citations omitted).

A State's failure to provide adequate funding for an indigent's defense that prevents a case from going to trial is no different. Where a State has failed to provide funding for the defense and that lack of funding causes a delay, the defendant cannot reasonably be faulted. See *Barker*, 407 U. S., at 531. Placing the consequences of such a delay squarely on the State's shoulders is proper for the simple reason that an indigent defendant has no control over whether a State has set aside funds to pay his lawyer or fund any necessary investigation. The failure to fund an indigent's defense is not as serious as a deliberate effort by a State to cause delay. *Ibid.* But States routinely make tradeoffs in the allocation of limited resources, and it is reasonable that a State bear the consequences of these choices.

The Louisiana court's analysis under *Barker* was therefore based on a critical misapprehension of our precedents: It did not attribute responsibility for the delay to the State, and thus incorrectly applied the factor that we have found to be especially significant. See *Loud Hawk*, 474 U. S., at 315. We have explained that, in every case, "courts must still engage in a difficult and sensitive balancing process," and "none of the four factors [is] either a necessary or sufficient

condition to the finding of a deprivation of the right of speedy trial." *Barker*, 407 U. S., at 533. Because the *Barker* factors must be viewed collectively, this error could very well have affected the outcome. "[T]he balance arrived at in close cases ordinarily would not prompt this Court's review," but the Louisiana court's misattribution of the reason for the delay was a "fundamental error . . . that calls for this Court's correction." *Brillon*, 556 U. S., at 91.

Our precedents therefore point the way to a straightforward resolution of this case. I take no view as to how the other elements of the *Barker* inquiry should be weighed, or the ultimate issue whether the delay violated Boyer's right to a speedy trial. Instead, I would decide only the narrow question on which we granted certiorari and hold that, under *Barker*, any delay that results from a State's failure to provide funding for an indigent's defense weighs against the State. On remand, the Louisiana court could conduct the *Barker* analysis under the correct legal standard.

III

Louisiana's primary arguments are either unpersuasive or are more appropriately addressed on remand. They provide no barrier to the Court's resolution of the question presented.

Louisiana's procedures require that capital defendants be appointed two capital-qualified attorneys. See La. Sup. Ct. Rule 31(A)(1)(a) (2012). In Louisiana's view, the fact that there may have been insufficient funds for a second lawyer did not contribute to the delay. See Brief for Respondent 31–33. It contends that these procedural rules did not create an affirmative right to two lawyers, so that Boyer could have forgone the second lawyer at any time and gone to trial if he had so desired. See *id.*, at 32 (citing La. Sup. Ct. Rules 31(A)(1)(a), (B)).

The Louisiana court treated it as a given that Boyer could not proceed to trial during the period of the funding crisis.

We therefore have no need to address how these state-law procedures might have affected the overall reason for the delay. Cf. *Mullaney* v. *Wilbur*, 421 U. S. 684, 690–691 (1975); *General Motors Corp.* v. *Romein*, 503 U. S. 181, 187 (1992). To the extent Louisiana disputes the lower court's conclusions about how state-law principles influenced the delay, these points could have been addressed in state court on remand. And in fact, Boyer alleged that there were substantial costs other than the appointment of a second lawyer, such as the expenses associated with pretrial investigation, that necessitated additional resources before any counsel—one or two—could have gone to trial. App. 377a.

Louisiana also contends that the delay was mostly attributable to Boyer, because he failed to move the case forward. Brief for Respondent 28–38. The Louisiana court did not so find. And Boyer disputes this view; he contends that statutory procedures and their time limitations under Louisiana law prevented him from bringing his speedy trial claim any earlier than he did. Tr. of Oral Arg. 28. In any event, the question of how Boyer's diligence, or lack thereof, affects the overall balance of the *Barker* factors would be an appropriate subject for remand.

JUSTICE ALITO's concurrence largely adopts Louisiana's arguments, and contends that the majority of the delay should be attributed to Boyer's requests for continuances in the trial court, and not to the funding crisis. See *ante*, at 240–241. It is a mistake to second-guess the state court's findings on this point, particularly because Louisiana conceded below that most of the delay resulted from the lack of funding for Boyer's defense. See n. 3, *supra*. Contrary to the concurrence's assertion, see *ante*, at 241, n., this concession was not made *arguendo*. The most reasonable reading of the state court's opinion is that it simply accepted Louisiana's concession when it found that the "majority of the seven-year delay was caused by the 'lack of funding.'" 56 So. 3d, at 1142. There is no reason this Court should comb

through the record to allow Louisiana to turn its back on this prior position, and risk substituting this Court's judgment for that of a state court on a question that is closely intertwined with state procedural rules. These matters of state law are better suited for the Louisiana court to address in the first instance on remand.

Louisiana's arguments accordingly provide no reason to decline to address the question of federal law on which we granted certiorari and which the parties argued.

IV

The Court's failure to resolve this case is especially regrettable, because it does not seem to be an isolated one. Rather, Boyer's case appears to be illustrative of larger, systemic problems in Louisiana.

The Louisiana Supreme Court has suggested on multiple occasions that the State's failure to provide funding for indigent defense contributes to extended pretrial detentions. See *State* v. *Citizen*, 2004–1841, pp. 14–17 (La. 4/1/05), 898 So. 2d 325, 336–338; *State* v. *Wigley*, 624 So. 2d 425, 429 (La. 1993); *State* v. *Peart*, 621 So. 2d 780, 791 (La. 1993). There is also empirical evidence supporting that assessment. In Orleans Parish, for example, a recent study found that more than 22 percent of pending criminal cases were more than one year old. Metropolitan Crime Commission, Inc., 2011 Orleans Parish Judicial Accountability Report 1 (July 2012). Another study found that the average time between felony arrest and trial in Calcasieu Parish, the jurisdiction where Boyer was tried, was 501 days in the years before Boyer's arrest. M. Kurth & D. Burckel, Defending the Indigent in Southwest Louisiana 27 (2003). More broadly, the public defender system seems to be significantly understaffed. See E. Lewis & D. Goyette, Report on the Evaluation of the Office of the Orleans Public Defenders 28–29 (July 2012) (noting that in New Orleans, public defenders handle approximately 277 felonies per year, which is nearly twice

the number recommended by ABA standards (citing ABA Formal Opinion 06–441 (2006))); National Legal Aid & Defender Association, In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After *Gideon* 35, and n. 119 (2004) (estimating that public defenders in Avoyelles Parish handle approximately 792 felony cases per year, or 528 percent of the ABA caseload standard).

Against this backdrop, the Court's silence in this case is particularly unfortunate. Conditions of this kind cannot persist without endangering constitutional rights.

* * *

The Louisiana Third Circuit Court of Appeal made a serious error: It did not charge the State's failure to pay Boyer's lawyer against the State in determining whether there was a violation of his right to a speedy trial. Because a State bears the ultimate responsibility for funding adequately an indigent's defense, our precedents require a court to count this delay against the State and not the criminal defendant.

Rather than dismiss the writ, I would answer the question on which we granted certiorari and remand for the Louisiana court to conduct the *Barker* analysis anew. I respectfully dissent from the Court's judgment of dismissal.

Syllabus

DAN'S CITY USED CARS, INC., DBA DAN'S CITY AUTO BODY *v.* PELKEY

CERTIORARI TO THE SUPREME COURT OF NEW HAMPSHIRE

No. 12–52. Argued March 20, 2013—Decided May 13, 2013

The Federal Aviation Administration Authorization Act of 1994 (FAAAA) preempts state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U. S. C. § 14501(c)(1). This provision borrows from the Airline Deregulation Act of 1978 (ADA), which preempts state laws "related to a price, route, or service of an air carrier," § 41713(b)(1), but it adds the important qualification, "with respect to transportation of property."

Plaintiff-respondent Pelkey brought suit in New Hampshire Superior Court, alleging that defendant-petitioner Dan's City Used Cars (Dan's City), a towing company, took custody of his car after towing it from his landlord's parking lot without Pelkey's knowledge, failed to notify him of its plan to auction the car, held an auction despite Pelkey's notice that he wanted to reclaim the car, and eventually traded the car away without compensating Pelkey for the loss of his vehicle. In disposing of his car, Pelkey further alleged, Dan's City did not meet the requirements contained in chapter 262 of the New Hampshire Revised Statutes Annotated, which regulates the disposal of abandoned vehicles by a "storage company." Dan's City's misconduct, Pelkey charged, both violated New Hampshire's Consumer Protection Act and breached the towing company's statutory and common-law duties as a bailee to use reasonable care while in possession of a bailor's property. The court granted summary judgment to Dan's City, concluding that the FAAAA preempted Pelkey's claims. The New Hampshire Supreme Court reversed. It held the FAAAA's preemption clause inapplicable because Pelkey's claims related to Dan's City's conduct in disposing of his car post-storage, not to conduct concerning "the transportation of property," or a towing company's "service."

Held: Section 14501(c)(1) does not preempt state-law claims stemming from the storage and disposal of a towed vehicle. Pp. 260–266.

(a) Where Congress has superseded state legislation by statute, this Court's task is to "identify the domain expressly pre-empted," *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 541, focusing first on the statutory language, *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664. In *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 370, this Court's

reading of § 14501(c)(1) was informed by decisions interpreting parallel language in the ADA's preemption clause. Thus, the Court held, the phrase "related to" embraces state laws "having a connection with or reference to" carrier "'rates, routes, or services,'" whether directly or indirectly. *Ibid.* At the same time, the breadth of the words "related to" does not mean that the preemption clause should be read with an "uncritical literalism." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655–656. The Court has cautioned that § 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services "in only a 'tenuous, remote, or peripheral . . . manner.'" *Rowe*, 552 U. S., at 371. Pp. 260–261.

(b) Pelkey's state-law claims escape preemption because they are "related to" neither the "transportation of property" nor the "service" of a motor carrier. Although § 14501(c)(1) otherwise tracks the ADA's air-carrier preemption provision, the FAAAA formulation's one conspicuous alteration—addition of the words "with respect to the transportation of property"—significantly limits the FAAAA's preemptive scope. It is not sufficient for a state law to relate to the "price, route, or service" of a motor carrier in any capacity; the law must also concern a motor carrier's "transportation of property." Title 49 defines "transportation," in relevant part, as "services related to th[e] movement" of property, "including arranging for . . . storage [and] handling." § 13102(23)(B). Pelkey's Consumer Protection Act and negligence claims are not "related to th[e] movement" of his car. Chapter 262 regulates the disposal of vehicles once their transportation—here, by towing—has ended. Pelkey seeks redress only for conduct occurring after the car ceased moving and was stored. Dan's City maintains that because § 13102(23)(B)'s definition of "transportation" includes "storage" and "handling," Pelkey's claims fall within § 14501(c)(1)'s preemptive ambit. But "storage" and "handling" fit within § 13102(23)(B)'s definition only when those services "relat[e] to th[e] movement" of property. Thus temporary storage of an item in transit en route to its final destination qualifies as "transportation," but permanent storage does not. Here, no storage occurred in the course of transporting Pelkey's vehicle.

Pelkey's claims are also unrelated to a "service" a motor carrier renders its customers. The transportation service Dan's City provided—removal of Pelkey's car from his landlord's parking lot—did involve the movement of property, but that service ended months before the conduct on which Pelkey's claims are based. Because chapter 262, on which Pelkey relies, addresses "storage compan[ies]" and "garage owner[s] or keeper[s]," not transportation activities, it has neither a direct

nor an indirect connection to transportation services a motor carrier offers its customers. See *Rowe*, 552 U. S., at 371.

The conclusion that state-law claims regarding disposal of towed vehicles are not preempted is in full accord with Congress' purpose in enacting § 14501(c)(1), which was to displace "a State's direct substitution of its own governmental commands for 'competitive market forces' in determining . . . the services that motor carriers will provide." *Id.*, at 372. The New Hampshire prescriptions Pelkey invokes hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do they "freez[e] into place services that carriers might prefer to discontinue in the future." *Ibid.* Pp. 261–264.

(c) Dan's City's additional arguments in favor of preemption are not persuasive. Dan's City contends that because none of Pelkey's claims fits within the exceptions to preemption detailed in 49 U. S. C. §§ 14501(c)(2), (3), and (5), his claims must be preempted. But exceptions, while sometimes a helpful interpretive guide, do not in themselves delineate the scope of the rule. Here, the exceptions identify matters a State may regulate when it would otherwise be precluded from doing so, but they do not control more than that.

Dan's City also maintains that Pelkey's claims are "related to" its towing service because selling Pelkey's car was the means by which Dan's City obtained payment for the tow. If such state-law claims were preempted, no law would govern resolution of a non-contract-based dispute arising from a towing company's disposal of a vehicle previously towed or afford a remedy for wrongful disposal. No such design can be attributed to a rational Congress. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251. Pp. 264–265.

163 N. H. 483, 44 A. 3d 480, affirmed.

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

Andre D. Bouffard argued the cause for petitioner. With him on the briefs was *Katherine M. Strickland.*

Brian C. Shaughnessy argued the cause for respondent. With him on the brief were *Adina H. Rosenbaum*, *Allison M. Zieve*, and *Scott L. Nelson.*

Lewis S. Yelin argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Knee-*

dler, Mark B. Stern, John S. Koppel, Robert S. Rivkin, Paul M. Geier, Peter J. Plocki, and *Christopher S. Perry.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the preemptive scope of a provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA or Act) applicable to motor carriers. Codified at 49 U. S. C. § 14501(c)(1), the provision reads:

> "[A] State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property."

Plaintiff-respondent Robert Pelkey brought suit under New Hampshire law against defendant-petitioner Dan's City Used Cars (Dan's City), a towing company. Pelkey alleged that Dan's City took custody of his car after towing it without

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**Patrick J. Whalen* filed a brief for the California Tow Truck Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *Patricia H. Wilton*, Assistant Attorney General, *Michael A. Delaney*, Attorney General of New Hampshire, and *Dan Schweitzer*, and by the Attorneys General for their respective jurisdictions as follows: *Michael C. Geraghty* of Alaska, *George Jepsen* of Connecticut, *Irvin B. Nathan* of the District of Columbia, *David M. Louie* of Hawaii, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Douglas F. Gansler* of Maryland, *Bill Schuette* of Michigan, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Ellen F. Rosenblum* of Oregon, *Peter F. Kilmartin* of Rhode Island, *Robert E. Cooper, Jr.*, of Tennessee, *William H. Sorrell* of Vermont, *Bob Ferguson* of Washington, and *J. B. Van Hollen* of Wisconsin; for the International Municipal Lawyers Association et al. by *Sarah M. Shalf* and *Charles W. Thompson, Jr.*; for the Property Casualty Insurers Association of America by *Jonathan F. Bloom*; and for the Towing and Recovery Association of America by *Erik S. Jaffe* and *Michael McGovern.*

Shannon Liss-Riordan filed a brief for Massachusetts Jobs With Justice as *amicus curiae.*

Pelkey's knowledge, failed to notify him of its plan to auction the car, held an auction despite Pelkey's communication that he wanted to arrange for the car's return, and eventually traded the car away without compensating Pelkey for the loss of his vehicle.

Disposal of abandoned vehicles by a "storage company" is regulated by chapter 262 of the New Hampshire Revised Statutes Annotated. See N. H. Rev. Stat. Ann. §§ 262:31 to 262:40–c (West 2004 and 2012 West Cum. Supp.). Dan's City relied on those laws to dispose of Pelkey's vehicle for nonpayment of towing and storage fees. According to Pelkey, however, Dan's City failed to comply with New Hampshire's provisions governing the sale of stored vehicles and the application of sale proceeds. Pelkey charged that Dan's City's disposal of his car without following the requirements contained in chapter 262 violated the New Hampshire Consumer Protection Act, § 358–A:2 (West 2009), as well as Dan's City's statutory and common-law duties as bailee to exercise reasonable care while in possession of a bailor's property.

We hold, in accord with the New Hampshire Supreme Court, that state-law claims stemming from the storage and disposal of a car, once towing has ended, are not sufficiently connected to a motor carrier's service *with respect to the transportation of property* to warrant preemption under § 14501(c)(1). The New Hampshire law in point regulates no towing services, no carriage of property. Instead, it trains on custodians of stored vehicles seeking to sell them. Congress did not displace the State's regulation of that activity by any federal prescription.

I

A

The Airline Deregulation Act of 1978 (ADA), 92 Stat. 1705, largely deregulated the domestic airline industry. In keeping with the statute's aim to achieve "maximum reliance on competitive market forces," *id.*, at 1706, Congress sought to

"ensure that the States would not undo federal deregulation with regulation of their own." *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 378 (1992). Congress therefore included a preemption provision, now codified at 49 U. S. C. § 41713(b)(1), prohibiting States from enacting or enforcing any law "related to a price, route, or service of an air carrier."

Two years later, the Motor Carrier Act of 1980, 94 Stat. 793, extended deregulation to the trucking industry. Congress completed the deregulation 14 years thereafter, in 1994, by expressly preempting state trucking regulation. Congress did so upon finding that state governance of intrastate transportation of property had become "unreasonably burden[some]" to "free trade, interstate commerce, and American consumers." *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U. S. 424, 440 (2002) (citing FAAAA § 601(a)(1), 108 Stat. 1605). Borrowing from the ADA's preemption clause, but adding a new qualification, § 601(c) of the FAAAA supersedes state laws "related to a price, route, or service of any motor carrier . . . *with respect to the transportation of property*." 108 Stat. 1606, now codified at 49 U. S. C. § 14501(c)(1) (emphasis added).[1] The Act exempts certain measures from its preemptive scope, including state laws regulating motor vehicle safety, size, and weight; motor-carrier insurance; and the intrastate transportation of household goods. §§ 14501(c)(2)(A)–(B). Also exempted from preemption are state laws "relating to the price" of "vehicle transportation by a tow truck," if towing occurs without prior consent of the vehicle owner. § 14501(c)(2)(C).

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[1] The term "motor carrier" is defined as "a person providing motor vehicle transportation for compensation." 49 U. S. C. § 13102(14) (2006 ed., Supp. V). We have previously recognized that tow trucks qualify as "motor carriers" under § 14501(c)(1). *Columbus* v. *Ours Garage & Wrecker Service, Inc.*, 536 U. S. 424, 430 (2002). Dan's City's qualification as a motor carrier under the FAAAA is uncontested by the parties. See Brief for Petitioner i; Brief for Respondent 18.

This case involves the interaction between the FAAAA's preemption clause and the State of New Hampshire's regulation of the removal, storage, and disposal of abandoned motor vehicles. Chapter 262 of the New Hampshire Revised Statutes Annotated establishes procedures by which an "authorized official" or the "owner . . . of any private property . . . on which a vehicle is parked without permission" may arrange to have the vehicle towed and stored. N. H. Rev. Stat. Ann. §§ 262:31 to 262:34, 262:40–a(I). It generally makes the owner of a towed vehicle responsible for reasonable removal and storage fees. See § 262:33(I) (reasonable removal and storage charges "shall be a lien against the vehicle which shall be paid by the owner"); § 262:33(II) (owner entitled to recover vehicle after "payment of all reasonable towing and storage charges"); § 262:40–a(II) (owner of a vehicle towed from a parking lot or parking garage is responsible for "removal and storage charges" when the lot or garage conspicuously posts notice of parking restrictions).

Under chapter 262, the custodian of a car that remains unclaimed for 30 days following a tow may dispose of the vehicle upon compliance with notice requirements. §§ 262:36–a(I), (II). A "garage owner or keeper" must post notices of an impending sale in public places and provide mail notice to the vehicle owner whenever the owner's address may "be ascertained . . . by the exercise of reasonable diligence." § 262:38. If a towed vehicle is not fit for legal use, its custodian need not provide individual or public notice prior to disposal, and sale of the vehicle may occur upon written notice to and approval from New Hampshire's Department of Public Safety. § 262:36–a(III).[2]

On compliance with the statutory requirements, the custodian of a stored vehicle may sell the vehicle by public auction at its place of business. § 262:37. The storage company

[2] Section 262:36–a has been amended since April 2007, when Dan's City's alleged misconduct occurred. The amendments do not bear on the outcome of this case.

may use the sale proceeds to pay "the amount of the liens and the reasonable expenses incident to the sale." § 262:39 (West 2004). Remaining proceeds are payable "to the [vehicle's] owner . . . if claimed at any time within one year from the date of sale." *Ibid.*

B

The landlord of the apartment complex in which Pelkey lived required tenants to remove their cars from the parking lot in the event of a snowstorm, so that the snow could be cleared. Pelkey's 2004 Honda Civic remained in the lot during and after a February 2007 snowstorm. At the landlord's request, Dan's City towed and stored the vehicle. Confined to his bed with a serious medical condition, Pelkey did not know his car had been towed. Soon after removal of his car, Pelkey was admitted to the hospital for a procedure to amputate his left foot, during which he suffered a heart attack. He remained under hospital care until his discharge on April 9, 2007.

Unaware of Pelkey's identity or illness, Dan's City sought permission from New Hampshire's Department of Public Safety to sell the Honda at auction without notice. In response, the department identified Pelkey as the last known owner of the vehicle. Dan's City wrote to Pelkey, notifying him that it had towed and was storing his car. When the post office returned the letter, checking the box "moved, left no address," Dan's City scheduled an auction for April 19. Meanwhile, in the days following Pelkey's discharge from the hospital, his attorney learned from counsel for the apartment complex that the car had been towed by Dan's City and was scheduled to be sold at public auction. On April 17, Pelkey's attorney informed Dan's City that Pelkey wanted to pay any charges owed and reclaim his vehicle. Dan's City nevertheless proceeded with the auction. Attracting no bidders, Dan's City later disposed of the car by trading it to a third party. Pelkey was not notified in advance of the trade, and has received no proceeds from the sale.

Pelkey brought suit against Dan's City in New Hampshire Superior Court. He alleged that Dan's City violated the New Hampshire Consumer Protection Act, N. H. Rev. Stat. Ann. § 358–A:2, by failing to comply with chapter 262's requirements for disposal of stored vehicles, making false statements about the condition and value of his Honda, and proceeding with the auction despite notice that Pelkey wanted to reclaim the car.[3] He also alleged that Dan's City negligently breached both statutory and common-law duties as a bailee to use reasonable care in disposing of the car. Granting summary judgment to Dan's City, the New Hampshire Superior Court concluded that Pelkey's claims were preempted by the FAAAA.

The New Hampshire Supreme Court reversed. It held the FAAAA's preemption clause, 49 U. S. C. § 14501(c)(1), inapplicable because Pelkey's claims related to Dan's City's conduct in disposing of his Honda post-storage, not to conduct concerning "the transportation of property." 163 N. H. 483, 490–493, 44 A. 3d 480, 487–489 (2012) (emphasis deleted). Alternatively, the court ruled that, even if Pelkey's claims could be said to concern the transportation of property, they did not "sufficiently relat[e] to a towing company's 'service' to be preempted." *Id.*, at 493, 44 A. 3d, at 490.

We granted certiorari to resolve a division of opinion in state supreme courts on whether 49 U. S. C. § 14501(c)(1) preempts a vehicle owner's state-law claims against a towing company regarding the company's posttowing disposal of the vehicle. 568 U. S. 1065 (2012). Compare 163 N. H. 483, 44 A. 3d 480 (this case), with *Weatherspoon* v. *Tillery Body*

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[3] The Consumer Protection Act makes it unlawful for "any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within" New Hampshire. N. H. Rev. Stat. Ann. § 358–A:2 (West 2009). It authorizes a private claim for damages and equitable relief; for a willful or knowing violation, the Act allows the plaintiff to recover "as much as 3 times, but not less than 2 times," actual damages. § 358–A:10(I).

Shop, Inc., 44 So. 3d 447, 458 (Ala. 2010) (§ 14501(c)(1) pre-empts state statutory and common-law claims arising out of storage and sale of a towed vehicle).

II

A

Where, as in this case, Congress has superseded state legislation by statute, our task is to "identify the domain expressly pre-empted." *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 541 (2001). To do so, we focus first on the statutory language, "which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658, 664 (1993).

The FAAAA's preemption clause prohibits enforcement of state laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U. S. C. § 14501(c)(1). In *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 370 (2008), our reading of this language was informed by decisions interpreting the parallel language in the ADA's preemption clause. The phrase "related to," we said, embraces state laws "having a connection with or reference to" carrier "'rates, routes, or services,'" whether directly or indirectly. *Ibid.* (quoting *Morales*, 504 U. S., at 384; emphasis deleted). See also *id.*, at 383 ("ordinary meaning of . . . words ['related to'] is a broad one," thus ADA's use of those words "expresses a broad pre-emptive purpose").

At the same time, the breadth of the words "related to" does not mean the sky is the limit. We have refused to read the preemption clause of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1144(a), which supersedes state laws "relate[d] to any employee benefit plan," with an "uncritical literalism," else "for all practical purposes pre-emption would never run its course." *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655–656 (1995) (internal quotation marks

omitted). And we have cautioned that § 14501(c)(1) does not preempt state laws affecting carrier prices, routes, and services "in only a 'tenuous, remote, or peripheral . . . manner.'" *Rowe*, 552 U. S., at 371 (quoting *Morales*, 504 U. S., at 390).

B

The New Hampshire Supreme Court concluded that Pelkey's state-law claims are "related to" neither the "transportation of property" nor the "service" of a motor carrier. We agree.

Pelkey's claims escape preemption, we hold, because they are not "related to" the service of a motor carrier "with respect to the transportation of property." § 14501(c)(1). Although § 14501(c)(1) otherwise tracks the ADA's air-carrier preemption provision, see *Rowe*, 552 U. S., at 370, the FAAAA formulation contains one conspicuous alteration—the addition of the words "with respect to the transportation of property." That phrase "massively limits the scope of preemption" ordered by the FAAAA. *Ours Garage*, 536 U. S., at 449 (SCALIA, J., dissenting).[4] As the New Hampshire Supreme Court correctly understood, for purposes of FAAAA preemption, it is not sufficient that a state law relates to the "price, route, or service" of a motor carrier in any capacity; the law must also concern a motor carrier's "transportation of property." See 163 N. H., at 490, 44 A. 3d, at 487.

Title 49 defines "transportation," in relevant part, as "services related to th[e] movement" of property, "including arranging for, receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, packing, unpacking, and interchange of passengers and property." § 13102(23)(B). Pelkey's Consumer Protection Act and neg-

[4] Although this statement appears in the *Ours Garage* dissent, nothing in the Court's opinion in that case is in any way inconsistent with the dissent's characterization of § 14501(c)(1).

ligence claims are not "related to th[e] *movement*" of his car. *Ibid.* (emphasis added). He charges Dan's City with failure to comply with chapter 262 and neglect of its statutory and common-law duties of care as a bailee of his stored vehicle. Chapter 262 does not limit when, where, or how tow trucks may be operated. The chapter regulates, instead, the disposal of vehicles once their transportation—here, by towing—has ended. Pelkey does not object to the manner in which his car was moved or the price of the tow; he seeks redress only for conduct subsequent to "transportation," conduct occurring after the car ceased moving and was stored.

Dan's City maintains that because § 13102(23)(B)'s definition of "transportation" includes "storage" and "handling," Pelkey's claims, which do concern the storage and handling of his car, fall within § 14501(c)(1)'s preemptive ambit. Dan's City overlooks, however, that under § 13102(23)(B), services such as "storage" and "handling" fit within the definition of "transportation" only when those services "relat[e] to th[e] movement" of property. Temporary storage of an item in transit en route to its final destination relates to the movement of property and therefore fits within § 13102(23)(B)'s definition. But property stored after delivery is no longer in transit. Cf. 49 CFR § 375.609 (2012) (distinguishing between "storage-in-transit" and "permanent storage" (regulation of Federal Motor Carrier Safety Administration)). Here, no storage occurred in the course of transporting Pelkey's vehicle. Dan's City's storage of Pelkey's car after the towing job was done, in short, does not involve "transportation" within the meaning of the federal Act.

Pelkey's claims also survive preemption under § 14501(c)(1) because they are unrelated to a "service" a motor carrier renders its customers. The transportation service Dan's City provided was the removal of Pelkey's car from his landlord's parking lot. That service, which did involve the movement of property, ended months before the conduct on

which Pelkey's claims are based. His claims rely on New Hampshire's abandoned vehicle disposal regime, prescribed in chapter 262, for the rules governing Dan's City's conduct.[5] Chapter 262 addresses "storage compan[ies]" and "garage owner[s] or keeper[s]," not transportation activities. See N. H. Rev. Stat. Ann. §§ 262:36–a, 262:38. Unlike Maine's tobacco delivery regulations at issue in *Rowe*, chapter 262 has neither a direct nor an indirect connection to any transportation services a motor carrier offers its customers. See 552 U. S., at 371. We need not venture an all-purposes definition of transportation "service[s]" in order to conclude that state-law claims homing in on the disposal of stored vehicles fall outside § 14501(c)(1)'s preemptive compass.

Our conclusion that state-law claims regarding disposal of towed vehicles are not preempted is in full accord with Congress' purpose in enacting § 14501(c)(1). Concerned that state regulation "impeded the free flow of trade, traffic, and transportation of interstate commerce," Congress resolved to displace "*certain* aspects of the State regulatory process." FAAAA § 601(a), 108 Stat. 1605 (emphasis added). The target at which it aimed was "a State's direct substitution of its own governmental commands for competitive market forces in determining (to a significant degree) the services that motor carriers will provide." *Rowe*, 552 U. S., at 372 (internal quotation marks omitted).

Pelkey's claims are far removed from Congress' driving concern. He sued under state consumer protection and tort laws to gain compensation for the alleged unlawful disposal of his vehicle. The state laws in question hardly constrain participation in interstate commerce by requiring a motor carrier to offer services not available in the market. Nor do

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[5] The parties dispute whether, as Pelkey alleges, conduct that violates chapter 262 may qualify as an unfair or deceptive act or practice proscribed by New Hampshire's Consumer Protection Act. This dispute turns on interpretation of state law, a matter on which we express no opinion.

the state laws invoked by Pelkey "freez[e] into place services that carriers might prefer to discontinue in the future." *Ibid.* New Hampshire's laws on disposal of stored vehicles, moreover, will not open the way for "a patchwork of state service-determining laws, rules, and regulations." *Id.*, at 373. As Dan's City concedes, abandoned vehicle laws like chapter 262 "do not hamper the operations of tow truckers" and "are not the kind of burdensome state economic regulation Congress sought to preempt." Reply Brief 21.

C

Dan's City advances two further arguments in favor of preemption. First, Dan's City contends that Congress' enumeration of exceptions to preemption, detailed in 49 U. S. C. §§ 14501(c)(2), (3), and (5), permits state regulation of motor carriers only when the State's law comes within a specified exception. Because Pelkey's claims do not fit within any exception to preemption, Dan's City urges, those claims must be preempted. This argument exceeds sensible bounds. Exceptions to a general rule, while sometimes a helpful interpretive guide, do not in themselves delineate the scope of the rule. The exceptions to § 14501(c)(1)'s general rule of preemption identify matters a State may regulate when it would otherwise be precluded from doing so, but they do not control more than that.

An example may clarify the point. Section 14501(c) does not exempt zoning regulations. Such laws, however, "are peculiarly within the province of state and local legislative authorities." *Warth* v. *Seldin*, 422 U. S. 490, 508, n. 18 (1975). It is hardly doubtful that state or local regulation of the physical location of motor-carrier operations falls outside the preemptive sweep of § 14501(c)(1). That is so because zoning ordinances ordinarily are not "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." § 14501(c)(1). The same is true of New Hampshire's regulation of the disposal of stored vehicles.

Dan's City, in a second argument, urges otherwise. Pelkey's claims, Dan's City maintains, are "related to" the towing service it rendered because selling Pelkey's car was the means by which Dan's City obtained payment for the tow. But if such state-law claims are preempted, no law would govern resolution of a non-contract-based dispute arising from a towing company's disposal of a vehicle previously towed or afford a remedy for wrongful disposal. Federal law does not speak to these issues.[6] Thus, not only would the preemption urged by Dan's City leave vehicle owners without any recourse for damages, it would eliminate the sole legal authorization for a towing company's disposal of stored vehicles that go unclaimed. No such design can be attributed to a rational Congress. See *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984) ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

In sum, Dan's City cannot have it both ways. It cannot rely on New Hampshire's regulatory framework as authorization for the sale of Pelkey's car, yet argue that Pelkey's claims, invoking the same state-law regime, are preempted. New Hampshire's legislation on abandoned vehicles gave rise to Pelkey's debt and established the conditions under which Dan's City could collect on that debt by selling Pelkey's Honda. See N. H. Rev. Stat. Ann. §§ 262:33, 262:36–a, 262:40–a; *supra*, at 257–258. Pelkey's claims, attacking Dan's City's conduct in disposing of the vehicle, rest on the very same provisions. See Brief for Petitioner 41 ("All of the alleged wrongful conduct of Dan's City was part of the state sanctioned and regulated process for disposing of abandoned vehicles under Ch. 262.").

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[6] There is an exception to Congress' silence, but it is of no aid to Dan's City: The Act spares from preemption laws "relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed [as it was here] without the prior consent or authorization of the owner or operator of the motor vehicle." 49 U. S. C. § 14501(c)(2)(C).

* * *

For the reasons stated, we hold that 49 U. S. C. § 14501(c)(1) does not preempt state-law claims for damages stemming from the storage and disposal of a towed vehicle. The judgment of the New Hampshire Supreme Court is therefore affirmed.

It is so ordered.

Syllabus

BULLOCK *v.* BANKCHAMPAIGN, N. A.

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

No. 11–1518. Argued March 18, 2013—Decided May 13, 2013

Petitioner's father established a trust for the benefit of petitioner and his siblings, and made petitioner the (nonprofessional) trustee. The trust's sole asset was the father's life insurance policy. Petitioner borrowed funds from the trust three times; all borrowed funds were repaid with interest. His siblings obtained a judgment against him in state court for breach of fiduciary duty, though the court found no apparent malicious motive. The court imposed constructive trusts on certain of petitioner's interests—including his interest in the original trust—in order to secure petitioner's payment of the judgment, with respondent serving as trustee for all of the trusts. Petitioner filed for bankruptcy. Respondent opposed discharge of petitioner's state-court-imposed debts to the trust, and the Bankruptcy Court granted respondent summary judgment, holding that petitioner's debts were not dischargeable pursuant to 11 U. S. C. § 523(a)(4), which provides that an individual cannot obtain a bankruptcy discharge from a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." The Federal District Court and the Eleventh Circuit affirmed. The latter court reasoned that "defalcation requires a known breach of a fiduciary duty, such that the conduct can be characterized as objectively reckless."

Held: The term "defalcation" in the Bankruptcy Code includes a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior. Pp. 271–277.

(a) While "defalcation" has been an exception to discharge in a bankruptcy statute since 1867, legal authorities have long disagreed about its meaning. Broad definitions of the term in modern and older dictionaries are unhelpful, and courts of appeals have disagreed about what mental state must accompany defalcation's definition. Pp. 271–273.

(b) In *Neal* v. *Clark*, 95 U. S. 704, this Court interpreted the term "fraud" in the Bankruptcy Code's exceptions to discharge to mean "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *Id.*, at 709. The term "defalcation" should be treated similarly. Thus, where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, "defalcation" requires an intentional wrong.

Syllabus

An intentional wrong includes not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Where actual knowledge of wrongdoing is lacking, conduct is considered as equivalent if, as set forth in the Model Penal Code, the fiduciary "consciously disregards," or is willfully blind to, "a substantial and unjustifiable risk" that his conduct will violate a fiduciary duty. Pp. 273–274.

(c) Several considerations support this interpretation. First, statutory context strongly favors it. The canon *noscitur a sociis* argues for interpreting "defalcation" as similar to its linguistic neighbors "embezzlement," "larceny," and "fraud," which all require a showing of wrongful or felonious intent. See, *e. g.*, *Neal*, *supra*, at 709. Second, the interpretation does not make the word identical to its statutory neighbors. "Embezzlement" requires conversion, "larceny" requires taking and carrying away another's property, and "fraud" typically requires a false statement or omission; while "defalcation" can encompass a breach of fiduciary obligation that involves neither conversion, nor taking and carrying away another's property, nor falsity. Third, the interpretation is consistent with the longstanding principle that "exceptions to discharge 'should be confined to those plainly expressed.'" *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62. It is also consistent with statutory exceptions to discharge that Congress normally confines to circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt, thereby benefiting, for example, a typically more honest creditor. See, *e. g.*, 11 U. S. C. § 523(a)(2)(A). Fourth, some Circuits have interpreted the statute similarly for many years without administrative or other difficulties. Finally, it is important to have a uniform interpretation of federal law, the choices are limited, and neither the parties nor the Government has presented strong considerations favoring a different interpretation. Pp. 274–277.

670 F. 3d 1160, vacated and remanded.

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

Thomas M. Byrne argued the cause for petitioner. With him on the briefs were *James R. Engelthaler* and *Sarah M. Shalf.*

Bill D. Bensinger argued the cause and filed a brief for respondent.

Curtis E. Gannon argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant*

Attorney General Delery, Deputy Solicitor General Stewart, Robert M. Loeb, and *Sushma Soni.**

JUSTICE BREYER delivered the opinion of the Court.

Section 523(a)(4) of the Federal Bankruptcy Code provides that an individual cannot obtain a bankruptcy discharge from a debt "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U. S. C. § 523(a)(4). We here consider the scope of the term "defalcation." We hold that it includes a culpable state of mind requirement akin to that which accompanies application of the other terms in the same statutory phrase. We describe that state of mind as one involving knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior.

I

In 1978, the father of petitioner Randy Bullock established a trust for the benefit of his five children. He made petitioner the (nonprofessional) trustee; and he transferred to the trust a single asset, an insurance policy on his life. 670 F. 3d 1160, 1162 (CA11 2012); App. to Pet. for Cert. 33a. The trust instrument permitted the trustee to borrow funds from the insurer against the policy's value (which, in practice, was available at an insurance-company-determined 6% interest rate). *Id.*, at 17a, 34a, 50a.

In 1981, petitioner, at his father's request, borrowed money from the trust, paying the funds to his mother who used them to repay a debt to the father's business. In 1984, petitioner again borrowed funds from the trust, this time using the funds to pay for certificates of deposit, which he and his mother used to buy a mill. In 1990, petitioner once

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*A brief of *amicus curiae* urging reversal was filed for G. Eric Brunstad, Jr., by *Mr. Brunstad, pro se, Collin O'Connor Udell,* and *Matthew J. Delude.*

Richard Lieb filed a brief for Richard Aaron et al. as *amici curiae* urging affirmance.

again borrowed funds, this time using the money to buy real property for himself and his mother. 670 F. 3d, at 1162. Petitioner saw that all of the borrowed funds were repaid to the trust along with 6% interest. App. to Pet. for Cert. 17a, 45a, 50a; Brief for Petitioner 3; Brief for Respondent 2.

In 1999, petitioner's brothers sued petitioner in Illinois state court. The state court held that petitioner had committed a breach of fiduciary duty. It explained that petitioner "does not appear to have had a malicious motive in borrowing funds from the trust" but nonetheless "was clearly involved in self-dealing." App. to Pet. for Cert. 45a, 52a. It ordered petitioner to pay the trust "the benefits he received from his breaches" (along with costs and attorney's fees). *Id.*, at 47a. The court imposed constructive trusts on petitioner's interests in the mill and the original trust, in order to secure petitioner's payment of its judgment, with respondent BankChampaign serving as trustee for all of the trusts. 670 F. 3d, at 1162; App. to Pet. for Cert. 47a–48a. After petitioner tried unsuccessfully to liquidate his interests in the mill and other constructive trust assets to obtain funds to make the court-ordered payment, petitioner filed for bankruptcy in federal court. *Id.*, at 27a, 30a.

BankChampaign opposed petitioner's efforts to obtain a bankruptcy discharge of his state-court-imposed debts to the trust. And the Bankruptcy Court granted summary judgment in the bank's favor. It held that the debts fell within § 523(a)(4)'s exception "as a debt for defalcation while acting in a fiduciary capacity." *Id.*, at 40a–41a. Hence, they were not dischargeable.

The Federal District Court reviewed the Bankruptcy Court's determination. It said that it was "convinced" that BankChampaign was "abusing its position of trust by failing to liquidate the assets," but it nonetheless affirmed the Bankruptcy Court's decision. *Id.*, at 27a–28a.

In turn, the Court of Appeals affirmed the District Court. It wrote that "defalcation requires a known breach of a fidu-

ciary duty, such that the conduct can be characterized as objectively reckless." 670 F. 3d, at 1166. And it found that petitioner's conduct satisfied this standard. *Ibid.*

Petitioner sought certiorari. In effect he has asked us to decide whether the bankruptcy term "defalcation" applies "in the absence of any specific finding of ill intent or evidence of an ultimate loss of trust principal." Brief for United States as *Amicus Curiae* 1. See also Pet. for Cert. i. The lower courts have long disagreed about whether "defalcation" includes a scienter requirement and, if so, what kind of scienter it requires. Compare *In re Sherman*, 658 F. 3d 1009, 1017 (CA9 2011) ("defalcation" includes "even innocent acts of failure to fully account for money received in trust" (internal quotation marks and brackets omitted)), with *In re Uwimana*, 274 F. 3d 806, 811 (CA4 2001) (defalcation occurs when "negligence or even an innocent mistake . . . results in misappropriation"), with 670 F. 3d, at 1166 ("defalcation requires . . . conduct [that] can be characterized as objectively reckless"), and with *In re Baylis*, 313 F. 3d 9, 20 (CA1 2002) ("defalcation requires something close to a showing of extreme recklessness"). In light of that disagreement, we granted the petition.

II

A

Congress first included the term "defalcation" as an exception to discharge in a federal bankruptcy statute in 1867. See *id.*, at 17. And legal authorities have disagreed about its meaning almost ever since. Dictionary definitions of "defalcation" are not particularly helpful. On the one hand, a law dictionary in use in 1867 defines the word "defalcation" as "the act of a defaulter," which, in turn, it defines broadly as one "who is deficient in his accounts, or fails in making his accounts correct." 1 J. Bouvier, Law Dictionary 387, 388 (4th ed. 1852). See also 4 Oxford English Dictionary 369 (2d ed. 1989) (quoting an 1846 definition that defines the term as

"'a breach of trust by one who has charge or management of money'"). Modern dictionaries contain similarly broad definitional language. Black's Law Dictionary, for example, defines "defalcation" first as "EMBEZZLEMENT," but, second, as "[l]oosely, the failure to meet an obligation; a nonfraudulent default." Black's Law Dictionary 479 (9th ed. 2009) (hereinafter Black's). See also American Heritage Dictionary 474 (5th ed. 2011) ("To misuse funds; embezzle"); 4 Oxford English Dictionary, *supra*, at 369 ("monetary deficiency through breach of trust by one who has the management or charge of funds; a fraudulent deficiency in money matters"); Webster's New International Dictionary 686 (2d ed. 1954) ("An abstraction or misappropriation of money by one, esp. an officer or agent, having it in trust"); Webster's Third New International Dictionary 590 (1986) ("misappropriation of money in one's keeping").

On the other hand, an 1842 bankruptcy treatise warns that fiduciaries "are not supposed to commit defalcation in the matter of their trust, without . . . at least such criminal negligence as admits of no excuse." G. Bicknell, Commentary on the Bankrupt Law of 1841, Showing Its Operation and Effect 12 (rev. 2d ed. 1842). Modern dictionaries often accompany their broad definitions with illustrative terms such as "embezzle," American Heritage Dictionary, *supra*, at 474, or "fraudulent deficiency," 4 Oxford English Dictionary, *supra*, at 369. And the editor of Black's Law Dictionary has written that the term should be read as limited to deficiencies that are "fraudulent" and which are "*the fault* of someone put in trust of the money." B. Garner, Modern American Usage 232 (3d ed. 2009) (emphasis added).

Similarly, courts of appeals have long disagreed about the mental state that must accompany the bankruptcy-related definition of "defalcation." Many years ago Judge Augustus Hand wrote that "the misappropriation must be due to a known breach of the duty, and not to mere negligence or mistake." *In re Bernard*, 87 F. 2d 705, 707 (CA2 1937).

But Judge Learned Hand suggested that the term "*may* have included innocent defaults." *Central Hanover Bank & Trust Co.* v. *Herbst*, 93 F. 2d 510, 511 (CA2 1937) (emphasis added). A more modern treatise on trusts ends its discussion of the subject with a question mark. 4 A. Scott, W. Fratcher, & M. Ascher, Scott and Ascher on Trusts § 24.26 p. 1797 (5th ed. 2007).

In resolving these differences, we note that this longstanding disagreement concerns state of mind, not whether "defalcation" can cover a trustee's failure (as here) to make a trust more than whole. We consequently shall assume without deciding that the statutory term is broad enough to cover the latter type of conduct and answer only the "state of mind" question.

B

1

We base our approach and our answer upon one of this Court's precedents. In 1878, this Court interpreted the related statutory term "fraud" in the portion of the Bankruptcy Code laying out exceptions to discharge. Justice Harlan wrote for the Court:

> "[D]ebts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." *Neal* v. *Clark*, 95 U. S. 704, 709 (1878).

We believe that the statutory term "defalcation" should be treated similarly.

Thus, where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong. We include as intentional

not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent. Thus, we include reckless conduct of the kind set forth in the Model Penal Code. Where actual knowledge of wrongdoing is lacking, we consider conduct as equivalent if the fiduciary "consciously disregards" (or is willfully blind to) "a substantial and unjustifiable risk" that his conduct will turn out to violate a fiduciary duty. ALI, Model Penal Code § 2.02(2)(c), p. 226 (1985). See *id.*, § 2.02, Comment 9, at 248 (explaining that the Model Penal Code's definition of "knowledge" was designed to include "'wilful blindness'"). That risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the actor's situation." *Id.*, § 2.02(2)(c), at 226 (emphasis added). Cf. *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 194, n. 12 (1976) (defining scienter for securities law purposes as "a mental state embracing intent to deceive, manipulate, or defraud").

2

Several considerations lead us to interpret the statutory term "defalcation" in this way. First, as Justice Harlan pointed out in *Neal*, statutory context strongly favors this interpretation. Applying the canon of interpretation *noscitur a sociis*, the Court there looked to fraud's linguistic neighbor "embezzlement." It found that both terms refer to different forms of generally similar conduct. It wrote that both are "'*ejusdem generis*,'" of the same kind, and that both are "'referable to the same subject-matter.'" 95 U. S., at 709. Moreover, embezzlement requires a showing of wrongful intent. *Ibid.* (noting that embezzlement "involv[es] moral turpitude or intentional wrong"). See *Moore* v. *United States*, 160 U. S. 268, 269–270 (1895) (describing embezzlement and larceny as requiring "felonious intent").

See also, *e. g.*, W. LaFave, Criminal Law § 19.6(a), p. 995 (5th ed. 2010) ("intent to deprive" is part of embezzlement). Hence, the Court concluded, "fraud" must require an equivalent showing. *Neal*, *supra*, at 709. *Neal* has been the law for more than a century. And here, the additional neighbors ("larceny" and, as defined in *Neal*, "fraud") mean that the canon *noscitur a sociis* argues even more strongly for similarly interpreting the similar statutory term "defalcation."

Second, this interpretation does not make the word identical to its statutory neighbors. See *Babbitt* v. *Sweet Home Chapter, Communities for Great Ore.*, 515 U. S. 687, 698 (1995) (noting "[a] reluctance to treat statutory terms as surplusage"). As commonly used, "embezzlement" requires conversion, and "larceny" requires taking and carrying away another's property. See LaFave, Criminal Law §§ 19.2, 19.5 (larceny); *id.*, § 19.6 (embezzlement). "Fraud" typically requires a false statement or omission. See *id.*, § 19.7 (discussing fraud in the context of false pretenses). "Defalcation," as commonly used (hence as Congress might have understood it), can encompass a breach of fiduciary obligation that involves neither conversion, nor taking and carrying away another's property, nor falsity. Black's 479. See, *e. g.*, *In re Frankel*, 77 B. R. 401 (Bkrtcy. Ct. WDNY 1987) (finding a breach of fiduciary duty and defalcation based on an unreasonable sale of assets).

Nor are embezzlement, larceny, and fiduciary fraud simply special cases of defalcation as so defined. The statutory provision makes clear that the first two terms apply outside of the fiduciary context; and "defalcation," unlike "fraud," may be used to refer to *nonfraudulent* breaches of fiduciary duty. Black's 479.

Third, the interpretation is consistent with the longstanding principle that "exceptions to discharge 'should be confined to those plainly expressed.' " *Kawaauhau* v. *Geiger*, 523 U. S. 57, 62 (1998) (quoting *Gleason* v. *Thaw*, 236 U. S. 558, 562 (1915)). See *Local Loan Co.* v. *Hunt*, 292 U. S. 234,

244 (1934); *Neal*, *supra*, at 709. It is also consistent with a set of statutory exceptions that Congress normally confines to circumstances where strong, special policy considerations, such as the presence of fault, argue for preserving the debt, thereby benefiting, for example, a typically more honest creditor. See, *e. g.*, 11 U. S. C. §§ 523(a)(2)(A), (a)(2)(B), (a)(6), (a)(9) (fault). See also, *e. g.*, §§ 523(a)(1), (a)(7), (a)(14), (a)(14A) (taxes); § 523(a)(8) (educational loans); § 523(a)(15) (spousal and child support). In the absence of fault, it is difficult to find strong policy reasons favoring a broader exception here, at least in respect to those whom a scienter requirement will most likely help, namely, *nonprofessional* trustees, perhaps administering small family trusts potentially immersed in intrafamily arguments that are difficult to evaluate in terms of comparative fault.

Fourth, as far as the briefs before us reveal, at least some Circuits have interpreted the statute similarly for many years without administrative, or other practical, difficulties. *Baylis*, 313 F. 3d 9. See also *In re Hyman*, 502 F. 3d 61, 69 (CA2 2007) ("This [scienter] standard . . . also has the virtue of ease of application since the courts and litigants have reference to a robust body of securities law examining what these terms mean").

Finally, it is important to have a uniform interpretation of federal law, the choices are limited, and neither the parties nor the Government has presented us with strong considerations favoring a different interpretation. In addition to those we have already discussed, the Government has pointed to the fact that in 1970 Congress rewrote the statute, eliminating the word "misappropriation" and placing the term "defalcation" (previously in a different exemption provision) alongside its present three neighbors. See Brief for United States as *Amicus Curiae* 16–17. The Government believes that these changes support reading "defalcation" without a scienter requirement. But one might argue, with equal plausibility, that the changes reflect a decision to make

certain that courts would read in similar ways "defalcation," "fraud," "embezzlement," and "larceny." In fact, we believe the 1970 changes are inconclusive.

III

In this case the Court of Appeals applied a standard of "objectiv[e] reckless[ness]" to facts presented at summary judgment. 670 F. 3d, at 1166. We consequently remand the case to permit the court to determine whether further proceedings are needed and, if so, to apply the heightened standard that we have set forth. For these reasons we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

BOWMAN *v.* MONSANTO CO. ET AL.

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

No. 11–796. Argued February 19, 2013—Decided May 13, 2013

Respondent Monsanto invented and patented Roundup Ready soybean seeds, which contain a genetic alteration that allows them to survive exposure to the herbicide glyphosate. It sells the seeds subject to a licensing agreement that permits farmers to plant the purchased seed in one, and only one, growing season. Growers may consume or sell the resulting crops, but may not save any of the harvested soybeans for replanting. Petitioner Bowman purchased Roundup Ready soybean seed for his first crop of each growing season from a company associated with Monsanto and followed the terms of the licensing agreement. But to reduce costs for his riskier late-season planting, Bowman purchased soybeans intended for consumption from a grain elevator; planted them; treated the plants with glyphosate, killing all plants without the Roundup Ready trait; harvested the resulting soybeans that contained that trait; and saved some of these harvested seeds to use in his late-season planting the next season. After discovering this practice, Monsanto sued Bowman for patent infringement. Bowman raised the defense of patent exhaustion, which gives the purchaser of a patented article, or any subsequent owner, the right to use or resell that article. The District Court rejected Bowman's defense and the Federal Circuit affirmed.

Held: Patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission. Pp. 283–289.

(a) Under the patent exhaustion doctrine, "the initial authorized sale of a patented item terminates all patent rights to that item," *Quanta Computer, Inc.* v. *LG Electronics, Inc.*, 553 U. S. 617, 625, and confers on the purchaser, or any subsequent owner, "the right to use [or] sell" the thing as he sees fit, *United States* v. *Univis Lens Co.*, 316 U. S. 241, 249–250. However, the doctrine restricts the patentee's rights only as to the "particular article" sold, *id.*, at 251; it leaves untouched the patentee's ability to prevent a buyer from making new copies of the patented item. By planting and harvesting Monsanto's patented seeds, Bowman made additional copies of Monsanto's patented invention, and his conduct thus falls outside the protections of patent exhaustion. Were this otherwise, Monsanto's patent would provide scant benefit.

Syllabus

After Monsanto sold its first seed, other seed companies could produce the patented seed to compete with Monsanto, and farmers would need to buy seed only once. Pp. 283–286.

(b) Bowman argues that exhaustion should apply here because he is using seeds in the normal way farmers do, and thus allowing Monsanto to interfere with that use would create an impermissible exception to the exhaustion doctrine for patented seeds. But it is really Bowman who is asking for an exception to the well-settled rule that exhaustion does not extend to the right to make new copies of the patented item. If Bowman were granted that exception, patents on seeds would retain little value. Further, applying the normal rule will allow farmers to make effective use of patented seeds. Bowman, who purchased seeds intended for consumption, stands in a peculiarly poor position to argue that he cannot make effective use of his soybeans. Bowman conceded that he knew of no other farmer who planted soybeans bought from a grain elevator. In the more ordinary case, when a farmer purchases Roundup Ready seed from Monsanto or an affiliate, he will be able to plant it in accordance with Monsanto's license to make one crop. Pp. 287–289.

657 F. 3d 1341, affirmed.

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

Mark P. Walters argued the cause for petitioner. With him on the briefs were *Edgar H. Haug*, *Steven M. Amundson*, and *Dario A. Machleidt*.

Seth P. Waxman argued the cause for respondents. With him on the brief were *Paul R. Q. Wolfson*, *Gregory H. Lantier*, *Christopher E. Babbitt*, *Daniel C. Cox*, *David B. Jinkins*, and *Jeffrey A. Masson*.

Melissa Arbus Sherry argued the cause for the United States as *amicus curiae* urging affirmance. With her on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Mark W. Pennak*, *Raymond T. Chen*, *Thomas W. Krause*, and *Mary L. Kelly*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Antitrust Institute et al. by *Albert A. Foer*, *Peter Carstensen*, and *David A. Balto*; for the Automotive Aftermarket Industry Association et al. by *Seth D. Greenstein*; for the Center for Food Safety et al. by *George*

JUSTICE KAGAN delivered the opinion of the Court.

Under the doctrine of patent exhaustion, the authorized sale of a patented article gives the purchaser, or any subsequent owner, a right to use or resell that article. Such a sale, however, does not allow the purchaser to make new copies of the patented invention. The question in this case is whether a farmer who buys patented seeds may reproduce them through planting and harvesting without the patent holder's permission. We hold that he may not.

I

Respondent Monsanto invented a genetic modification that enables soybean plants to survive exposure to glyphosate,

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A. Kimbrell and *Paige M. Tomaselli*; for Knowledge Ecology International by *Krista L. Cox*; and for the Public Patent Foundation by *Daniel B. Ravicher*.

Briefs of *amici curiae* urging affirmance were filed for Agilent Technologies, Inc., et al. by *James W. Dabney*, *Stephen S. Rabinowitz*, and *Randy C. Eisensmith*; for the American Intellectual Property Law Association by *Kenneth J. Burchfiel*, *William J. Simmons*, and *Jeffrey I. D. Lewis*; for the American Seed Trade Association by *Catherine E. Stetson* and *Gary Jay Kushner*; for the American Soybean Association et al. by *Gary H. Baise* and *Stewart D. Fried*; for BayhDole25, Inc., by *Bryan J. Vogel* and *Susan K. Finston*; for the Biotechnology Industry Organization by *Patricia A. Millett*, *Ruthanne M. Deutsch*, and *Matthew Pearson*; for BSA|The Software Alliance by *Andrew J. Pincus* and *Paul W. Hughes*; for CHS Inc. by *Theresa M. Bevilacqua*; for CropLife America by *J. Scott Ballenger*, *Lori Alvino McGill*, *Drew C. Ensign*, and *Douglas T. Nelson*; for CropLife International by *Evan A. Young*; for Economists by *Robert N. Weiner*; for the New York Intellectual Property Law Association by *Scott B. Howard*, *Michael F. Buchanan*, *Charles R. Hoffmann*, *Thomas J. Kowalski*, *Robert M. Isackson*, and *David F. Ryan*; for Pioneer Hi-Bred International, Inc., by *Adam K. Mortara*; for the Washington Legal Foundation by *Richard A. Samp* and *Cory L. Andrews*; for the Wisconsin Alumni Research Foundation et al. by *Scott P. McBride*; and for Christopher M. Holman by *Mark Arnold*.

Paul H. Berghoff, *Richard F. Phillips*, and *Kevin H. Rhodes* filed a brief for the Intellectual Property Owners Association as *amicus curiae*.

the active ingredient in many herbicides (including Monsanto's own Roundup). Monsanto markets soybean seed containing this altered genetic material as Roundup Ready seed. Farmers planting that seed can use a glyphosate-based herbicide to kill weeds without damaging their crops. Two patents issued to Monsanto cover various aspects of its Roundup Ready technology, including a seed incorporating the genetic alteration. See Supp. App. SA1–21 (U. S. Patent Nos. 5,352,605 and RE39,247E); see also 657 F. 3d 1341, 1343–1344 (CA Fed. 2011).

Monsanto sells, and allows other companies to sell, Roundup Ready soybean seeds to growers who assent to a special licensing agreement. See App. 27a. That agreement permits a grower to plant the purchased seeds in one (and only one) season. He can then consume the resulting crop or sell it as a commodity, usually to a grain elevator or agricultural processor. See 657 F. 3d, at 1344–1345. But under the agreement, the farmer may not save any of the harvested soybeans for replanting, nor may he supply them to anyone else for that purpose. These restrictions reflect the ease of producing new generations of Roundup Ready seed. Because glyphosate resistance comes from the seed's genetic material, that trait is passed on from the planted seed to the harvested soybeans: Indeed, a single Roundup Ready seed can grow a plant containing dozens of genetically identical beans, each of which, if replanted, can grow another such plant—and so on and so on. See App. 100a. The agreement's terms prevent the farmer from co-opting that process to produce his own Roundup Ready seeds, forcing him instead to buy from Monsanto each season.

Petitioner Vernon Bowman is a farmer in Indiana who, it is fair to say, appreciates Roundup Ready soybean seed. He purchased Roundup Ready each year, from a company affiliated with Monsanto, for his first crop of the season. In accord with the agreement just described, he used all of that

seed for planting, and sold his entire crop to a grain elevator (which typically would resell it to an agricultural processor for human or animal consumption).

Bowman, however, devised a less orthodox approach for his second crop of each season. Because he thought such late-season planting "risky," he did not want to pay the premium price that Monsanto charges for Roundup Ready seed. *Id.*, at 78a; see Brief for Petitioner 6. He therefore went to a grain elevator; purchased "commodity soybeans" intended for human or animal consumption; and planted them in his fields.[1] Those soybeans came from prior harvests of other local farmers. And because most of those farmers also used Roundup Ready seed, Bowman could anticipate that many of the purchased soybeans would contain Monsanto's patented technology. When he applied a glyphosate-based herbicide to his fields, he confirmed that this was so; a significant proportion of the new plants survived the treatment, and produced in their turn a new crop of soybeans with the Roundup Ready trait. Bowman saved seed from that crop to use in his late-season planting the next year—and then the next, and the next, until he had harvested eight crops in that way. Each year, that is, he planted saved seed from the year before (sometimes adding more soybeans bought from the grain elevator), sprayed his fields with glyphosate to kill weeds (and any non-resistant plants), and produced a new crop of glyphosate-resistant—*i. e.*, Roundup Ready—soybeans.

After discovering this practice, Monsanto sued Bowman for infringing its patents on Roundup Ready seed. Bowman

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[1] Grain elevators, as indicated above, purchase grain from farmers and sell it for consumption; under federal and state law, they generally cannot package or market their grain for use as agricultural seed. See 7 U. S. C. § 1571; Ind. Code § 15–15–1–32 (2012). But because soybeans are themselves seeds, nothing (except, as we shall see, the law) prevented Bowman from planting, rather than consuming, the product he bought from the grain elevator.

raised patent exhaustion as a defense, arguing that Monsanto could not control his use of the soybeans because they were the subject of a prior authorized sale (from local farmers to the grain elevator). The District Court rejected that argument, and awarded damages to Monsanto of $84,456. The Federal Circuit affirmed. It reasoned that patent exhaustion did not protect Bowman because he had "created a newly infringing article." 657 F. 3d, at 1348. The "right to use" a patented article following an authorized sale, the court explained, "does not include the right to construct an essentially new article on the template of the original, for the right to make the article remains with the patentee." *Ibid.* (brackets and internal quotation marks omitted). Accordingly, Bowman could not "'replicate' Monsanto's patented technology by planting it in the ground to create newly infringing genetic material, seeds, and plants." *Ibid.*

We granted certiorari to consider the important question of patent law raised in this case, 568 U. S. 936 (2012), and now affirm.

II

The doctrine of patent exhaustion limits a patentee's right to control what others can do with an article embodying or containing an invention.[2] Under the doctrine, "the initial authorized sale of a patented item terminates all patent rights to that item." *Quanta Computer, Inc.* v. *LG Electronics, Inc.*, 553 U. S. 617, 625 (2008). And by "exhaust[ing] the [patentee's] monopoly" in that item, the sale confers on the purchaser, or any subsequent owner, "the right to use [or] sell" the thing as he sees fit. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 249–250 (1942). We have explained the basis for the doctrine as follows: "[T]he purpose of the patent law is fulfilled with respect to any particular article

[2] The Patent Act grants a patentee the "right to exclude others from making, using, offering for sale, or selling the invention." 35 U. S. C. § 154(a)(1); see § 271(a) ("[W]hoever without authority makes, uses, offers to sell, or sells any patented invention . . . infringes the patent").

when the patentee has received his reward . . . by the sale of the article"; once that "purpose is realized the patent law affords no basis for restraining the use and enjoyment of the thing sold." *Id.*, at 251.

Consistent with that rationale, the doctrine restricts a patentee's rights only as to the "particular article" sold, *ibid.*; it leaves untouched the patentee's ability to prevent a buyer from making new copies of the patented item. "[T]he purchaser of the [patented] machine . . . does not acquire any right to construct another machine either for his own use or to be vended to another." *Mitchell* v. *Hawley*, 16 Wall. 544, 548 (1873); see *Wilbur-Ellis Co.* v. *Kuther*, 377 U. S. 422, 424 (1964) (holding that a purchaser's "reconstruction" of a patented machine "would impinge on the patentee's right '*to exclude others from making*' . . . the article" (quoting 35 U. S. C. § 154 (1964 ed.))). Rather, "a second creation" of the patented item "call[s] the monopoly, conferred by the patent grant, into play for a second time." *Aro Mfg. Co.* v. *Convertible Top Replacement Co.*, 365 U. S. 336, 346 (1961). That is because the patent holder has "received his reward" only for the actual article sold, and not for subsequent recreations of it. *Univis*, 316 U. S., at 251. If the purchaser of that article could make and sell endless copies, the patent would effectively protect the invention for just a single sale. Bowman himself disputes none of this analysis as a general matter: He forthrightly acknowledges the "well settled" principle "that the exhaustion doctrine does not extend to the right to 'make' a new product." Brief for Petitioner 37 (citing *Aro*, 365 U. S., at 346).

Unfortunately for Bowman, that principle decides this case against him. Under the patent exhaustion doctrine, Bowman could resell the patented soybeans he purchased from the grain elevator; so too he could consume the beans himself or feed them to his animals. Monsanto, although the patent holder, would have no business interfering in those uses of Roundup Ready beans. But the exhaustion doctrine does

not enable Bowman to make *additional* patented soybeans without Monsanto's permission (either express or implied). And that is precisely what Bowman did. He took the soybeans he purchased home; planted them in his fields at the time he thought best; applied glyphosate to kill weeds (as well as any soy plants lacking the Roundup Ready trait); and finally harvested more (many more) beans than he started with. That is how "to 'make' a new product," to use Bowman's words, when the original product is a seed. Brief for Petitioner 37; see Webster's Third New International Dictionary 1363 (1961) ("make" means "cause to exist, occur, or appear," or more specifically, "plant and raise (a crop)"). Because Bowman thus reproduced Monsanto's patented invention, the exhaustion doctrine does not protect him.[3]

Were the matter otherwise, Monsanto's patent would provide scant benefit. After inventing the Roundup Ready trait, Monsanto would, to be sure, "receiv[e] [its] reward" for the first seeds it sells. *Univis*, 316 U. S., at 251. But in short order, other seed companies could reproduce the product and market it to growers, thus depriving Monsanto of its monopoly. And farmers themselves need only buy the seed once, whether from Monsanto, a competitor, or (as here) a grain elevator. The grower could multiply his initial purchase, and then multiply that new creation, *ad infinitum*—each time profiting from the patented seed without compen-

[3] This conclusion applies however Bowman acquired Roundup Ready seed: The doctrine of patent exhaustion no more protected Bowman's reproduction of the seed he purchased for his first crop (from a Monsanto-affiliated seed company) than the beans he bought for his second (from a grain elevator). The difference between the two purchases was that the first—but not the second—came with a license from Monsanto to plant the seed and then harvest and market one crop of beans. We do not here confront a case in which Monsanto (or an affiliated seed company) sold Roundup Ready to a farmer without an express license agreement. For reasons we explain below, we think that case unlikely to arise. See *infra*, at 288. And in the event it did, the farmer might reasonably claim that the sale came with an implied license to plant and harvest one soybean crop.

sating its inventor. Bowman's late-season plantings offer a prime illustration. After buying beans for a single harvest, Bowman saved enough seed each year to reduce or eliminate the need for additional purchases. Monsanto still held its patent, but received no gain from Bowman's annual production and sale of Roundup Ready soybeans. The exhaustion doctrine is limited to the "particular item" sold to avoid just such a mismatch between invention and reward.

Our holding today also follows from *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124 (2001). We considered there whether an inventor could get a patent on a seed or plant, or only a certificate issued under the Plant Variety Protection Act (PVPA), 7 U. S. C. § 2321 *et seq.* We decided a patent was available, rejecting the claim that the PVPA implicitly repealed the Patent Act's coverage of seeds and plants. On our view, the two statutes established different, but not conflicting schemes: The requirements for getting a patent "are more stringent than those for obtaining a PVP certificate, and the protections afforded" by a patent are correspondingly greater. *J. E. M.*, 534 U. S., at 142. Most notable here, we explained that only a patent holder (not a certificate holder) could prohibit "[a] farmer who legally purchases and plants" a protected seed from saving harvested seed "for replanting." *Id.*, at 140; see *id.*, at 143 (noting that the Patent Act, unlike the PVPA, contains "no exemptio[n]" for "saving seed"). That statement is inconsistent with applying exhaustion to protect conduct like Bowman's. If a sale cut off the right to control a patented seed's progeny, then (contrary to *J. E. M.*) the patentee could *not* prevent the buyer from saving harvested seed. Indeed, the patentee could not stop the buyer from *selling* such seed, which even a PVP certificate owner (who, recall, is supposed to have fewer rights) can usually accomplish. See 7 U. S. C. §§ 2541, 2543. Those limitations would turn upside-down the statutory scheme *J. E. M.* described.

Bowman principally argues that exhaustion should apply here because seeds are meant to be planted. The exhaustion doctrine, he reminds us, typically prevents a patentee from controlling the use of a patented product following an authorized sale. And in planting Roundup Ready seeds, Bowman continues, he is merely using them in the normal way farmers do. Bowman thus concludes that allowing Monsanto to interfere with that use would "creat[e] an impermissible exception to the exhaustion doctrine" for patented seeds and other "self-replicating technologies." Brief for Petitioner 16.

But it is really Bowman who is asking for an unprecedented exception—to what he concedes is the "well settled" rule that "the exhaustion doctrine does not extend to the right to 'make' a new product." See *supra*, at 284. Reproducing a patented article no doubt "uses" it after a fashion. But as already explained, we have always drawn the boundaries of the exhaustion doctrine to exclude that activity, so that the patentee retains an undiminished right to prohibit others from making the thing his patent protects. See, *e. g.*, *Cotton-Tie Co.* v. *Simmons*, 106 U. S. 89, 93–94 (1882) (holding that a purchaser could not "use" the buckle from a patented cotton-bale tie to "make" a new tie). That is because, once again, if simple copying were a protected use, a patent would plummet in value after the first sale of the first item containing the invention. The undiluted patent monopoly, it might be said, would extend not for 20 years (as the Patent Act promises), but for only one transaction. And that would result in less incentive for innovation than Congress wanted. Hence our repeated insistence that exhaustion applies only to the particular item sold, and not to reproductions.

Nor do we think that rule will prevent farmers from making appropriate use of the Roundup Ready seed they buy. Bowman himself stands in a peculiarly poor position to assert such a claim. As noted earlier, the commodity soybeans

he purchased were intended not for planting, but for consumption. See *supra*, at 282. Indeed, Bowman conceded in deposition testimony that he knew of no other farmer who employed beans bought from a grain elevator to grow a new crop. See App. 84a. So a non-replicating use of the commodity beans at issue here was not just available, but standard fare. And in the more ordinary case, when a farmer purchases Roundup Ready seed *qua* seed—that is, seed intended to grow a crop—he will be able to plant it. Monsanto, to be sure, conditions the farmer's ability to reproduce Roundup Ready; but it does not—could not realistically—preclude all planting. No sane farmer, after all, would buy the product without some ability to grow soybeans from it. And so Monsanto, predictably enough, sells Roundup Ready seed to farmers with a license to use it to make a crop. See *supra*, at 282, 285, n. 3. Applying our usual rule in this context therefore will allow farmers to benefit from Roundup Ready, even as it rewards Monsanto for its innovation.

Still, Bowman has another seeds-are-special argument: that soybeans naturally "self-replicate or 'sprout' unless stored in a controlled manner," and thus "it was the planted soybean, not Bowman" himself, that made replicas of Monsanto's patented invention. Brief for Petitioner 42; see Tr. of Oral Arg. 14 ("[F]armers, when they plant seeds, they don't exercise any control . . . over their crop" or "over the creative process"). But we think that blame-the-bean defense tough to credit. Bowman was not a passive observer of his soybeans' multiplication; or put another way, the seeds he purchased (miraculous though they might be in other respects) did not spontaneously create eight successive soybean crops. As we have explained, *supra*, at 281–282, Bowman devised and executed a novel way to harvest crops from Roundup Ready seeds without paying the usual premium. He purchased beans from a grain elevator anticipating that many would be Roundup Ready; applied a glyphosate-based herbicide in a way that culled any plants without the pat-

ented trait; and saved beans from the rest for the next season. He then planted those Roundup Ready beans at a chosen time; tended and treated them, including by exploiting their patented glyphosate resistance; and harvested many more seeds, which he either marketed or saved to begin the next cycle. In all this, the bean surely figured. But it was Bowman, and not the bean, who controlled the reproduction (unto the eighth generation) of Monsanto's patented invention.

Our holding today is limited—addressing the situation before us, rather than every one involving a self-replicating product. We recognize that such inventions are becoming ever more prevalent, complex, and diverse. In another case, the article's self-replication might occur outside the purchaser's control. Or it might be a necessary but incidental step in using the item for another purpose. Cf. 17 U. S. C. § 117(a)(1) ("[I]t is not [a copyright] infringement for the owner of a copy of a computer program to make . . . another copy or adaptation of that computer program provide[d] that such a new copy or adaptation is created as an essential step in the utilization of the computer program"). We need not address here whether or how the doctrine of patent exhaustion would apply in such circumstances. In the case at hand, Bowman planted Monsanto's patented soybeans solely to make and market replicas of them, thus depriving the company of the reward patent law provides for the sale of each article. Patent exhaustion provides no haven for that conduct. We accordingly affirm the judgment of the Court of Appeals for the Federal Circuit.

It is so ordered.

Syllabus

CITY OF ARLINGTON, TEXAS, ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL.

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

No. 11–1545. Argued January 16, 2013—Decided May 20, 2013*

The Communications Act of 1934, as amended, requires state or local governments to act on siting applications for wireless facilities "within a reasonable period of time after the request is duly filed." 47 U. S. C. § 332(c)(7)(B)(ii). Relying on its broad authority to implement the Communications Act, see 47 U. S. C. § 201(b), the Federal Communications Commission (FCC or Commission) issued a Declaratory Ruling concluding that the phrase "reasonable period of time" is presumptively (but rebuttably) 90 days to process an application to place a new antenna on an existing tower and 150 days to process all other applications. The cities of Arlington and San Antonio, Texas, sought review of the Declaratory Ruling in the Fifth Circuit. They argued that the Commission lacked authority to interpret § 332(c)(7)(B)'s limitations. The Court of Appeals, relying on Circuit precedent holding that *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, applies to an agency's interpretation of its own statutory jurisdiction, applied *Chevron* to that question. Finding the statute ambiguous, it upheld as a permissible construction of the statute the FCC's view that § 201(b)'s broad grant of regulatory authority empowered it to administer § 332(c)(7)(B).

Held: Courts must apply the *Chevron* framework to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (*i. e.*, its jurisdiction). Pp. 296–307.

(a) Under *Chevron*, a reviewing court must first ask whether Congress has directly spoken to the precise question at issue; if so, the court must give effect to Congress' unambiguously expressed intent. 467 U. S., at 842–843. However, if "the statute is silent or ambiguous," the court must defer to the administering agency's construction of the statute so long as it is permissible. *Id.*, at 843. P. 296.

(b) When a court reviews an agency's interpretation of a statute it administers, the question is always, simply, whether the agency has

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*Together with No. 11–1547, *Cable, Telecommunications, and Technology Committee of New Orleans City Council* v. *Federal Communications Commission et al.*, also on certiorari to the same court.

stayed within the bounds of its statutory authority. There is no distinction between an agency's "jurisdictional" and "nonjurisdictional" interpretations. The "jurisdictional-nonjurisdictional" line is meaningful in the judicial context because Congress has the power to tell the courts what classes of cases they may decide—that is, to define their jurisdiction—but not to prescribe how they decide those cases. But for agencies charged with administering congressional statutes, both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires. Because the question is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out an arbitrary subset of "jurisdictional" questions from the *Chevron* framework. See, *e. g.*, *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327, 333, 339. Pp. 296–301.

(c) This Court has consistently afforded *Chevron* deference to agencies' constructions of the scope of their own jurisdiction. See, *e. g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833; *United States* v. *Eurodif S. A.*, 555 U. S. 305, 316. *Chevron* applies to statutes designed to curtail the scope of agency discretion, see *Chemical Mfrs. Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 123, and even where concerns about agency self-aggrandizement are at their apogee—*i. e.*, where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme, see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 132. Pp. 301–305.

(d) The contention that *Chevron* deference is not appropriate here because the FCC asserted jurisdiction over matters of traditional state and local concern is meritless. These cases have nothing to do with federalism: The statute explicitly supplants state authority, so the question is simply whether a federal agency or federal courts will draw the lines to which the States must hew. P. 305.

(e) *United States* v. *Mead Corp.*, 533 U. S. 218, requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. There is no case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field. A general conferral of rulemaking authority validates rules for *all* the matters the agency is charged with administering. It suffices to decide these cases that the preconditions to deference under *Chevron* are satisfied

Syllabus

because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority. Pp. 305–307.

668 F. 3d 229, affirmed.

SCALIA, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 308. ROBERTS, C. J., filed a dissenting opinion, in which KENNEDY and ALITO, JJ., joined, *post*, p. 312.

Thomas C. Goldstein argued the cause for petitioners in both cases. With him on the briefs in No. 11–1545 were *Joseph Van Eaton*, *James R. Hobson*, *Matthew K. Schettenhelm*, *Kevin K. Russell*, *Kevin R. Amer*, *Tejinder Singh*, and *Thomas D. Bunton*. *William D. Aaron, Jr.*, and *Basile J. Uddo* filed a brief for Cable, Telecommunications, and Technology Committee of the New Orleans City Council, petitioner in No. 11–1547. *Paul D. Clement* filed briefs in both cases for respondents International Municipal Lawyers Association et al. in support of petitioners.

Solicitor General Verrilli argued the cause in both cases for the federal respondents and for respondent Cellco Partnership d/b/a Verizon Wireless. With him on the brief for the federal respondents were *Deputy Solicitor General Stewart*, *Joseph R. Palmore*, *Sean A. Lev*, *Peter Karanjia*, *Jacob M. Lewis*, and *James M. Carr*. *Helgi C. Walker*, *Thomas R. McCarthy*, *Brett A. Shumate*, *Walter Dellinger*, *Jonathan D. Hacker*, *Anton Metlitsky*, and *Michael E. Glover* filed a brief for respondent Cellco Partnership d/b/a Verizon Wireless.†

†Briefs of *amici curiae* urging reversal in both cases were filed for the Cato Institute et al. by *Colin E. Wrabley*, *David J. Bird*, *Ilya Shapiro*, and *Nicholas Quinn Rosenkranz*; for the National Governors Association et al. by *Thomas W. Merrill*, *Lisa E. Soronen*, and *James Bradford Ramsay*; and for the National Water Resources Association et al. by *Roderick*

JUSTICE SCALIA delivered the opinion of the Court.

We consider whether an agency's interpretation of a statutory ambiguity that concerns the scope of its regulatory authority (that is, its jurisdiction) is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

I

Wireless telecommunications networks require towers and antennas; proposed sites for those towers and antennas must be approved by local zoning authorities. In the Telecommunications Act of 1996, Congress "impose[d] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities," *Rancho Palos Verdes* v. *Abrams*, 544 U. S. 113, 115 (2005), and incorporated those limitations into the Communications Act of 1934, see 110 Stat. 56, 151. Section 201(b) of that Act empowers the Federal Communications Commission (FCC or Commission) to "prescribe such rules and regulations as may be necessary in the public interest to carry out [its] provisions." Ch. 296, 52 Stat. 588, codified at 47 U. S. C. § 201(b). Of course, that rulemaking authority extends to the subsequently added portions of the Act. See *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 377–378 (1999).

E. Walston, Steven L. Hernandez, Scott L. Shapiro, and *Harold Craig Manson. John P. Elwood, Ellen Steen, Thomas J. Ward, Amy C. Chai, Karen R. Harned, Elizabeth Milito, Deborah R. White, Robin S. Conrad,* and *Rachel L. Brand* filed a brief in both cases for the American Farm Bureau Federation et al. as *amici curiae* urging vacatur.

Briefs of *amici curiae* urging affirmance in both cases were filed for AT&T Services Inc. et al. by *Michael K. Kellogg, Gregory G. Rapawy, Gary L. Phillips,* and *Jonathan B. Banks*; for PCIA-The Wireless Infrastructure Association by *Catherine E. Stetson, Daniel L. Brenner,* and *Dominic F. Perella*; and for T-Mobile USA, Inc., et al. by *Charles S. Sims.*

David B. Rivkin, Jr., Lee A. Casey, G. Edison Holland, Jr., and *Karl R. Moor* filed a brief in both cases for the Southern Co. as *amicus curiae.*

The Act imposes five substantive limitations, which are codified in 47 U. S. C. § 332(c)(7)(B); only one of them, § 332(c)(7)(B)(ii), is at issue here. That provision requires state or local governments to act on wireless-siting applications "within a reasonable period of time after the request is duly filed." Two other features of § 332(c)(7) are relevant. First, subparagraph (A), known as the "saving clause," provides that nothing in the Act, *except* those limitations provided in § 332(c)(7)(B), "shall limit or affect the authority of a State or local government" over siting decisions. Second, § 332(c)(7)(B)(v) authorizes a person who believes a state or local government's wireless-siting decision to be inconsistent with any of the limitations in § 332(c)(7)(B) to "commence an action in any court of competent jurisdiction."

In theory, § 332(c)(7)(B)(ii) requires state and local zoning authorities to take prompt action on siting applications for wireless facilities. But in practice, wireless providers often faced long delays. In July 2008, CTIA-The Wireless Association,[1] which represents wireless service providers, petitioned the FCC to clarify the meaning of § 332(c)(7)(B)(ii)'s requirement that zoning authorities act on siting requests "within a reasonable period of time." In November 2009, the Commission, relying on its broad statutory authority to implement the provisions of the Communications Act, issued a declaratory ruling responding to CTIA's petition. *In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001. The Commission found that the "record evidence demonstrates that unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services" and that such delays "impede the promotion of advanced services and competition

[1] This is not a typographical error. CTIA-The Wireless Association was the name of the petitioner. CTIA is presumably an (unpronounceable) acronym, but even the organization's Web site does not say what it stands for. That secret, known only to wireless-service-provider insiders, we will not disclose here.

that Congress deemed critical in the Telecommunications Act of 1996." *Id.*, at 14006, 14008. A "reasonable period of time" under § 332(c)(7)(B)(ii), the Commission determined, is presumptively (but rebuttably) 90 days to process a collocation application (that is, an application to place a new antenna on an existing tower) and 150 days to process all other applications. *Id.*, at 14005.

Some state and local governments opposed adoption of the *Declaratory Ruling* on the ground that the Commission lacked "authority to interpret ambiguous provisions of Section 332(c)(7)." *Id.*, at 14000. Specifically, they argued that the saving clause, § 332(c)(7)(A), and the judicial review provision, § 332(c)(7)(B)(v), together display a congressional intent to withhold from the Commission authority to interpret the limitations in § 332(c)(7)(B). Asserting that ground of objection, the cities of Arlington and San Antonio, Texas, petitioned for review of the *Declaratory Ruling* in the Court of Appeals for the Fifth Circuit.

Relying on Circuit precedent, the Court of Appeals held that the *Chevron* framework applied to the threshold question whether the FCC possessed statutory authority to adopt the 90- and 150-day timeframes. 668 F. 3d 229, 248 (2012) (citing *Texas* v. *United States*, 497 F. 3d 491, 501 (CA5 2007)). Applying *Chevron*, the Court of Appeals found "§ 332(c)(7)(A)'s effect on the FCC's authority to administer § 332(c)(7)(B)'s limitations ambiguous," 668 F. 3d, at 250, and held that "the FCC's interpretation of its statutory authority" was a permissible construction of the statute, *id.*, at 254. On the merits, the court upheld the presumptive 90- and 150-day deadlines as a "permissible construction of § 332(c)(7)(B)(ii) and (v) . . . entitled to *Chevron* deference." *Id.*, at 256.

We granted certiorari, 568 U. S. 936 (2012), limited to the first question presented: "Whether . . . a court should apply *Chevron* to . . . an agency's determination of its own jurisdiction." Pet. for Cert. in No. 11–1545, p. i.

II

A

As these cases turn on the scope of the doctrine enshrined in *Chevron*, we begin with a description of that case's now-canonical formulation. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions." 467 U. S., at 842. First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*, at 842–843. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843.

Chevron is rooted in a background presumption of congressional intent: namely, "that Congress, when it left ambiguity in a statute" administered by an agency, "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 740–741 (1996). *Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency. See *Iowa Utilities Bd.*, 525 U. S., at 397. Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion.

B

The question here is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory author-

ity (that is, its jurisdiction). The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority.*

The misconception that there are, for *Chevron* purposes, separate "jurisdictional" questions on which no deference is due derives, perhaps, from a reflexive extension to agencies of the very real division between the jurisdictional and nonjurisdictional that is applicable to courts. In the judicial context, there *is* a meaningful line: Whether the court decided *correctly* is a question that has different consequences from the question whether it had the power to decide *at all*. Congress has the power (within limits) to tell the courts what classes of cases they may decide, see *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, 63–64 (1944); *Lauf* v. *E. G. Shinner & Co.*, 303 U. S. 323, 330 (1938), but not to prescribe or superintend how they decide those cases, see *Plaut* v. *Spendthrift Farm, Inc.*, 514 U. S. 211, 218–219 (1995). A court's power to decide a case is independent of whether its decision is correct, which is why even an erroneous judgment is entitled to res judicata effect. Put differently, a jurisdictionally proper but substantively incorrect judicial decision is not ultra vires.

That is not so for agencies charged with administering congressional statutes. Both their power to act and how they are to act are authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires. Because the

question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do, there is no principled basis for carving out some arbitrary subset of such claims as "jurisdictional."

An example will illustrate just how illusory the proposed line between "jurisdictional" and "nonjurisdictional" agency interpretations is. Imagine the following validly-enacted statute:

> "COMMON CARRIER ACT
>
> "SECTION 1. The Agency shall have jurisdiction to prohibit any common carrier from imposing an unreasonable condition upon access to its facilities."

There is no question that this provision—including the terms "common carrier" and "unreasonable condition"—defines the agency's jurisdiction. Surely, the argument goes, a court must determine *de novo* the scope of that jurisdiction.

Consider, however, this alternative formulation of the statute:

> "COMMON CARRIER ACT
>
> "SECTION 1. No common carrier shall impose an unreasonable condition upon access to its facilities.
>
> "SECTION 2. The Agency may prescribe rules and regulations necessary in the public interest to effectuate Section 1 of this Act."

Now imagine that the agency, invoking its Section 2 authority, promulgates this rule: "(1) The term 'common carrier' in Section 1 includes Internet Service Providers. (2) The term 'unreasonable condition' in Section 1 includes unreasonably high prices. (3) A monthly fee greater than $25 is an unreasonable condition on access to Internet service." By this rule, the agency has claimed for itself jurisdiction that is doubly questionable: Does its authority extend to Internet Serv-

ice Providers? And does it extend to setting prices? Yet Section 2 makes clear that Congress, in petitioners' words, "conferred interpretive power on the agency" with respect to Section 1. Brief for Petitioners in No. 11–1545, p. 14. Even under petitioners' theory, then, a court should defer to the agency's interpretation of the terms "common carrier" and "unreasonable condition"—that is to say, its assertion that its "jurisdiction" extends to regulating Internet Service Providers and setting prices.

In the first case, by contrast, petitioners' theory would accord the agency no deference. The trouble with this is that in both cases, the underlying question is *exactly the same*: Does the statute give the agency authority to regulate Internet Service Providers and cap prices, or not?[2] The reality, laid bare, is that there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its "jurisdiction") and its exceeding authorized application of authority that it unquestionably has. "To exceed authorized application is to exceed authority. Virtually any administrative action can be characterized as either the one or the other, depending on how generally one wishes to describe the 'authority.'" *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, 381 (1988) (SCALIA, J., concurring in judgment); see also Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 29 (1983) ("Administrative application of law is administrative formulation of law whenever it involves elaboration of the statutory norm").

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[2] The dissent's nonanswer to this example reveals the hollowness of its theory. It "might," the dissent claims, be "harder" to interpret the first Act, because it is (somehow) less "clear" than the second Act. *Post*, at 326 (opinion of ROBERTS, C. J.). That it is even *possible* that the two could come out differently under the dissent's test (whatever it is) shows that that test must be wrong. The two statutes are substantively identical. Any difference in outcome would be arbitrary, so a sound interpretive approach should yield none.

This point is nicely illustrated by our decision in *National Cable & Telecommunications Assn., Inc.* v. *Gulf Power Co.*, 534 U. S. 327 (2002). That case considered whether the FCC's "jurisdiction" to regulate the rents utility-pole owners charge for "pole attachments" (defined as attachments by a cable television system or provider of telecommunications service) extended to attachments that provided both cable television and high-speed Internet access (attachments for so-called "commingled services"). *Id.*, at 331–336. We held, sensibly, that *Chevron* applied. 534 U. S., at 333, 339. Whether framed as going to the *scope* of the FCC's delegated authority or the FCC's *application* of its delegated authority, the underlying question was the same: Did the FCC exceed the bounds of its statutory authority to regulate rents for "pole attachments" when it sought to regulate rents for pole attachments providing commingled services?

The label is an empty distraction because every new application of a broad statutory term can be reframed as a questionable extension of the agency's jurisdiction. One of the briefs in support of petitioners explains, helpfully, that "[j]urisdictional questions concern the *who*, *what*, *where*, and *when* of regulatory power: which subject matters may an agency regulate and under what conditions." Brief for International Municipal Lawyers Association (IMLA) Respondents 18–19. But an agency's *application* of its authority pursuant to statutory text answers the same questions. *Who* is an "outside salesman"? *What* is a "pole attachment"? *Where* do the "waters of the United States" end? *When* must a Medicare provider challenge a reimbursement determination in order to be entitled to an administrative appeal? These can all be reframed as questions about the scope of agencies' regulatory jurisdiction—and they are all questions to which the *Chevron* framework applies. See *Christopher* v. *SmithKline Beecham Corp.*, 567 U. S. 142, 147, 153 (2012); *National Cable & Telecommunications Assn.*, *supra*, at 331, 333; *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 123, 131 (1985); *Sebelius* v. *Au-*

burn Regional Medical Center, 568 U. S. 145, 148–149, 157–158 (2013).

In sum, judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statutory provision is "jurisdictional" or "nonjurisdictional." Once those labels are sheared away, it becomes clear that the question in every case is, simply, whether the statutory text forecloses the agency's assertion of authority, or not. See H. Edwards & L. Elliott, Federal Standards of Review 146 (2007) ("In practice, it does not appear to matter whether delegated authority is viewed as a threshold inquiry"). The federal judge as haruspex, sifting the entrails of vast statutory schemes to divine whether a particular agency interpretation qualifies as "jurisdictional," is not engaged in reasoned decisionmaking.

C

Fortunately, then, we have consistently held "that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." 1 R. Pierce, Administrative Law Treatise § 3.5, p. 187 (2010). One of our opinions explicitly says that no "exception exists to the normal [deferential] standard of review" for " 'jurisdictional or legal question[s] concerning the coverage' " of an Act. *NLRB* v. *City Disposal Systems, Inc.*, 465 U. S. 822, 830, n. 7 (1984). A prime example of deferential review for questions of jurisdiction is *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833 (1986). That case involved a CFTC interpretation of 7 U. S. C. § 18(c), which provides that before the Commission takes action on a complaint, the complainant must file a bond to cover "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent." (Emphasis added.) The CFTC, pursuant to its broad rulemaking authority, see § 12a(5), interpreted that oblique reference to counterclaims as granting it "the power to take jurisdiction

over" not just federal-law counterclaims, but state-law counterclaims as well. *Schor*, *supra*, at 844. We not only deferred under *Chevron* to the Commission's "eminently reasonable . . . interpretation of the statute it is entrusted to administer," but also chided the Court of Appeals for declining to afford deference because of the putatively " 'statutory interpretation-jurisdictional' nature of the question at issue." 478 U. S., at 844–845.

Similar examples abound. We have afforded *Chevron* deference to the Commerce Department's determination that its authority to seek antidumping duties extended to uranium imported under contracts for enrichment services, *United States* v. *Eurodif S. A.*, 555 U. S. 305, 316 (2009); to the Interstate Commerce Commission's view that courts, not the Commission, possessed "initial jurisdiction with respect to the award of reparations" for unreasonable shipping charges, *Reiter* v. *Cooper*, 507 U. S. 258, 269 (1993) (internal quotation marks and ellipsis omitted); and to the Army Corps of Engineers' assertion that its permitting authority over discharges into "waters of the United States" extended to "freshwater wetlands" adjacent to covered waters, *Riverside Bayview Homes*, *supra*, at 123–124, 131. We have even deferred to the FCC's assertion that its broad regulatory authority extends to pre-empting conflicting state rules. *City of New York* v. *FCC*, 486 U. S. 57, 64 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 700 (1984).[3]

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[3] The dissent's reliance on dicta in *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638 (1990), see *post*, at 319, is misplaced. In that case, the Department of Labor had interpreted a statute creating a private right of action for migrant or seasonal farmworkers as providing no remedy where a state workers'-compensation law covered the worker. 494 U. S., at 649. We held that we had no need to "defer to the Secretary of Labor's view of the scope of" that private right of action "because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." *Ibid.* *Adams Fruit* stands for the modest proposition that the Judiciary, not any executive agency, determines "the scope"—including the available remedies—

Our cases hold that *Chevron* applies equally to statutes designed to *curtail* the scope of agency discretion. For instance, in *Chemical Mfrs. Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 123 (1985), we considered a statute prohibiting the Environmental Protection Agency from "'modify[ing] any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list.'" The EPA construed the statute as not precluding it from granting variances with respect to certain toxic pollutants. Finding no "clear congressional intent to forbid EPA's sensible variance mechanism," *id.*, at 134, we deferred to the EPA's construction of this express limitation on its own regulatory authority, *id.*, at 125 (citing *Chevron*, 467 U. S. 837); see also, *e. g.*, *Japan Whaling Assn.* v. *American Cetacean Soc.*, 478 U. S. 221, 226, 232–234 (1986).

The U. S. Reports are shot through with applications of *Chevron* to agencies' constructions of the scope of their own jurisdiction. And we have applied *Chevron* where concerns about agency self-aggrandizement are at their apogee: in cases where an agency's expansive construction of the extent of its own power would have wrought a fundamental change in the regulatory scheme. In *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120 (2000), the threshold question was the "appropriate framework for analyzing" the FDA's

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"of judicial power vested by" statutes establishing private rights of action. *Id.*, at 650. *Adams Fruit* explicitly affirmed the Department's authority to promulgate the substantive standards enforced through that private right of action. See *ibid.*

The dissent's invocation of *Gonzales* v. *Oregon*, 546 U. S. 243 (2006), see *post*, at 321, is simply perplexing: The majority opinion in that case expressly lists the Communications Act as an example of a statute under which an agency's "authority is clear because the statute gives an agency broad power to enforce *all* provisions of the statute." 546 U. S., at 258–259 (citing 47 U. S. C. §201(b); emphasis added). That statement cannot be squared with the dissent's proposed remand for the Fifth Circuit to determine "whether Congress delegated interpretive authority over §332(c)(7)(B)(ii) to the FCC." *Post*, at 328.

assertion of "jurisdiction to regulate tobacco products," *id.*, at 126, 132—a question of vast "economic and political magnitude," *id.*, at 133. "Because this case involves an administrative agency's construction of a statute that it administers," we held, *Chevron* applied. 529 U. S., at 132. Similarly, in *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 224, 229, 231 (1994), we applied the *Chevron* framework to the FCC's assertion that the statutory phrase "modify any requirement" gave it authority to eliminate rate-filing requirements, "the essential characteristic of a rate-regulated industry," for long-distance telephone carriers.

The false dichotomy between "jurisdictional" and "nonjurisdictional" agency interpretations may be no more than a bogeyman, but it is dangerous all the same. Like the Hound of the Baskervilles, it is conjured by those with greater quarry in sight: Make no mistake—the ultimate target here is *Chevron* itself. Savvy challengers of agency action would play the "jurisdictional" card in every case. See, *e. g.*, *Cellco Partnership* v. *FCC*, 700 F. 3d 534, 541 (CADC 2012). Some judges would be deceived by the specious, but scary-sounding, "jurisdictional-nonjurisdictional" line; others tempted by the prospect of making public policy by prescribing the meaning of ambiguous statutory commands. The effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts.[4] We have cautioned that "judges ought to

[4] THE CHIEF JUSTICE's discomfort with the growth of agency power, see *post*, at 313–315, is perhaps understandable. But the dissent overstates when it claims that agencies exercise "legislative power" and "judicial power." *Post*, at 312–313; see also *post*, at 327. The former is vested exclusively in Congress, U. S. Const., Art. I, § 1, the latter in the "one supreme Court" and "such inferior Courts as the Congress may from time to time ordain and establish," Art. III, § 1. Agencies make rules ("Private cattle may be grazed on public lands *X*, *Y*, and *Z* subject to certain conditions") and conduct adjudications ("This rancher's grazing permit is revoked for

refrain from substituting their own interstitial lawmaking" for that of an agency. *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 568 (1980). That is precisely what *Chevron* prevents.

III

A

One group of respondents contends that *Chevron* deference is inappropriate here because the FCC has "assert[ed] jurisdiction over matters of traditional state and local concern." Brief for IMLA Respondents 35. But these cases have nothing to do with federalism. Section 332(c)(7)(B)(ii) explicitly supplants state authority by *requiring* zoning authorities to render a decision "within a reasonable period of time," and the meaning of that phrase is indisputably a question of federal law. We rejected a similar faux-federalism argument in the *Iowa Utilities Board* case, in terms that apply equally here: "This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." 525 U. S., at 379, n. 6. These lines will be drawn either by unelected federal bureaucrats, or by unelected (and even less politically accountable) federal judges. "[I]t is hard to spark a passionate 'States' rights' debate over that detail." *Ibid.*

B

A few words in response to the dissent. The question on which we granted certiorari was whether "a court should apply *Chevron* to review an agency's determination of its own jurisdiction." Pet. for Cert. i.[5] Perhaps sensing the

violation of the conditions") and have done so since the beginning of the Republic. These activities take "legislative" and "judicial" forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the "executive Power." Art. II, § 1, cl. 1.

[5] The dissent—apparently with no attempt at irony—accuses us of "misunderstand[ing]" the question presented as one of "jurisdiction." *Post*, at 316. Whatever imprecision inheres in our understanding of the question presented derives solely from our having read it.

incoherence of the "jurisdictional-nonjurisdictional" line, the dissent does not even attempt to defend it, see *post*, at 316, but proposes a much broader scope for *de novo* judicial review: Jurisdictional or not, and even where a rule is at issue and the statute contains a broad grant of rulemaking authority, the dissent would have a court search provision by provision to determine "whether [that] delegation covers the 'specific provision' and 'particular question' before the court." *Post*, at 322–323.

The dissent is correct that *United States* v. *Mead Corp.*, 533 U. S. 218 (2001), requires that, for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted. No one disputes that. But *Mead* denied *Chevron* deference to action, by an agency with rulemaking authority, that was not rulemaking. What the dissent needs, and fails to produce, is a single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field. There is no such case, and what the dissent proposes is a massive revision of our *Chevron* jurisprudence.

Where we differ from the dissent is in its apparent rejection of the theorem that the whole includes all of its parts—its view that a general conferral of rulemaking authority does not validate rules for *all* the matters the agency is charged with administering. Rather, the dissent proposes that even when general rulemaking authority is clear, *every* agency rule must be subjected to a *de novo* judicial determination of whether *the particular issue* was committed to agency discretion. It offers no standards at all to guide this open-ended hunt for congressional intent (that is to say, for evidence of congressional intent more specific than the conferral of general rulemaking authority). It would simply punt that question back to the Court of Appeals, presumably

for application of some sort of totality-of-the-circumstances test—which is really, of course, not a test at all but an invitation to make an ad hoc judgment regarding congressional intent. Thirteen Courts of Appeals applying a totality-of-the-circumstances test would render the binding effect of agency rules unpredictable and destroy the whole stabilizing purpose of *Chevron*. The excessive agency power that the dissent fears would be replaced by chaos. There is no need to wade into these murky waters. It suffices to decide these cases that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority.

* * *

Those who assert that applying *Chevron* to "jurisdictional" interpretations "leaves the fox in charge of the henhouse" overlook the reality that a separate category of "jurisdictional" interpretations does not exist. The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional." If "the agency's answer is based on a permissible construction of the statute," that is the end of the matter. *Chevron*, 467 U. S., at 843.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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

I agree with the Court that normally "the question a court faces when confronted with an agency's interpretation of a statute it administers" is, "simply, *whether the agency has stayed within the bounds of its statutory authority.*" *Ante*, at 297. In this context, "the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage." *Ibid.*

Deciding just what those statutory bounds are, however, is not always an easy matter, and the Court's case law abounds with discussion of the subject. A reviewing judge, for example, will have to decide independently whether Congress delegated authority to the agency to provide interpretations of, or to enact rules pursuant to, the statute at issue—interpretations or rules that carry with them "the force of law." *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001). If so, the reviewing court must give special leeway or "deference" to the agency's interpretation. See *id.*, at 227–228.

We have added that, if "[e]mploying traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 446 (1987), the court determines that Congress has spoken clearly on the disputed question, then "that is the end of the matter," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984). The agency is due no deference, for Congress has left no gap for the agency to fill. *Id.*, at 842–844. If, on the other hand, Congress has not spoken clearly, if, for example, it has written ambiguously, then that ambiguity is a sign—but not always a conclusive sign—that Congress intends a reviewing court to pay particular attention to (*i. e.*, to give a degree of deference to) the agency's interpretation. See *Gonzales* v. *Oregon*, 546 U. S. 243, 258–269 (2006); *Mead*, *supra*, at 229.

I say that the existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress

has left a deference-warranting gap for the agency to fill because our cases make clear that other, sometimes context-specific, factors will on occasion prove relevant. (And, given the vast number of government statutes, regulatory programs, and underlying circumstances, that variety is hardly surprising.) In *Mead*, for example, we looked to several factors other than simple ambiguity to help determine whether Congress left a statutory gap, thus delegating to the agency the authority to fill that gap with an interpretation that would carry "the force of law." 533 U. S., at 229–231. Elsewhere, we have assessed

> "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002).

The subject matter of the relevant provision—for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority—has also proved relevant. See *Gonzales*, *supra*, at 265–266. See also Gellhorn & Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1007–1010 (1999).

Moreover, the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous and can be equally helpful in determining whether such ambiguity comes accompanied with agency authority to fill a gap with an interpretation that carries the force of law. See *Household Credit Services, Inc.* v. *Pfennig*, 541 U. S. 232, 239–242 (2004); *Zuni Public School Dist. No. 89* v. *Department of Education*, 550 U. S. 81, 98–99 (2007); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000); *Dole* v. *Steelworkers*, 494 U. S. 26, 36 (1990). Statutory purposes, including those revealed in part by legislative

and regulatory history, can be similarly relevant. See *Brown & Williamson Tobacco Corp.*, *supra,* at 143–147; *Pension Benefit Guaranty Corporation* v. *LTV Corp.*, 496 U. S. 633, 649 (1990); *Global Crossing Telecommunications, Inc.* v. *Metrophones Telecommunications, Inc.*, 550 U. S. 45, 48–49 (2007). See also *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U. S. 366, 412–413 (1999) (BREYER, J., concurring in part and dissenting in part).

Although seemingly complex in abstract description, in practice this framework has proved a workable way to approximate how Congress would likely have meant to allocate interpretive law-determining authority between reviewing court and agency. The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently. The judge, considering "traditional tools of statutory construction," *Cardoza-Fonseca*, *supra*, at 446, will ask whether Congress has spoken unambiguously. If so, the text controls. If not, the judge will ask whether Congress would have intended the agency to resolve the resulting ambiguity. If so, deference is warranted. See *Mead*, *supra*, at 229. Even if not, however, sometimes an agency interpretation, in light of the agency's special expertise, will still have the "power to persuade, if lacking power to control," *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944).

The cases before us offer an example. The relevant statutory provision requires state or local governments to act on wireless siting applications "within a reasonable period of time after" a wireless service provider files such a request. 47 U. S. C. § 332(c)(7)(B)(ii). The Federal Communications Commission (FCC) argued that this provision granted it a degree of leeway in determining the amount of time that is reasonable. Many factors favor the agency's view: (1) The language of the Telecommunications Act grants the FCC broad authority (including rulemaking authority) to administer the Act; (2) the words are open-ended—*i. e.* "ambiguous";

(3) the provision concerns an interstitial administrative matter, in respect to which the agency's expertise could have an important role to play; and (4) the matter, in context, is complex, likely making the agency's expertise useful in helping to answer the "reasonableness" question that the statute poses. See § 151 (creating the FCC); § 201(b) (providing rulemaking authority); *National Cable & Telecommunications Assn.* v. *Brand X Internet Services*, 545 U. S. 967, 980–981 (2005) (acknowledging the FCC's authority to administer the Act).

On the other side of the coin, petitioners point to two statutory provisions which, they believe, require a different conclusion—namely, that the FCC lacked authority altogether to interpret § 332(c)(7)(B)(ii). First, a nearby saving clause says: "Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." § 332(c)(7)(A). Second, a judicial review provision says: "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." § 332(c)(7)(B)(v).

In my view, however, these two provisions cannot provide good reason for reaching the conclusion advocated by petitioners. The first provision begins with an exception, stating that it does *not* apply to (among other things) the "reasonableness" provision here at issue. The second simply sets forth a procedure for judicial review, a review that applies to most government actions. Both are consistent with a statutory scheme that gives States, localities, the FCC, and reviewing courts each some role to play in the location of wireless service facilities. And neither "expressly describ[es] an exception" to the FCC's plenary authority to in-

terpret the Act. *American Hospital Assn.* v. *NLRB*, 499 U. S. 606, 613 (1991).

For these reasons, I would reject petitioners' argument and conclude that § 332(c)(7)(B)(ii)—the "reasonableness" statute—leaves a gap for the FCC to fill. I would hold that the FCC's lawful efforts to do so carry "the force of law." *Mead*, 533 U. S., at 229. The Court of Appeals ultimately reached the same conclusion (though for somewhat different reasons), and the majority affirms the lower court. I consequently join the majority's judgment and such portions of its opinion as are consistent with what I have written here.

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

My disagreement with the Court is fundamental. It is also easily expressed: A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference. Courts defer to an agency's interpretation of law when and because Congress has conferred on the agency interpretive authority over the question at issue. An agency cannot exercise interpretive authority until it has it; the question whether an agency enjoys that authority must be decided by a court, without deference to the agency.

I

One of the principal authors of the Constitution famously wrote that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison). Although modern administrative agencies fit most comfortably within the Executive Branch, as a practical matter they exercise legislative power, by promulgating regulations with the force of law; executive power, by policing compliance with those regulations; and judicial power, by adjudicating enforcement actions and imposing sanctions on those found to

have violated their rules. The accumulation of these powers in the same hands is not an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government.

The administrative state "wields vast power and touches almost every aspect of daily life." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499 (2010). The Framers could hardly have envisioned today's "vast and varied federal bureaucracy" and the authority administrative agencies now hold over our economic, social, and political activities. *Ibid.* "[T]he administrative state with its reams of regulations would leave them rubbing their eyes." *Alden* v. *Maine*, 527 U. S. 706, 807 (1999) (Souter, J., dissenting), quoted in *Federal Maritime Comm'n* v. *South Carolina Ports Authority*, 535 U. S. 743, 755 (2002). And the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies. Compare Office of the Federal Register, United States Government Manual 1997/1998, with Office of the Federal Register, United States Government Manual 2012. And more are on the way. See, *e. g.*, Congressional Research Service, C. Copeland, New Entities Created Pursuant to the Patient Protection and Affordable Care Act 1 (2010) (The PPACA "creates, requires others to create, or authorizes dozens of new entities to implement the legislation").

Although the Constitution empowers the President to keep federal officers accountable, administrative agencies enjoy in practice a significant degree of independence. As scholars have noted, "no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity." Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2250 (2001); see also S. Breyer, Making Our Democracy Work 110 (2010) ("the president may not have the time or willingness to review [agency] decisions"). President Truman colorfully described his power over the administrative state by complaining, "I

thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing." See R. Nathan, The Administrative Presidency 2 (1983). President Kennedy once told a constituent, "I agree with you, but I don't know if the government will." See *id.*, at 1. The collection of agencies housed outside the traditional executive departments, including the Federal Communications Commission, is routinely described as the "headless fourth branch of government," reflecting not only the scope of their authority but their practical independence. See, *e. g.*, Administrative Conference of United States, D. Lewis & J. Selin, Sourcebook of United States Executive Agencies 11 (2012).

As for judicial oversight, agencies enjoy broad power to construe statutory provisions over which they have been given interpretive authority. In *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), we established a test for reviewing "an agency's construction of the statute which it administers." *Id.*, at 842. If Congress has "directly spoken to the precise question at issue," we said, "that is the end of the matter." *Ibid.* A contrary agency interpretation must give way. But if Congress has not expressed a specific intent, a court is bound to defer to any "permissible construction of the statute," even if that is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.*, at 843, and n. 11.

When it applies, *Chevron* is a powerful weapon in an agency's regulatory arsenal. Congressional delegations to agencies are often ambiguous—expressing "a mood rather than a message." Friendly, The Federal Administrative Agencies: The Need for Better Definition of Standards, 75 Harv. L. Rev. 1263, 1311 (1962). By design or default, Congress often fails to speak to "the precise question" before an agency. In the absence of such an answer, an agency's interpretation has the full force and effect of law, unless it "exceeds the bounds of the permissible." *Barnhart* v. *Walton*, 535 U. S. 212, 218 (2002).

It would be a bit much to describe the result as "the very definition of tyranny," but the danger posed by the growing power of the administrative state cannot be dismissed. See, *e. g.*, *Talk America, Inc.* v. *Michigan Bell Telephone Co.*, 564 U. S. 50, 69 (2011) (SCALIA, J., concurring) (noting that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends"); *Sackett* v. *EPA*, 566 U. S. 120, 131 (2012) (rejecting agency argument that would "enable the strongarming of regulated parties into 'voluntary compliance' without the opportunity for judicial review").

What the Court says in footnote 4 of its opinion is good, and true (except of course for the "dissent overstates" part). *Ante,* at 304, n. 4. The Framers did divide governmental power in the manner the Court describes, for the purpose of safeguarding liberty. And yet . . . the citizen confronting thousands of pages of regulations—promulgated by an agency directed by Congress to regulate, say, "in the public interest"—can perhaps be excused for thinking that it is the agency really doing the legislating. And with hundreds of federal agencies poking into every nook and cranny of daily life, that citizen might also understandably question whether Presidential oversight—a critical part of the constitutional plan—is always an effective safeguard against agency overreaching.

It is against this background that we consider whether the authority of administrative agencies should be augmented even further, to include not only broad power to give definitive answers to questions left to them by Congress, but also the same power to decide when Congress has given them that power.

Before proceeding to answer that question, however, it is necessary to sort through some confusion over what this litigation is about. The source of the confusion is a familiar culprit: the concept of "jurisdiction," which we have repeatedly described as a word with " 'many, too many, meanings.' "

Union Pacific R. Co. v. *Locomotive Engineers*, 558 U. S. 67, 81 (2009).

The Court states that the question "is whether a court must defer under *Chevron* to an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction)." *Ante*, at 296–297. That is fine—until the parenthetical. The parties, *amici*, and court below too often use the term "jurisdiction" imprecisely, which leads the Court to misunderstand the argument it must confront. That argument is not that "there exist two distinct classes of agency interpretations," some "big, important ones" that "define the agency's 'jurisdiction,'" and other "humdrum, run-of-the-mill" ones that "are simply applications of jurisdiction the agency plainly has." *Ante*, at 297. The argument is instead that a court should not defer to an agency on whether Congress has granted the agency interpretive authority over the statutory ambiguity at issue.

You can call that "jurisdiction" if you'd like, as petitioners do in the question presented. But given that the term is ambiguous, more is required to understand its use in that question than simply "having read it." *Ante*, at 305, n. 5. It is important to keep in mind that the term, in the present context, has the more precise meaning noted above, encompassing congressionally delegated authority to issue interpretations with the force and effect of law. See 668 F. 3d 229, 248 (CA5 2012) (case below) ("The issue in the instant case is whether the FCC possessed statutory authority to administer §332(c)(7)(B)(ii) and (v) by adopting the 90- and 150-day time frames"). And that has nothing to do with whether the statutory provisions at issue are "big" or "small."

II

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). The rise of the modern administrative state has not changed that duty. Indeed, the Admin-

istrative Procedure Act, governing judicial review of most agency action, instructs reviewing courts to decide "all relevant questions of law." 5 U. S. C. § 706.

We do not ignore that command when we afford an agency's statutory interpretation *Chevron* deference; we respect it. We give binding deference to permissible agency interpretations of statutory ambiguities *because* Congress has delegated to the agency the authority to interpret those ambiguities "with the force of law." *United States* v. *Mead Corp.*, 533 U. S. 218, 229 (2001); see also Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 27–28 (1983) ("the court is not abdicating its constitutional duty to 'say what the law is' by deferring to agency interpretations of law: it is simply applying the law as 'made' by the authorized law-making entity").

But before a court may grant such deference, it must on its own decide whether Congress—the branch vested with lawmaking authority under the Constitution—has in fact delegated to the agency lawmaking power over the ambiguity at issue. See *ante*, at 310 (BREYER, J., concurring in part and concurring in judgment) ("The question whether Congress has delegated to an agency the authority to provide an interpretation that carries the force of law is for the judge to answer independently"). Agencies are creatures of Congress; "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U. S. 355, 374 (1986). Whether Congress has conferred such power is the "relevant question[ ] of law" that must be answered before affording *Chevron* deference. 5 U. S. C. § 706.

III

A

Our precedents confirm this conclusion—beginning with *Chevron* itself. In *Chevron*, the Environmental Protection Agency promulgated a regulation interpreting the term

"stationary sources" in the Clean Air Act. 467 U. S., at 840 (quoting 42 U. S. C. § 7502(b)(6) (1982 ed.)). An environmental group petitioned for review of the rule, challenging it as an impermissible interpretation of the Act. 467 U. S., at 841, 859. Finding the statutory text "not dispositive" and the legislative history "silent on the precise issue," we upheld the rule. *Id.*, at 862, 866.

In our view, the challenge to the Agency's interpretation "center[ed] on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress." *Id.*, at 866. Judges, we said, "are not experts in the field, and are not part of either political branch of the Government." *Id.*, at 865. Thus, because Congress had not answered the specific question at issue, judges had no business providing their own resolution on the basis of their "personal policy preferences." *Ibid.* Instead, the "agency to which Congress ha[d] delegated policymaking responsibilities" was the appropriate political actor to resolve the competing interests at stake, "within the limits of that delegation." *Ibid.*

Chevron's rule of deference was based on—and limited by—this congressional delegation. And the Court did not ask simply whether Congress had delegated to the EPA the authority to administer the Clean Air Act generally. We asked whether Congress had "delegat[ed] authority to the agency to elucidate a *specific provision* of the statute by regulation." *Id.*, at 843–844 (emphasis added); see *id.*, at 844 (discussing "the legislative delegation to an agency on a *particular question*" (emphasis added)). We deferred to the EPA's interpretation of "stationary sources" based on our conclusion that the Agency had been "charged with responsibility for administering *the provision*." *Id.*, at 865 (emphasis added).

B

We have never faltered in our understanding of this straightforward principle, that whether a particular agency

interpretation warrants *Chevron* deference turns on the court's determination whether Congress has delegated to the agency the authority to interpret the statutory ambiguity at issue.

We made the point perhaps most clearly in *Adams Fruit Co.* v. *Barrett*, 494 U. S. 638 (1990). In that case, the Department of Labor contended the Court should defer to its interpretation of the scope of the private right of action provided by the Migrant and Seasonal Agriculture Worker Protection Act (AWPA), 29 U. S. C. § 1854, against employers who intentionally violated the Act's motor vehicle safety provisions. We refused to do so. Although "as an initial matter" we rejected the idea that Congress left a "statutory 'gap' " for the agency to fill, we reasoned that if "AWPA's language establishing a private right of action is ambiguous," the Secretary of Labor's interpretation of its scope did not warrant *Chevron* deference. 494 U. S., at 649.

In language directly applicable to the question before us, we explained that "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Ibid.* Although "Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate *standards* implementing AWPA's *motor vehicle provisions*," we found "[n]o such delegation regarding AWPA's *enforcement provisions*." *Id.*, at 650 (emphasis added). It would therefore be "inappropriate," we said, "to consult executive interpretations" of the enforcement provisions to resolve ambiguities "surrounding the scope of AWPA's judicially enforceable remedy." *Ibid.* Without questioning the principle that agency determinations "within the scope of delegated authority are entitled to deference," we explained that "it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' " *Ibid.* (quoting *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973)).

Our subsequent cases follow the same approach. In *United States* v. *Mead Corp.*, 533 U. S. 218, for example, *Chevron* deference turned on whether Congress had delegated to the agency authority to interpret the statutory ambiguity by a particular means. The Customs Service had issued a "classification ruling," interpreting the term "diaries" in a tariff schedule to include "day planners" of the type Mead imported, and on that basis subjected the planners to a four-percent tariff. Mead protested the imposition of the tariff, the Customs Service claimed *Chevron* deference for its interpretation, and the controversy made its way to our Court. *Id.*, at 224–226.

In *Mead*, we again made clear that the "category of interpretative choices" to which *Chevron* deference applies is defined by congressional intent. *Id.*, at 229. *Chevron* deference, we said, rests on a recognition that Congress has delegated to an agency the interpretive authority to implement "a particular provision" or answer "'a particular question.'" *Ibid.* (quoting *Chevron*, *supra*, at 844). An agency's interpretation of "a particular statutory provision" thus qualifies for *Chevron* deference only "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." 533 U. S., at 226–227.

The Court did not defer to the agency's views but instead determined that Congress had not delegated interpretive authority to the Customs Service to definitively construe the tariff schedule through classification rulings. Neither the statutory authorization for the classification rulings, nor the Customs Service's practice in issuing such rulings, "reasonably suggest[ed] that Congress ever thought of [such] classification rulings as deserving the deference claimed for them." *Id.*, at 231. And in the absence of such a delegation, we concluded the interpretations adopted in those rulings were "beyond the *Chevron* pale." *Id.*, at 234.

Gonzales v. *Oregon*, 546 U. S. 243 (2006), is in the same line of precedent. In that case, as here, deference turned on whether a congressional delegation of interpretive authority reached a particular statutory ambiguity. The Attorney General claimed *Chevron* deference for his interpretation of the phrase "legitimate medical purpose" in the Controlled Substances Act (CSA) to exclude the prescribing and dispensing of controlled substances for the purpose of assisting suicide. *Id.*, at 254, 258. No one disputed that "legitimate medical purpose" was "ambiguous in the relevant sense." *Id.*, at 258. Nor did any Justice dispute that the Attorney General had been granted the power in the CSA to promulgate rules with the force of law. *Ibid.*; see *id.*, at 281 (SCALIA, J., dissenting). Nevertheless, the Court explained, "*Chevron* deference . . . is not accorded merely because the statute is ambiguous and an administrative official is involved." *Id.*, at 258. The regulation advancing the interpretation, we said, "must be promulgated pursuant to authority Congress has delegated to the official." *Ibid.* (citing *Mead*, *supra*, at 226–227).

In the CSA, Congress delegated to the Attorney General the authority to promulgate regulations "relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances," 21 U. S. C. § 821, or "for the efficient execution of his functions under [the CSA]," § 871(b). After considering the text, structure, and purpose of the Act, the Court concluded *on its own* that interpreting "legitimate medical purpose" fell under neither delegation. *Gonzales*, 546 U. S., at 258–269. Because the regulation "was not promulgated pursuant to the Attorney General's authority, its interpretation of 'legitimate medical purpose' d[id] not receive *Chevron* deference." *Id.*, at 268.

Adams Fruit, *Mead*, and *Gonzales* thus confirm that *Chevron* deference is based on, and finds legitimacy as, a congressional delegation of interpretive authority. An agency interpretation warrants such deference only if Con-

gress has delegated authority to definitively interpret a particular ambiguity in a particular manner. Whether Congress has done so must be determined by the court on its own before *Chevron* can apply. See H. Edwards, L. Elliott, & M. Levy, Federal Courts Standards of Review 168 (2d ed. 2013) ("a court decides *de novo* whether an agency has acted within the bounds of congressionally delegated authority" (citing *Mead*, *supra*, at 226–227, and *Gonzales*, *supra*, at 258)); Sales & Adler, The Rest Is Silence: *Chevron* Deference, Agency Jurisdiction, and Statutory Silences, 2009 U. Ill. L. Rev. 1497, 1564 (2009) ("if delegation really is antecedent to deference, as *Mead* insists, it cannot be that courts should defer to an agency's views on whether a delegation has taken place").

In other words, we do not defer to an agency's interpretation of an ambiguous provision unless Congress wants us to, and whether Congress wants us to is a question that courts, not agencies, must decide. Simply put, that question is "beyond the *Chevron* pale." *Mead*, *supra*, at 234.

IV

Despite these precedents, the FCC argues that a court need only locate an agency and a grant of general rulemaking authority over a statute. *Chevron* deference then applies, it contends, to the agency's interpretation of any ambiguity in the Act, including ambiguity in a provision said to carve out specific provisions from the agency's general rulemaking authority. If Congress intends to exempt part of the statute from the agency's interpretive authority, the FCC says, Congress "can ordinarily be expected to state that intent explicitly." Brief for Federal Respondents 30 (citing *American Hospital Assn.* v. *NLRB*, 499 U. S. 606 (1991)).

If a congressional delegation of interpretive authority is to support *Chevron* deference, however, that delegation must extend to the specific statutory ambiguity at issue. The appropriate question is whether the delegation covers the "spe-

cific provision" and "particular question" before the court. *Chevron*, 467 U. S., at 844. A congressional grant of authority over some portion of a statute does not necessarily mean that Congress granted the agency interpretive authority over all its provisions. See *Adams Fruit*, 494 U. S., at 650.

An example that might highlight the point concerns statutes that parcel out authority to multiple agencies, which "may be the norm, rather than an exception." Gersen, Overlapping and Underlapping Jurisdiction in Administrative Law, 2006 S. Ct. Rev. 201, 208; see, *e. g.*, *Gonzales*, *supra*, at 250–251 (describing shared authority over the CSA between the Attorney General and the Secretary of Health and Human Services); *Sutton* v. *United Air Lines, Inc.*, 527 U. S. 471, 478 (1999) (authority to issue regulations implementing the Americans with Disabilities Act "is split primarily among three Government agencies"). The Dodd-Frank Wall Street Reform and Consumer Protection Act, for example, authorizes rulemaking by at least eight different agencies. See Congressional Research Service, C. Copeland, Rulemaking Requirements and Authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act 7 (2010). When presented with an agency's interpretation of such a statute, a court cannot simply ask whether the statute is one that the agency administers; the question is whether authority over the particular ambiguity at issue has been delegated to the particular agency.

By the same logic, even when Congress provides interpretive authority to a single agency, a court must decide if the ambiguity the agency has purported to interpret with the force of law is one to which the congressional delegation extends. A general delegation to the agency to administer the statute will often suffice to satisfy the court that Congress has delegated interpretive authority over the ambiguity at issue. But if Congress has exempted particular provisions from that authority, that exemption must be respected, and

the determination whether Congress has done so is for the courts alone.

The FCC's argument that Congress "can ordinarily be expected to state that intent explicitly," Brief for Federal Respondents 30 (citing *American Hospital*, *supra*), goes to the merits of that determination, not to whether a court should decide the question *de novo* or defer to the agency. Indeed, that is how the Court in *American Hospital* considered it. It was in the process of "employing the traditional tools of statutory construction" that the Court said it would have expected Congress to speak more clearly if it had intended to exclude an entire subject area—employee units for collective bargaining—from the National Labor Relation Board's general rulemaking authority. *Id.*, at 613, 614. The Court concluded, after considering the language, structure, policy, and legislative history of the Act on its own—without deferring to the agency—that the meaning of the statute was "clear and contrary to the meaning advanced by petitioner." *Id.*, at 609–614. To be sure, the Court also noted that "[e]ven if we *could* find any ambiguity in [the provision] after employing the traditional tools of statutory construction, we would still defer to the Board's reasonable interpretation." *Id.*, at 614 (emphasis added). But that single sentence of dictum cannot carry the day for the FCC here.

V

As the preceding analysis makes clear, I do not understand petitioners to ask the Court—nor do I think it necessary—to draw a "specious, but scary-sounding" line between "big, important" interpretations on the one hand and "humdrum, run-of-the-mill" ones on the other. *Ante*, at 297, 304. Drawing such a line may well be difficult. Distinguishing between whether an agency's interpretation of an ambiguous term is reasonable and whether that term is for the agency to interpret is not nearly so difficult. It certainly did not confuse the FCC in this proceeding. Compare *In re Petition for*

Declaratory Ruling, 24 FCC Rcd. 13994, 14000–14003 (2009) (addressing the latter question), with *id.*, at 14003–14015 (addressing the former). Nor did it confound the Fifth Circuit. Compare 668 F. 3d, at 247–254 (deciding "whether the FCC possessed statutory authority to administer § 332(c)(7)(B)(ii)"), with *id.*, at 254–260 (considering "whether the 90- and 150-day time frames themselves also pass muster under *Chevron*"). More importantly, if the legitimacy of *Chevron* deference is based on a congressional delegation of interpretive authority, then the line is one the Court must draw.

The majority's hypothetical Common Carrier Acts do not demonstrate anything different. *Ante*, at 298–299. The majority states that in its second Common Carrier Act, Section 2 makes clear that Congress "'conferred interpretative power on the agency'" to interpret the ambiguous terms "common carrier" and "unreasonable condition." *Ante*, at 299 (quoting Brief for Petitioners in No. 11–1545, p. 14). Thus, it says, under anyone's theory a court must defer to the agency's reasonable interpretations of those terms. Correct.

The majority claims, however, that "petitioners' theory would accord the agency no deference" in its interpretation of the same ambiguous terms in the first Common Carrier Act. *Ante*, at 299. But as I understand petitioners' argument—and certainly in my own view—a court, in both cases, need only decide for itself whether Congress has delegated to the agency authority to interpret the ambiguous terms, before affording the agency's interpretation *Chevron* deference.

For the second Common Carrier Act, the answer is easy. The majority's hypothetical Congress has spoken clearly and specifically in Section 2 of the Act about its delegation of authority to interpret Section 1. As for the first Act, it is harder to analyze the question, given only one section of a presumably much larger statute. But if the first Common Carrier Act is like most agencies' organic statutes, I have no

reason to doubt that the agency would likewise have interpretive authority over the same ambiguous terms, and therefore be entitled to deference in construing them, just as with the second Common Carrier Act. There is no new "test" to worry about, cf. *ante*, at 306–307; courts would simply apply the normal rules of statutory construction.

That the question might be harder with respect to the first Common Carrier Act should come as no surprise. The second hypothetical Congress has more carefully defined the agency's authority than the first. *Whatever* standard of review applies, it is more difficult to interpret an unclear statute than a clear one. My point is simply that before a court can defer to the agency's interpretation of the ambiguous terms in either Act, it must determine for itself that Congress has delegated authority to the agency to issue those interpretations with the force of law.

The majority also expresses concern that adopting petitioners' position would undermine *Chevron*'s stable background rule against which Congress legislates. *Ante*, at 296. That, of course, begs the question of what that stable background rule is. See Merrill & Hickman, *Chevron*'s Domain, 89 Geo. L. J. 833, 910 (2001) ("Courts have never deferred to agencies with respect to questions such as whether Congress has delegated to an agency the power to act with the force of law through either legislative rules or binding adjudications. Similarly, it has never been maintained that Congress would want courts to give *Chevron* deference to an agency's determination that it is entitled to *Chevron* deference, or should give *Chevron* deference to an agency's determination of what types of interpretations are entitled to *Chevron* deference" (footnote omitted)).

VI

The Court sees something nefarious behind the view that courts must decide on their own whether Congress has delegated interpretative authority to an agency, before deferring to that agency's interpretation of law. What is afoot, ac-

cording to the Court, is a judicial power grab, with nothing less than "*Chevron* itself" as "the ultimate target." *Ante*, at 304.

The Court touches on a legitimate concern: *Chevron* importantly guards against the Judiciary arrogating to itself policymaking properly left, under the separation of powers, to the Executive. But there is another concern at play, no less firmly rooted in our constitutional structure. That is the obligation of the Judiciary not only to confine itself to its proper role, but to ensure that the other branches do so as well.

An agency's interpretive authority, entitling the agency to judicial deference, acquires its legitimacy from a delegation of lawmaking power from Congress to the Executive. Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive. See *Zivotofsky* v. *Clinton*, 566 U. S. 189, 196–198 (2012). In the present context, that means ensuring that the Legislative Branch has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is. That concern is heightened, not diminished, by the fact that the administrative agencies, as a practical matter, draw upon a potent brew of executive, legislative, and judicial power. And it is heightened, not diminished, by the dramatic shift in power over the last 50 years from Congress to the Executive—a shift effected through the administrative agencies.

We reconcile our competing responsibilities in this area by ensuring judicial deference to agency interpretations under *Chevron*—but only after we have determined on our own that Congress has given interpretive authority to the agency. Our "task is to fix the boundaries of delegated authority," Monaghan, 83 Colum. L. Rev., at 27; that is not a task we can delegate to the agency. We do not leave it to the agency to decide when it is in charge.

* * *

In these cases, the FCC issued a declaratory ruling interpreting the term "reasonable period of time" in 47 U. S. C. § 332(c)(7)(B)(ii). The Fifth Circuit correctly recognized that it could not apply *Chevron* deference to the FCC's interpretation unless the agency "possessed statutory authority to administer § 332(c)(7)(B)(ii)," but it erred by granting *Chevron* deference to the FCC's view on that antecedent question. See 668 F. 3d, at 248. Because the court should have determined on its own whether Congress delegated interpretive authority over § 332(c)(7)(B)(ii) to the FCC before affording *Chevron* deference, I would vacate the decision below and remand the cases to the Fifth Circuit to perform the proper inquiry in the first instance.

I respectfully dissent.

Syllabus

PPL CORP. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

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

No. 12–43. Argued February 20, 2013—Decided May 20, 2013

In 1997, the United Kingdom (U. K.), newly under Labour Party rule, imposed a one-time "windfall tax" on 32 U. K. companies privatized between 1984 and 1996 by the Conservative government. The companies had been sold to private parties through an initial sale of shares, known as a "flotation." Some of the companies were required to continue providing services for a fixed period at the same rates they had offered under government control. Many of those companies became dramatically more efficient and earned substantial profits in the process.

Petitioner PPL Corporation (PPL), part owner of a privatized U. K. company subject to the windfall tax, claimed a credit for its share of the bill in its 1997 federal income-tax return, relying on Internal Revenue Code § 901(b)(1), which states that any "income, war profits, and excess profits taxes" paid overseas are creditable against U. S. income taxes. Treasury Regulation § 1.901–2(a)(1) interprets this section to mean that a foreign tax is creditable if its "predominant character" "is that of an income tax in the U. S. sense." The Commissioner of Internal Revenue (Commissioner) rejected PPL's claim, but the Tax Court held that the U. K. windfall tax was creditable for U. S. tax purposes under § 901. The Third Circuit reversed.

Held: The U. K. tax is creditable under § 901. Pp. 334–344.

(a) Treasury Regulation § 1.901–2, which codifies longstanding doctrine dating back to *Biddle* v. *Commissioner*, 302 U. S. 573, 578–579, provides the relevant legal standard. First, a tax's "predominant character," or the normal manner in which a tax applies, is controlling. See *id.*, at 579. Thus, a foreign tax that operates as an income, war profits, or excess profits tax for most taxpayers is generally creditable. Second, foreign tax creditability depends not on the way a foreign government characterizes its tax but on whether the tax, if enacted in the U. S., would be an income, war profits, or excess profits tax. See § 1.901–2(a)(1)(ii). Giving further form to these principles, § 1.901–2(a)(3)(i) explains that a foreign tax's predominant character is that of a U. S. income tax "[i]f . . . the foreign tax is likely to reach net gain in the normal circumstances in which it applies." Three tests set forth in

the regulations provide guidance in making this assessment, see § 1.901–2(b)(1). The tests indicate that net gain consists of realized gross receipts reduced by significant costs and expenses attributable to such gross receipts, in combination known as net income. A foreign tax that reaches net income, or profits, is creditable. Pp. 334–336.

(b) The U. K. windfall tax's predominant character is that of an excess profits tax, a category of income tax in the U. S. sense. The Labour government's conception of "profit-making value" as a backward-looking analysis of historic profits is not a typical valuation method. Rather, it is a tax on realized net income disguised as a tax on the difference between two values, one of which is a fictitious value calculated using an imputed price-to-earnings ratio. The substance of the windfall tax confirms this conclusion. When rearranged, the U. K.'s formula demonstrates that the windfall tax is economically equivalent to the difference between the profits each company *actually* earned and the amount the Labour government believed it *should* have earned given its flotation value. For most of the relevant companies, the U. K.'s formula's substantive effect was to impose a 51.71-percent tax on all profits above a threshold, a classic excess profits tax. The Commissioner claims that any algebraic rearrangement is improper because U. S. courts must take the foreign tax rate as written and accept whatever tax base the foreign tax purports to adopt. But such a rigid construction cannot be squared with the black-letter principle that "tax law deals in economic realities, not legal abstractions." *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 315. Given the artificiality of the U. K.'s calculation method, this Court follows substance over form and recognizes that the windfall tax is nothing more than a tax on actual profits above a threshold. Pp. 336–341.

(c) The Commissioner's additional arguments in support of his position are similarly unpersuasive. Pp. 341–343.

665 F. 3d 60, reversed.

THOMAS, J., delivered the opinion for a unanimous Court. SOTOMAYOR, J., filed a concurring opinion, *post*, p. 344.

Paul D. Clement argued the cause for petitioners. With him on the briefs were *Erin E. Murphy*, *Ashley C. Parrish*, *Richard E. May*, *Mark B. Bierbower*, and *Timothy L. Jacobs.*

Ann O'Connell argued the cause for respondent. With her on the brief were *Solicitor General Verrilli*, *Assistant*

Attorney General Keneally, Deputy Solicitor General Stewart, Thomas J. Clark, and *Francesca U. Tamami.**

JUSTICE THOMAS delivered the opinion of the Court.

In 1997, the United Kingdom (U. K.) imposed a one-time "windfall tax" on 32 U. K. companies privatized between 1984 and 1996. This case addresses whether that tax is creditable for U. S. tax purposes. Internal Revenue Code § 901(b)(1) states that any "income, war profits, and excess profits taxes" paid overseas are creditable against U. S. income taxes. 26 U. S. C. § 901(b)(1). Treasury Regulations interpret this section to mean that a foreign tax is creditable if its "predominant character" "is that of an income tax in the U. S. sense." Treas. Reg. § 1.901–2(a)(1)(ii), 26 CFR § 1.901–2(a)(1) (1992). Consistent with precedent and the Tax Court's analysis below, we apply the predominant character test using a commonsense approach that considers the substantive effect of the tax. Under this approach, we hold that the U. K. tax is creditable under § 901 and reverse the judgment of the Court of Appeals for the Third Circuit.

I

A

During the 1980's and 1990's, the U. K.'s Conservative Party controlled Parliament and privatized a number of

*Briefs of *amici curiae* urging reversal were filed for American Electric Power Co., Inc., by *Alan I. Horowitz* and *Kevin L. Kenworthy*; for Entergy Corp. et al. by *Stephen D. Gardner, Benjamin P. Oklan, Charles A. Rothfeld, Joseph T. Henderson, Daniel C. Brauweiler, Casey M. Baker,* and *David J. Dziak*; and for the Southeastern Legal Foundation, Inc., et al. by *Steven G. Bradbury, Robin S. Conrad, Rachel Brand, Shannon Lee Goessling, Ilya Shapiro,* and *Clint Bolick.*

Michael J. Graetz filed a brief for Anne Alstott et al. as *amici curiae* urging affirmance.

A brief of *amici curiae* was filed for Patrick J. Smith, by *Mr. Smith, pro se.*

government-owned companies. These companies were sold to private parties through an initial sale of shares, known as a "flotation." As part of privatization, many companies were required to continue providing services at the same rates they had offered under government control for a fixed period, typically their first four years of private operation. As a result, the companies could only increase profits during this period by operating more efficiently. Responding to market incentives, many of the companies became dramatically more efficient and earned substantial profits in the process.

The U. K.'s Labour Party, which had unsuccessfully opposed privatization, used the companies' profitability as a campaign issue against the Conservative Party. In part because of campaign promises to tax what it characterized as undue profits, the Labour Party defeated the Conservative Party at the polls in 1997. Prior to coming to power, Labour Party leaders hired accounting firm Arthur Andersen to structure a tax that would capture excess, or "windfall," profits earned during the initial years in which the companies were prohibited from increasing rates. Parliament eventually adopted the tax, which applied only to the regulated companies that were prohibited from raising their rates. See Finance (No. 2) Act, 1997, ch. 58, pt. I, cls. 1 and 2(5) (Eng.) (U. K. Windfall Tax Act). It imposed a 23-percent tax on any "windfall" earned by such companies. *Id.*, cl. 1(2). A separate schedule "se[t] out how to quantify the windfall from which a company was benefitting." *Id.*, cl. 1(3). See *id.*, sched. 1.

In the proceedings below, the parties stipulated that the following formula summarizes the tax imposed by the Labour Party:

$$\text{Tax} = 23\% \left[\left(365 \times \left(\frac{\text{P}}{\text{D}}\right) \times 9\right) - \text{FV}\right]$$

D equals the number of days a company was subject to rate regulation (also known as the "initial period"), P equals the

total profits earned during the initial period, and FV equals the flotation value, or market capitalization value after sale. For 27 of the 32 companies subject to the tax, the number of days in the initial period was 1,461 days (or four years). Of the remaining five companies, one had no tax liability because it did not earn any windfall profits. Three had initial periods close to four years (1,463, 1,456, and 1,380 days). The last was privatized shortly before the Labour Party took power and had an initial period of only 316 days.

The number 9 in the formula was characterized as a price-to-earnings ratio and was selected because it represented the lowest average price-to-earnings ratio of the 32 companies subject to the tax during the relevant period.[1] See *id.*, sched. 1, § 1, cl. 2(3); Brief for Respondent 7. The statute expressly set its value, and that value was the same for all companies. U. K. Windfall Tax Act, sched. 1, § 1, cl. 2(3). The only variables that changed in the windfall tax formula for all the companies were profits (P) and flotation value (FV); the initial period (D) varied for only a few of the companies subject to the tax. The Labour government asserted that the term [365 × (P / D) × 9] represented what the flotation value *should have been* given the assumed price-to-earnings ratio of 9. Thus, it claimed (and the Commissioner here reiterates) that the tax was simply a 23-percent tax on the difference between what the companies' flotation values *should have been* and what they actually were.

B

Petitioner PPL Corporation (PPL) was an owner, through a number of subsidiaries, of 25 percent of South Western Electricity plc, 1 of 12 government-owned electric companies that were privatized in 1990 and that were subject to the

[1] A price-to-earnings ratio "is defined as the stock price divided by annual earnings per share. It is typically calculated by dividing the current stock price by the sum of the previous four quarters of earnings." 3 New Palgrave Dictionary of Money & Finance 176 (1992).

tax. See 135 T. C. 304, 307, App. (2010) (diagram of PPL corporate structure in 1997). South Western Electricity's total U. K. windfall tax burden was £90,419,265. In its 1997 federal income-tax return, PPL claimed a credit under § 901 for its share of the bill. The Commissioner of Internal Revenue (Commissioner) rejected the claim, but the Tax Court held that the U. K. windfall tax was creditable for U. S. tax purposes under § 901. See *id.*, at 342. The Third Circuit reversed. 665 F. 3d 60, 68 (2011). We granted certiorari, 568 U. S. 977 (2012), to resolve a Circuit split concerning the windfall tax's creditability under § 901. Compare 665 F. 3d, at 68, with *Entergy Corp. & Affiliated Subsidiaries* v. *Commissioner*, 683 F. 3d 233, 239 (CA5 2012).

II

Internal Revenue Code § 901(b)(1) provides that "[i]n the case of . . . a domestic corporation, the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States" shall be creditable.[2] Under relevant Treasury Regulations, "[a] foreign levy is an income tax if and only if . . . [t]he predominant character of that tax is that of an income tax in the U. S. sense." 26 CFR § 1.901–2(a)(1). The parties agree that Treasury Regulation § 1.901–2 applies to this case. That regulation codifies longstanding doctrine dating back to *Biddle* v. *Commissioner*, 302 U. S. 573, 578–579 (1938), and provides the relevant legal standard.

The regulation establishes several principles relevant to our inquiry. First, the "predominant character" of a tax, or the normal manner in which a tax applies, is controlling.

[2] Prior to enactment of what is now § 901, income earned overseas was subject to taxes not only in the foreign country but also in the United States. See *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 7 (1932). The relevant text making "income, war-profits and excess-profits taxes" creditable has not changed since 1918. See Revenue Act of 1918, §§ 222(a)(1), 238(a), 40 Stat. 1073, 1080.

See *id.*, at 579 ("We are here concerned only with the 'standard' or normal tax"). Under this principle, a foreign tax that operates as an income, war profits, or excess profits tax in most instances is creditable, even if it may affect a handful of taxpayers differently. Creditability is an all or nothing proposition. As the Treasury Regulations confirm, "a tax either is or is not an income tax, in its entirety, for all persons subject to the tax." 26 CFR § 1.901–2(a)(1).

Second, the way a foreign government characterizes its tax is not dispositive with respect to the U. S. creditability analysis. See § 1.901–2(a)(1)(ii) (foreign tax creditable if predominantly "an income tax in the U. S. sense"). In *Biddle*, the Court considered the creditability of certain U. K. taxes on stock dividends under the substantively identical predecessor to § 901. The Court recognized that "there is nothing in [the statute's] language to suggest that in allowing the credit for foreign tax payments, a shifting standard was adopted by reference to foreign characterizations and classifications of tax legislation." 302 U. S., at 578–579. See also *United States* v. *Goodyear Tire & Rubber Co.*, 493 U. S. 132, 145 (1989) (noting in interpreting 26 U. S. C. § 902 that *Biddle* is particularly applicable "where a contrary interpretation would leave" tax interpretation "to the varying tax policies of foreign tax authorities"); *Heiner* v. *Mellon*, 304 U. S. 271, 279, and n. 7 (1938) (state-law definitions generally not controlling in federal tax context). Instead of the foreign government's characterization of the tax, the crucial inquiry is the tax's economic effect. See *Biddle*, *supra*, at 579 (inquiry is "whether [a tax] is the substantial equivalent of payment of the tax as those terms are used in our own statute"). In other words, foreign tax creditability depends on whether the tax, if enacted in the U. S., would be an income, war profits, or excess profits tax.

Giving further form to these principles, Treasury Regulation § 1.901–2(a)(3)(i) explains that a foreign tax's predominant character is that of a U. S. income tax "[i]f . . . the

foreign tax is likely to reach net gain in the normal circumstances in which it applies." The regulation then sets forth three tests for assessing whether a foreign tax reaches net gain. A tax does so if, "judged on the basis of its predominant character, [it] satisfies each of the realization, gross receipts, and net income requirements set forth in paragraphs (b)(2), (b)(3) and (b)(4), respectively, of this section." § 1.901–2(b)(1).[3] The tests indicate that net gain (also referred to as net income) consists of realized gross receipts reduced by significant costs and expenses attributable to such gross receipts. A foreign tax that reaches net income, or profits, is creditable.

III

A

It is undisputed that net income is a component of the U. K.'s "windfall tax" formula. See Brief for Respondent 23 ("The windfall tax takes into account a company's profits during its four-year initial period"). Indeed, annual profit is

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[3] The relevant provisions provide as follows:

"A foreign tax satisfies the realization requirement if, judged on the basis of its predominant character, it is imposed—(A) Upon or subsequent to the occurrence of events ('realization events') that would result in the realization of income under the income tax provisions of the Internal Revenue Code." 26 CFR § 1.901–2(b)(2)(i).

"A foreign tax satisfies the gross receipts requirement if, judged on the basis of its predominant character, it is imposed on the basis of—(A) Gross receipts; or (B) Gross receipts computed under a method that is likely to produce an amount that is not greater than fair market value." § 1.901–2(b)(3)(i).

"A foreign tax satisfies the net income requirement if, judged on the basis of its predominant character, the base of the tax is computed by reducing gross receipts . . . to permit—(A) Recovery of the significant costs and expenses (including significant capital expenditures) attributable, under reasonable principles, to such gross receipts; or (B) Recovery of such significant costs and expenses computed under a method that is likely to produce an amount that approximates, or is greater than, recovery of such significant costs and expenses." § 1.901–2(b)(4)(i).

a variable in the tax formula. U. K. Windfall Tax Act, sched. 1, § 1, cls. 2(2) and 5. It is also undisputed that there is no meaningful difference for our purposes in the accounting principles by which the U. K. and the U. S. calculate profits. See Brief for Petitioners 47. The disagreement instead centers on how to characterize the tax formula the Labour Party adopted.

The Third Circuit, following the Commissioner's lead, believed it could look no further than the tax formula that the Parliament enacted and the way in which the Labour government characterized it. Under that view, the windfall tax must be considered a tax on the difference between a company's flotation value (the total amount investors paid for the company when the government sold it) and an imputed "profit-making value," defined as a company's "average annual profit during its 'initial period' . . . times 9, the assumed price-to-earnings ratio." 665 F. 3d, at 65. So characterized, the tax captures a portion of the difference between the price at which each company was sold and the price at which the Labour government believed each company *should have been* sold given the actual profits earned during the initial period. Relying on this characterization, the Third Circuit believed the windfall tax failed at least the Treasury Regulation's realization and gross receipts tests because it reached some artificial form of valuation instead of profits. See *id.*, at 67, and n. 3.

In contrast, PPL's position is that the substance of the windfall tax is that of an income tax in the U. S. sense. While recognizing that the tax ostensibly is based on the difference between two values, it argues that every "variable" in the windfall tax formula except for profits and flotation value is fixed (at least with regard to 27 of the 32 companies). PPL emphasizes that the only way the Labour government was able to calculate the imputed "profit-making value" at which it claimed companies should have been privatized was by looking after the fact at the *actual profits*

earned by each company. In PPL's view, it matters not how the U. K. chose to arrange the formula or what it *claimed* to be taxing, because a tax based on profits above some threshold is an excess profits tax, regardless of how it is mathematically arranged or what labels foreign law places on it. PPL, thus, contends that the windfall taxes it paid meet the Treasury Regulation's tests and are creditable under § 901.

We agree with PPL and conclude that the predominant character of the windfall tax is that of an excess profits tax, a category of income tax in the U. S. sense. It is important to note that the Labour government's conception of "profit-making value" as a backward-looking analysis of historic profits is not a recognized valuation method; instead, it is a fictitious value calculated using an imputed price-to-earnings ratio. At trial, one of PPL's expert witnesses explained that "'9 is not an accurate P/E multiple, and it is not applied to current or expected future earnings.'" 135 T. C., at 326, n. 17 (quoting testimony). Instead, the windfall tax is a tax on realized net income disguised as a tax on the difference between two values, one of which is completely fictitious. See App. 251, Report ¶1.7 ("[T]he *value in profit making terms* described in the wording of the act . . . is not a real value: it is rather a construct based on realised profits that would not have been known at the date of privatisation").

The substance of the windfall tax confirms the accuracy of this observation. As already noted, the parties stipulated that the windfall tax could be calculated as follows:

$$\text{Tax} = 23\% \left[\left(365 \times \left(\frac{\text{P}}{\text{D}}\right) \times 9\right) - \text{FV}\right]$$

This formula can be rearranged algebraically to the following formula, which is mathematically and substantively identical:[4]

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[4] The rearrangement requires only basic algebraic manipulation. First, because order of operations does not matter for multiplication and division, the formula is rearranged to the following:

$$\text{Tax} = \left[\frac{(365 \times 9 \times 23\%)}{\text{D}}\right] \times \left\{\text{P} - \left[\text{FV} \times \frac{\text{D}}{(365 \times 9)}\right]\right\}$$

The next step is to substitute the actual number of days for D. For 27 of the 32 companies subject to the windfall tax, the number of days was identical, 1,461 (or four years). Inserting that amount for D in the formula yields the following:

$$\text{Tax} = \left[\frac{(365 \times 9 \times 23\%)}{1{,}461}\right] \times \left\{\text{P} - \left[\text{FV} \times \frac{1{,}461}{(365 \times 9)}\right]\right\}$$

Simplifying the formula by multiplying and dividing numbers reduces the formula to:

$$\text{Tax} = 51.71\% \times \left[\text{P} - \left(\frac{\text{FV}}{9}\right) \times 4.0027\right]$$

As noted, FV represents the value at which each company was privatized. FV is then divided by 9, the arbitrary "price-to-earnings ratio" applied to every company. The economic effect is to convert flotation value into the profits a company *should* have earned given the assumed price-to-earnings ratio. See 135 T. C., at 327 ("'In effect, the way the tax works is to say that the amount of profits you're allowed in any year before you're subject to tax is equal to one-ninth of the flotation price. After that, profits are deemed excess, and there is a tax'" (quoting testimony from the treasurer of South Western Electricity plc)). The annual profits are then multiplied by 4.0027, giving the total "acceptable" profits (as opposed to windfall profit) that each company's flotation value entitled it to earn during the initial period given the artificial price-to-earnings ratio of 9. This

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$$\text{Tax} = 23\% \left[\left(365 \times 9 \times \left(\frac{\text{P}}{\text{D}}\right)\right) - \text{FV}\right]$$

Next, everything outside the brackets is multiplied by $\left[\frac{(365\times9)}{\text{D}}\right]$, and everything inside the brackets is multiplied by the inverse, $\left[\frac{\text{D}}{(365\times9)}\right]$. The effect is the same as multiplication by the number one (since $\left\{\left[\frac{(365\times9)}{\text{D}}\right]\times\left[\frac{\text{D}}{(365\times9)}\right]\right\} = 1$). That multiplication yields the formula in the text.

fictitious amount is finally subtracted from *actual* profits, yielding the excess profits, which were taxed at an effective rate of 51.71 percent.

The rearranged tax formula demonstrates that the windfall tax is economically equivalent to the difference between the profits each company *actually* earned and the amount the Labour government believed it *should* have earned given its flotation value. For the 27 companies that had 1,461-day initial periods, the U. K. tax formula's substantive effect was to impose a 51.71-percent tax on all profits earned above a threshold. That is a classic excess profits tax. See, *e. g.*, Act of Mar. 3, 1917, ch. 159, Tit. II, § 201, 39 Stat. 1000 (8-percent tax imposed on excess profits exceeding the sum of $5,000 plus 8 percent of invested capital).

Of course, other algebraic reformulations of the windfall tax equation are possible. See 665 F. 3d, at 66; Brief for Anne Alstott et al. as *Amici Curiae* 21–23 (Alstott Brief). The point of the reformulation is not that it yields a particular percentage (51.75 percent for most of the companies). Rather, the algebraic reformulations illustrate the economic substance of the tax and its interrelationship with net income.

The Commissioner argues that any algebraic rearrangement is improper, asserting that U. S. courts must take the foreign tax rate as written and accept whatever tax base the foreign tax purports to adopt. Brief for Respondent 28. As a result, the Commissioner claims that the analysis begins and ends with the Labour government's choice to characterize its tax base as the difference between "profit-making value" and flotation value. Such a rigid construction is unwarranted. It cannot be squared with the black-letter principle that "tax law deals in economic realities, not legal abstractions." *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 315 (1956). Given the artificiality of the U. K.'s method of calculating purported "value," we follow substance over form and recognize that the windfall tax

is nothing more than a tax on actual profits above a threshold.

B

We find the Commissioner's other arguments unpersuasive as well. First, the Commissioner attempts to buttress the argument that the windfall tax is a tax on value by noting that some U. S. gift and estate taxes use actual, past profits to estimate value. Brief for Respondent 17–18 (citing 26 CFR § 20.2031–3 (2012) and 26 U. S. C. § 2032A). This argument misses the point. In the case of valuation for gift and estate taxes, past income may be used to estimate future income streams. But, it is *future* revenue-earning potential, reduced to market value, that is subject to taxation. The windfall profits tax, by contrast, undisputedly taxed *past*, realized net income alone.

The Commissioner contends that the U. K. was not trying to establish valuation as of the 1997 date on which the windfall tax was enacted but instead was attempting to derive a proper flotation valuation as of each company's flotation date. Brief for Respondent 21. The Commissioner asserts that there was no need to estimate future income (as in the case of the gift or estate recipient) because actual revenue numbers for the privatized companies were available. *Ibid.* That argument also misses the mark. It is true, of course, that the companies might have been privatized at higher flotation values had the government recognized how efficient—and thus how profitable—the companies would become. But, the windfall tax requires an underlying concept of value (based on actual *ex post* earnings) that would be alien to any valuer. Taxing actual, realized net income in hindsight is not the same as considering past income for purposes of estimating future earning potential.

The Commissioner's reliance on Example 3 to the Treasury Regulation's gross receipts test is also misplaced. *Id.*, at 37–38; 26 CFR § 1.901–2(b)(3)(ii), Ex. 3. That example posits a petroleum tax in which "gross receipts from extraction in-

come are deemed to equal 105 percent of the fair market value of petroleum extracted. This computation is designed to produce an amount that is greater than the fair market value of actual gross receipts." *Ibid.* Under the example, a tax based on inflated gross receipts is not creditable.

The Third Circuit believed that the same type of algebraic rearrangement used above could also be used to rearrange a tax imposed on Example 3. It hypothesized:

> "Say that the tax rate on the hypothetical extraction tax is 20%. It is true that a 20% tax on 105% of receipts is mathematically equivalent to a 21% tax on 100% of receipts, the latter of which would satisfy the gross receipts requirement. PPL proposes that we make the same move here, increasing the tax rate from 23% to 51.75% so that there is no multiple of receipts in the tax base. But if the regulation allowed us to do that, the example would be a nullity. *Any* tax on a multiple of receipts or profits could satisfy the gross receipts requirement, because we could reduce the starting point of its tax base to 100% of gross receipts by imagining a higher tax rate." 665 F. 3d, at 67.

The Commissioner reiterates the Third Circuit's argument. Brief for Respondent 37–38.

There are three basic problems with this approach. As the Fifth Circuit correctly recognized, there is a difference between imputed and actual receipts. "Example 3 hypothesizes a tax on the extraction of petroleum where the income value of the petroleum is deemed to be . . . deliberately greater than actual gross receipts." *Entergy Corp.*, 683 F. 3d, at 238. In contrast, the windfall tax depends on *actual* figures. *Ibid.* ("There was no need to calculate imputed gross receipts; gross receipts were actually known"). Example 3 simply addresses a different foreign taxation issue.

The argument also incorrectly equates imputed *gross receipts* under Example 3 with *net income*. See 665 F. 3d, at 67 ("*[a]ny* tax on a multiple of receipts or profits"). As noted, a tax is creditable only if it applies to realized gross receipts *reduced by significant costs and expenses attributable to such gross receipts*. 26 CFR § 1.901–2(b)(4)(i). A tax based solely on gross receipts (like the Third Circuit's analysis) would be noncreditable because it would fail the Treasury Regulation's *net income* requirement.

Finally, even if expenses were subtracted from imputed gross receipts before a tax was imposed, the effect of inflating only gross receipts would be to inflate revenue while holding expenses (the other component of net income) constant. A tax imposed on inflated income minus actual expenses is not the same as a tax on net income.[5]

For these reasons, a tax based on imputed gross receipts is not creditable. But, as the Fifth Circuit explained in rejecting the Third Circuit's analysis, Example 3 is "facially irrelevant" to the analysis of the U. K. windfall tax, which is based on true net income. *Entergy Corp.*, *supra*, at 238.[6]

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[5] Mathematically, the Third Circuit's hypothetical was incomplete. It should have been:

20% [105% (Gross Receipts) – Expenses] = Tax

But 105 percent of gross receipts minus expenses is *not* net income. Thus, the 20-percent tax is not a tax on net income and is not creditable.

[6] An *amici* brief argues that because two companies had initial periods substantially shorter than four years, the predominant character of the U. K. windfall tax was not a tax on income in the U. S. sense. See Alstott Brief 29 (discussing Railtrack Group plc and British Energy plc). The argument amounts to a claim that two outliers changed the predominant character of the U. K. tax. See 135 T. C. 304, 340, n. 33 (2010) (rejecting this view).

The Commissioner admitted at oral argument that it did not preserve this argument, a fact reflected in its briefing before this Court and in the Third Circuit. See Tr. of Oral Arg. 35–36; Opening Brief for Appellant and Reply Brief for Appellant in No. 11–1069 (CA3). We therefore express no view on its merits.

* * *

The economic substance of the U. K. windfall tax is that of a U. S. income tax. The tax is based on net income, and the fact that the Labour government chose to characterize it as a tax on the difference between two values is not dispositive under Treasury Regulation § 1.901–2. Therefore, the tax is creditable under § 901.

The judgment of the Third Circuit is reversed.

It is so ordered.

JUSTICE SOTOMAYOR, concurring.

The Court's conclusion that the windfall tax is a creditable excess profits tax under 26 U. S. C. § 901(b)(1) depends on two interrelated analytic moves: first, restricting the "predominant character" analysis to those companies that shared an "initial period" of rate regulation of 1,461 days; and second, treating the tax's initial period variable as fixed. See *ante*, at 337–338. But there is a different way of looking at this case. If the predominant character inquiry is expanded to include the five companies that had different initial periods, especially those with much shorter initial periods, it becomes impossible to rewrite the windfall tax as an excess profits tax. Instead, it becomes clear that the windfall tax is functionally a tax on value. But because the Government took the position at oral argument that the predominant character inquiry should disregard such "outlie[r]" companies, see Tr. of Oral Arg. 38–39, and this argument is therefore only pressed by *amici*, Brief for Anne Alstott et al. as *Amici Curiae* 28–30 (hereinafter Alstott Brief), I reserve consideration of this argument for another day and another context and join the Court's opinion.

* * *

The Internal Revenue Code provides that "income, war profits, and excess profits taxes" paid to a foreign country

are creditable. 26 U. S. C. § 901(b)(1). Whether a foreign tax falls within one of these categories depends on whether its "predominant character . . . is that of an income tax in the U. S. sense." 26 CFR § 1.901–2(a)(1)(ii) (2010). As the Court explains, there are three components to this inquiry, *ante*, at 334–336, but at its core the inquiry simply asks whether a foreign tax resembles a typical income, war profits, or excess profits tax, *ante*, at 335.

Importantly, though, the relevant Treasury Regulations also provide that a foreign tax "is or is not an income tax, in its entirety, for all persons subject to the tax." 26 CFR § 1.901–2(a)(1). One way to understand this language is that for a tax to be classed as a creditable income tax, its predominant character must be that of an income tax with respect to "all persons subject to the tax." Of course, among the many persons subject to a tax, some may face tax burdens different from the majority of affected taxpayers. The challenge in applying predominant character analysis will sometimes lie in determining whether and how such outlier taxpayers affect the characterization of a given tax.[1]

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[1] For example, some taxes may produce outliers that might suggest that the tax is not an income tax, when in fact the tax is attempting to reach net gain and therefore has the predominant character of an income tax. This situation often arises when a tax relies on imperfect estimates and assumptions in attempting to calculate net gain. Such a tax strives to treat similarly situated taxpayers the same but fails to do so only because the estimated component inadvertently affects some taxpayers differently. A situation of this kind occurred in *Texasgulf, Inc.* v. *Commissioner*, 172 F. 3d 209 (CA2 1999). In that case, a Canadian mining tax did not permit taxpayers to deduct their specific expenses, but did permit them to deduct a fixed "processing allowance." *Id.*, at 211–213. The taxpayer argued that the tax was creditable because the processing allowance was an attempt to reach net income, gross income minus expenses, by using "'a method that is likely to produce an amount that approximates, or is greater than, recovery of such significant costs and expenses.'" *Id.*, at 215 (quoting 26 CFR § 1.901–2(b)(4)(i)(B) (1999)). To support its argument, the taxpayer introduced empirical evidence that roughly 85% of companies facing mining tax liability had nonrecoverable expenses less

The windfall tax at issue here exemplifies this problem. As the Court notes, *ante,* at 332, the parties stipulated to the following form of the windfall tax:

$$Tax = 23\% \left[\left(365 \times \frac{P}{D} \times 9\right) - FV\right]$$

If the predominant character analysis is restricted to those 27 companies that share an identical initial period length, then it makes sense to fix D at 1,461, as the Court does. *Ante,* at 338–340. And from there, it is just a matter of basic algebra, *ante,* at 338–339, and n. 4, to show that these companies' tax liability is equal to total profits minus a threshold amount (in this case, 44.47% of each company's flotation value) multiplied by a percentage-form tax rate: Tax = 51.71% × [P – (44.47% × FV)]. See *ante,* at 338–340; Brief for Petitioners 10. Because an excess profits tax is generally a tax levied on the profits of a business beyond a particular threshold, see Wells, Legislative History of Excess Profits Taxation in the United States in World Wars I and II, 4 Nat. Tax J. 237, 243 (1951), it appears to follow that the windfall tax can properly be characterized as an excess profits tax.

But not all of the 32 affected companies had an initial period length of 1,461 days; 5 of the companies had different initial periods. See App. 34, 39–41. When these different initial period values are inserted into the formulation proposed by PPL, two results follow. First, these companies

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than the processing allowance. *Texasgulf, Inc.*, 172 F. 3d, at 215–216. The Court of Appeals agreed with the taxpayer that the tax was a creditable income tax because it was clear that the mining tax was attempting to reach net income, albeit by using an estimate to calculate deductions. *Id.*, at 216–217. This result is sensible: A company that happens to have deductible expenses greater than the fixed amount set by the processing allowance is not an instructive outlier regarding the mining taxes predominant character. The mining tax is attempting to reach that company's net income, but fails to do so only because it relies on an approximate value for deductions.

have tax rates different from the 51.71% rate the Court calculates for the 27 other companies. Second, their excess profits threshold also varies.

For example, consider Railtrack Group, a clear outlier with an initial period of 316 days. Inserting this value into the stipulated formula yields the following:

$$Tax = 23\% \times \left[\left(365 \times \frac{P}{316} \times 9\right) - FV\right]$$

Applying the Court's algebra, this formula can be reduced to the following: Railtrack Group's Tax = 239.10% × [P – (9.62% × FV)]. Railtrack Group's "effective" tax rate and its excess profits threshold (239.10% and 9.62%, respectively) are very different from those companies with the common initial period length of 1,461 days (51.71% and 44.47%). See *ante*, at 340. Railtrack Group is not alone in this respect: four other companies also had tax rates and excess profits thresholds that differed from the majority of affected companies. See App. 34, 38–40.[2]

Once these outlier companies are included in the creditability analysis, it becomes clear that the windfall tax "is *not* an income tax . . . for all persons" subject to it. 26 CFR § 1.901–2(a)(1) (emphasis added). A typical income tax applies a fixed percentage rate to a base income that varies across taxpayers. An excess profits tax does the same, but incorporates a threshold, which may or may not vary across taxpayers, to exempt a portion of the base from taxa-

[2] The figures for the other four companies are as follows: Powergen plc, which had an initial period of 1,463 days, had a tax rate of 51.64% and an excess profits threshold of 44.54%, App. 38–39; National Power plc, which had an initial period of 1,456 days, had a rate of 51.89% and a threshold of 44.32%, *id.*, at 39–40; Northern Ireland Electricity plc, which had an initial period of 1,380 days, had a rate of 54.75% and a threshold of 42.01%, *id.*, at 40; and British Energy plc, which had an initial period of 260 days, had a rate of 290.60% and a threshold of 7.91%, *id.*, at 34. British Energy, however, did not end up having any windfall tax liability. *Id.*, at 33.

tion. In contrast, here both of the rate and threshold components vary from company to company according to the D variable.[3]

Seen through this lens, the windfall tax is really a tax on average profits. See Alstott Brief 28–30. Under the parties' stipulated form of the windfall tax, each company pays a fixed tax rate of 23% on a base that is calculated by first multiplying a company's daily average profits during its initial period (*i. e.*, P/D, or total profits over the initial period divided by the length of the initial period) by a fixed price-to-earnings ratio; and then subtracting that company's flotation value FV. See *ante*, at 332. In practice, this means that, for example, a company that earns $100 million over 1,461 days would pay approximately the same amount of taxes as a company that has earned $25 million over 365 days. These two companies would have almost the same *average* profits. See Alstott Brief 28. This is not how an income tax works.

The difference between a tax on profits and tax on average profits is especially significant for properly characterizing a tax such as the windfall tax. Average daily profits multiplied by a price-to-earnings ratio, rather than being a way of approximating income, is a way of approximating value.[4]

[3] At oral argument, PPL contended that an excess profits tax in which the excess profits threshold varies according to market capitalization would also have an effective tax rate that varies across taxpayers but remains creditable. Tr. of Oral Arg. 26–27. That might be true, but that does not describe the situation here. In PPL's hypothetical, any shift in the effective tax rate depends on the profits threshold; here, under PPL's version of the windfall tax, both the effective tax rate and the profits threshold move proportionately to a company's initial period length.

[4] Petitioners suggested at oral argument that because some of the outlier taxpayers may have been subject to a more favorable regulatory regime in the wake of their privatization, their outsized tax rates are less meaningful because they could recoup their windfall tax burdens. See *id.*, at 16–17. Even accepting the premise of this argument, it still does not change the fact that in "substance," *ante*, at 338, the tax functioned as value tax for these companies.

See Thompson, A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions, 21 J. Corp. L. 457, 532–533 (1996) (describing similar valuation techniques using price-to-earnings ratios). Accordingly, incorporating an outlier like Railtrack Group into the predominant character analysis suggests that the windfall tax is a tax on a company's value. Railtrack Group and the companies like it are not random outliers, Brief for Petitioners 38, n. 3, but instead are critical pieces of data for understanding how the tax actually functioned as a matter of "economic realit[y]." *Commissioner* v. *Southwest Exploration Co.*, 350 U. S. 308, 315 (1956).

This argument, however, rests on the premise that because the relevant regulations state that "a tax either is or is not an income tax, in its entirety, for all persons subject to the tax," 26 CFR § 1.901–2(a)(1)(ii), a tax's predominant character must be as an income tax for *all* taxpayers. But if a tax only needs to be an income tax for "a substantial number of taxpayers" and does not have to "satisfy the predominant character test in its application to all taxpayers," *Exxon Corp.* v. *Commissioner*, 113 T. C. 338, 352 (1999), then this average profits argument cannot get off the ground. Under this reading, the regulations tell courts to treat outliers like Railtrack Group as flukes.

At oral argument, the Government apparently rejected the notion that "outliers" like Railtrack Group are relevant to creditability analysis. See Tr. of Oral Arg. 35–39. The Government also did not argue these outliers' relevance before the Court of Appeals, *ante*, at 343, n. 6, and so this argument, and the regulatory interpretation it depends upon, has only been presented to this Court by *amici*, see Alstott Brief 17–18, 28–30. We are not barred from considering statutory and regulatory interpretations raised in an *amicus* brief, but we should be "reluctant to do so," *Davis* v. *United States*, 512 U. S. 452, 457, n. (1994), when the issue is one of first

impression and the Federal Government has staked out what appears to be a contrary position. Thus, while I find this argument persuasive, I do not base my analysis of this case on it and therefore concur in the Court's opinion.

Syllabus

METRISH, WARDEN *v.* LANCASTER

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

No. 12–547. Argued April 24, 2013—Decided May 20, 2013

On April 23, 1993, respondent Burt Lancaster, a former police officer with a long history of severe mental-health problems, shot and killed his girlfriend. At his 1994 jury trial in Michigan state court, Lancaster asserted a defense of diminished capacity. Under then-prevailing Michigan Court of Appeals precedent, the diminished-capacity defense permitted a legally sane defendant to present evidence of mental illness to negate the specific intent required to commit a particular crime. Apparently unpersuaded by Lancaster's defense, the jury convicted him of first-degree murder and a related firearm offense. Lancaster, however, later obtained federal habeas relief from these convictions.

By the time of Lancaster's retrial, the Michigan Supreme Court had rejected the diminished-capacity defense in its 2001 decision in *Carpenter*. Although the murder with which Lancaster was charged occurred several years before *Carpenter* was decided, the judge at his second trial applied *Carpenter* and therefore disallowed renewal of his diminished-capacity defense. Lancaster was again convicted. Affirming, the Michigan Court of Appeals rejected Lancaster's argument that the trial court's retroactive application of *Carpenter* violated due process.

Lancaster reasserted his due process claim in a federal habeas petition. The District Court denied the petition, but the Sixth Circuit reversed. Concluding that the Michigan Supreme Court's 2001 rejection of the diminished-capacity defense was unforeseeable in April 1993, when Lancaster killed his girlfriend, the Sixth Circuit held that, by rejecting Lancaster's due process claim, the Michigan Court of Appeals had unreasonably applied clearly established federal law.

Held: Lancaster is not entitled to federal habeas relief. Pp. 357–368.

(a) Under the Antiterrorism and Effective Death Penalty Act of 1996, Lancaster may obtain federal habeas relief only if the Michigan Court of Appeals, in rejecting his due process claim, unreasonably applied "clearly established Federal law, as determined by [this] Court." 28 U. S. C. §2254(d)(1). This standard is "difficult to meet": Lancaster must show that the Michigan Court of Appeals' decision rested on "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 102–103. To determine whether Lancaster has satisfied that

demanding standard, the Court first considers two key decisions: *Bouie* v. *City of Columbia*, 378 U. S. 347, and *Rogers* v. *Tennessee*, 532 U. S. 451. It then considers whether the Michigan Court of Appeals' decision qualifies as an unreasonable application of those decisions to Lancaster's case. Pp. 357–358.

(b) *Bouie* concerned African-American petitioners who had refused to leave a South Carolina drugstore's whites-only restaurant area after entering without notice that the store's policy barred their entry. They were convicted under a South Carolina trespass statute prohibiting "'entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry.'" 378 U. S., at 349–350. The South Carolina Supreme Court based its affirmance of the petitioners' convictions on its prior decision in *Mitchell*, where the court held that the trespass statute reached both unauthorized entries and "the act of remaining on the premises of another after receiving notice to leave." 378 U. S., at 350. *Mitchell*, however, was rendered 21 months after the petitioners' arrest. This Court held that the Due Process Clause prohibited *Mitchell*'s retroactive application to the *Bouie* petitioners, stressing that *Mitchell*'s interpretation of the state trespass statute was "clearly at variance with the statutory language" and "ha[d] not the slightest support in prior South Carolina decisions." 378 U. S., at 356.

In *Rogers*, the petitioner contested the Tennessee Supreme Court's retroactive abolition of the common-law "year and a day rule," which barred a murder conviction "unless [the] victim had died by the defendant's act within a year and a day of the act." 532 U. S., at 453. This Court found no due process violation. "[J]udicial alteration of a common law doctrine of criminal law," the Court held, "violates the principle of fair warning, and hence must not be given retroactive effect, only where [the alteration] is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.*, at 462. Judged by this standard, the retroactive abolition of the year and a day rule encountered no constitutional impediment. The rule was "widely viewed as an outdated relic of the common law," had been routinely rejected by modern courts and legislators, and had been mentioned in reported Tennessee decisions "only three times, and each time in dicta." *Id.*, at 462–464. Pp. 358–361.

(c) The Michigan Court of Appeals' rejection of Lancaster's due process claim does not represent an unreasonable application of the law this Court declared in *Bouie* and *Rogers*. Pp. 361–368.

(1) The Michigan Court of Appeals first recognized the diminished-capacity defense in 1973. Two years later, the Michigan Legislature prescribed comprehensive requirements for defenses based on mental

illness or retardation. In 1978, the Michigan Court of Appeals ruled that the diminished-capacity defense fit within the codified definition of insanity. The Michigan Supreme Court's 2001 decision in *Carpenter*, however, rejected that position, holding that the diminished-capacity defense was not encompassed within the Michigan Legislature's comprehensive scheme for mental-illness defenses and thus could not be invoked by criminal defendants. Pp. 361–365.

(2) In light of this Court's precedent and the history of Michigan's diminished-capacity defense, the Michigan Court of Appeals' decision applying *Carpenter* retroactively is not "an unreasonable application of . . . clearly established [f]ederal law." 28 U. S. C. § 2254(d)(1). This case is a far cry from *Bouie*, where the South Carolina Supreme Court unexpectedly expanded "narrow and precise statutory language" that, as written, did not reach the petitioners' conduct. 378 U. S., at 352. In *Carpenter*, by contrast, the Michigan Supreme Court rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature. Although Lancaster's due process claim is arguably less weak than the due process claim rejected in *Rogers*, the Court did not hold in *Rogers* that a newly announced judicial rule may be applied retroactively only if the rule it replaces was an "outdated relic" rarely appearing in a jurisdiction's case law. 532 U. S., at 462–467. Distinguishing *Rogers* thus does little to bolster Lancaster's argument that the Michigan Court of Appeals' decision unreasonably applied clearly established federal law. This Court has never found a due process violation in circumstances remotely resembling Lancaster's case—*i. e.*, where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute. Fairminded jurists could conclude that a state supreme court decision of that order is not "'unexpected and indefensible by reference to [existing] law.'" *Id.*, at 462. Pp. 365–368.

683 F. 3d 740, reversed.

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

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 *Laura L. Moody* and *Andrea M. Christensen*, Assistant Attorneys General.

Kenneth M. Mogill argued the cause for respondent. With him on the brief was *Jill M. Schinske.**

JUSTICE GINSBURG delivered the opinion of the Court.

Burt Lancaster was convicted in Michigan state court of first-degree murder and a related firearm offense. At the time the crime was committed, Michigan's intermediate appellate court had repeatedly recognized "diminished capacity" as a defense negating the *mens rea* element of first-degree murder. By the time of Lancaster's trial and conviction, however, the Michigan Supreme Court in *People* v. *Carpenter*, 464 Mich. 223, 627 N. W. 2d 276 (2001), had rejected the defense. Lancaster asserts that retroactive application of the Michigan Supreme Court's decision in *Carpenter* denied him due process of law. On habeas review, a federal court must assess a claim for relief under the demanding standard set by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Under that standard, Lancaster may gain relief only if the state-court decision he assails "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by [this] Court." 28 U. S. C. § 2254(d)(1). We hold that Lancaster's petition does not meet AEDPA's requirement and

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*Briefs of *amici curiae* urging reversal were filed for the State of Indiana et al. by *Gregory F. Zoeller,* Attorney General of Indiana, *Thomas M. Fisher,* Solicitor General, and *Ashley Tatman Harwel* and *Heather Hagan McVeigh,* Deputy Attorneys 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, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Timothy C. Fox* of Montana, *Gary King* of New Mexico, *Alan Wilson* of South Carolina, *John E. Swallow* of Utah, *Robert W. Ferguson* of Washington, and *Gregory A. Phillips* of Wyoming; and for Wayne County, Michigan, by *Kym L. Worthy* and *Timothy A. Baughman.*

Jeffrey T. Green, *David Porter,* and *Sarah O'Rourke Schrup* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

that the United States Court of Appeals for the Sixth Circuit erred in granting him federal habeas relief.

I

On April 23, 1993, Lancaster, a former police officer with a long history of severe mental-health problems, shot and killed his girlfriend in a shopping-plaza parking lot. At his 1994 jury trial in Michigan state court, Lancaster admitted that he had killed his girlfriend but asserted insanity and diminished-capacity defenses. Under then-prevailing Michigan Court of Appeals precedent, a defendant who pleaded diminished capacity, although he was legally sane, could "offer evidence of some mental abnormality to negate the specific intent required to commit a particular crime." *Carpenter*, 464 Mich., at 232, 627 N. W. 2d, at 280. If a defendant succeeded in showing that mental illness prevented him from "form[ing] the specific state of mind required as an essential element of a crime," he could "be convicted only of a lower grade of the offense not requiring that particular mental element." *Ibid.* (internal quotation marks omitted).

Apparently unpersuaded by Lancaster's defenses, the jury convicted him of first-degree murder, in violation of Mich. Comp. Laws Ann. § 750.316 (West 1991),[1] and possessing a firearm in the commission of a felony, in violation of § 750.227b (West Cum. Supp. 2004). Lancaster later obtained federal habeas relief from these convictions, however, because, in conflict with *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the prosecutor had exercised a race-based peremptory challenge to remove a potential juror. See *Lancaster* v. *Adams*, 324 F. 3d 423 (CA6 2003).

Lancaster was retried in 2005. By that time, the Michigan Supreme Court had disapproved the "series of [Michigan Court of Appeals] decisions" recognizing the diminished-

[1] As relevant here, a homicide constitutes first-degree murder under Mich. Comp. Laws Ann. § 750.316 if it is "wil[l]ful, deliberate, and premeditated."

capacity defense. *Carpenter*, 464 Mich., at 235, 627 N. W. 2d, at 282. In rejecting the defense, Michigan's high court observed that, in 1975, the Michigan Legislature had enacted "a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation." *Id.*, at 236, 627 N. W. 2d, at 282. That scheme, the Michigan Supreme Court concluded, "demonstrate[d] the Legislature's intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility." *Ibid.*

Although the murder with which Lancaster was charged occurred several years before the Michigan Supreme Court's decision in *Carpenter*, the judge presiding at Lancaster's second trial applied *Carpenter*'s holding and therefore disallowed renewal of Lancaster's diminished-capacity defense. Following a bench trial, Lancaster was again convicted. The trial court imposed a sentence of life imprisonment for the first-degree murder conviction and a consecutive two-year sentence for the related firearm offense.

Lancaster appealed, unsuccessfully, to the Michigan Court of Appeals. See App. to Pet. for Cert. 76a–78a. The appeals court rejected Lancaster's argument that retroactive application of *Carpenter* to his case violated his right to due process. "[D]ue process concerns prevent retroactive application [of judicial decisions] in some cases," the court acknowledged, "especially . . . where the decision is unforeseeable and has the effect of changing existing law." App. to Pet. for Cert. 77a. But *Carpenter* "did not involve a change in the law," the Court of Appeals reasoned, "because it concerned an unambiguous statute that was interpreted by the [Michigan] Supreme Court for the first time." App. to Pet. for Cert. 77a.

After the Michigan Supreme Court declined review, Lancaster reasserted his due process claim in a federal habeas petition filed under 28 U. S. C. § 2254. The District Court denied the petition, 735 F. Supp. 2d 750 (ED Mich. 2010), but

it granted a certificate of appealability, see 28 U. S. C. § 2253(c).

A divided panel of the Sixth Circuit reversed. 683 F. 3d 740 (2012). The Michigan Supreme Court's decision in *Carpenter* was unforeseeable, the Court of Appeals majority concluded, given (1) the Michigan Court of Appeals' consistent recognition of the diminished-capacity defense; (2) the Michigan Supreme Court's repeated references to the defense without casting a shadow of doubt on it; and (3) the inclusion of the diminished-capacity defense in the Michigan State Bar's pattern jury instructions. 683 F. 3d, at 745–749. These considerations persuaded the Sixth Circuit majority that, in rejecting Lancaster's due process claim, the Michigan Court of Appeals had unreasonably applied clearly established federal law. *Id.*, at 752–753. Accordingly, the Sixth Circuit ruled that Lancaster was entitled to a new trial at which he could present his diminished-capacity defense. *Id.*, at 754. Dissenting, Chief Judge Batchelder concluded that the "Michigan Court of Appeals[']s denial of Lancaster's due process claim was reasonable . . . because the diminished-capacity defense was not well-established in Michigan and its elimination was, therefore, foreseeable." *Id.*, at 755.

This Court granted certiorari. 568 U. S. 1140 (2013).

II

To obtain federal habeas relief under AEDPA's strictures, Lancaster must establish that, in rejecting his due process claim, the Michigan Court of Appeals unreasonably applied federal law clearly established in our decisions. See 28 U. S. C. § 2254(d)(1).[2] This standard, we have explained, is

[2] Title 28 U. S. C. § 2254(d) provides that where, as here, a state prisoner's habeas claim "was adjudicated on the merits in State court," a federal court may not grant relief with respect to that claim unless the state court's adjudication of the claim (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"

"difficult to meet": To obtain habeas corpus relief from a federal court, a state prisoner must show that the challenged state-court ruling rested on "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 562 U. S. 86, 102–103 (2011). To determine whether Lancaster has satisfied that demanding standard, we consider first two of this Court's key decisions: *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964), and *Rogers* v. *Tennessee*, 532 U. S. 451 (2001). We then consider whether the Michigan Court of Appeals' decision qualifies as an unreasonable application of those decisions to the particular circumstances of Lancaster's case.[3]

A

In *Bouie*, the African-American petitioners were convicted of trespass under South Carolina law after they re-

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or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Lancaster does not allege that the Michigan Court of Appeals' decision "was based on an unreasonable determination of the facts" in his case, nor does he develop any argument that the state court's decision was "contrary to" this Court's precedents. See *Williams* v. *Taylor*, 529 U. S. 362, 412–413 (2000) (a state-court decision is "contrary to" clearly established federal law if "the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts"). The only question in this case, therefore, is whether the Michigan Court of Appeals unreasonably applied "clearly established [f]ederal law, as determined by [this] Court." 28 U. S. C. § 2254(d)(1).

[3] Lancaster does not argue that the Michigan Supreme Court's rejection of the diminished-capacity defense in *People* v. *Carpenter*, 464 Mich. 223, 627 N. W. 2d 276 (2001), if applied only prospectively to defendants whose alleged offenses were committed after the decision was issued, would violate any constitutional provision. See *Clark* v. *Arizona*, 548 U. S. 735, 756–779 (2006) (rejecting due process challenge to Arizona's restrictions on mental-disease and capacity evidence offered to negate *mens rea*). We therefore address only whether the Michigan Court of Appeals unreasonably applied clearly established federal law in upholding *Carpenter*'s retroactive application to Lancaster's case.

fused to comply with orders to leave a drugstore's restaurant department, a facility reserved for white customers. 378 U. S., at 348–349. This Court held that the convictions violated the due process requirement that "a criminal statute give fair warning of the conduct which it prohibits." *Id.*, at 350. The state statute under which the petitioners were convicted, the Court emphasized, prohibited "*entry* upon the lands of another . . . after notice from the owner or tenant prohibiting such entry." *Id.*, at 349–350 (emphasis added; internal quotation marks omitted). It was undisputed that the petitioners were invited to enter the store and had received no notice that they were barred from the restaurant area before they occupied booth seats. *Id.*, at 350. Nevertheless, the South Carolina Supreme Court affirmed the petitioners' convictions based on its prior decision in *Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (1961). *Bouie*, 378 U. S., at 350, n. 2. The *Mitchell* decision, which the South Carolina Supreme Court found dispositive, was rendered 21 months after the petitioners' arrest. 378 U. S., at 348, 350, n. 2. *Mitchell* held that the trespass statute under which the petitioners were convicted reached not only unauthorized entries; it proscribed as well "the act of remaining on the premises of another after receiving notice to leave." 378 U. S., at 350.

We held that the Due Process Clause prohibited *Mitchell*'s retroactive application to the *Bouie* petitioners. In so ruling, we stressed that *Mitchell*'s interpretation of the South Carolina trespass statute was "clearly at variance with the statutory language" and "ha[d] not the slightest support in prior South Carolina decisions." 378 U. S., at 356. Due process, we said, does not countenance an "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.*, at 352.

In *Rogers*, the petitioner contested the Tennessee Supreme Court's retroactive abolition of the common-law "year and a day rule." 532 U. S., at 453. That rule barred a mur-

der conviction "unless [the] victim had died by the defendant's act within a year and a day of the act." *Ibid.* The victim in *Rogers* had died some 15 months after the petitioner stabbed him. *Id.*, at 454. We held that the Tennessee Supreme Court's refusal to adhere to the year and a day rule in the petitioner's case did not violate due process. *Id.*, at 466–467. The "due process limitations on the retroactive application of judicial decisions," we explained, are not coextensive with the limitations placed on legislatures by the Constitution's *Ex Post Facto* Clauses. *Id.*, at 459. See also U. S. Const., Art. I, § 9, cl. 3; *id.*, § 10, cl. 1; *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (*seriatim* opinion of Chase, J.) (describing four categories of laws prohibited by the Constitution's *Ex Post Facto* Clauses). Strictly applying *ex post facto* principles to judicial decisionmaking, we recognized, "would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks any evolving legal system." *Rogers*, 532 U. S., at 461. "[J]udicial alteration of a common law doctrine of criminal law," we therefore held, "violates the principle of fair warning, and hence must not be given retroactive effect, only where [the alteration] is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Id.*, at 462 (quoting *Bouie*, 378 U. S., at 354).

Judged by this standard, we explained, the retroactive abolition of the year and a day rule encountered no constitutional impediment. First, the rule was "widely viewed as an outdated relic of the common law" and had been "legislatively or judicially abolished in the vast majority of jurisdictions recently to have addressed the issue." *Rogers*, 532 U. S., at 462–463. Second, the rule "had only the most tenuous foothold" in Tennessee, having been mentioned in reported Tennessee decisions "only three times, and each time in dicta." *Id.*, at 464. Abolishing the obsolete rule in Rogers' case, we were satisfied, was not "the sort of unfair and

arbitrary judicial action against which the Due Process Clause aims to protect." *Id.*, at 466–467.

B

1

Does the Michigan Court of Appeals' rejection of Lancaster's due process claim represent an unreasonable application of the law we declared in *Bouie* and *Rogers*? Addressing that question, we first summarize the history of the diminished-capacity defense in Michigan.

The Michigan Court of Appeals first recognized the defense in *People* v. *Lynch*, 47 Mich. App. 8, 208 N. W. 2d 656 (1973). See *Carpenter*, 464 Mich., at 233, 627 N. W. 2d, at 281. The defendant in *Lynch* was convicted of first-degree murder for starving her newborn daughter. 47 Mich. App., at 9, 208 N. W. 2d, at 656. On appeal, the defendant challenged the trial court's exclusion of psychiatric testimony "bearing on [her] state of mind." *Id.*, at 14, 208 N. W. 2d, at 659. She sought to introduce this evidence not to show she was legally insane at the time of her child's death.[4] Instead, her plea was that she lacked the *mens rea* necessary to commit first-degree murder. *Ibid.* Reversing the defendant's conviction and remanding for a new trial, the Michigan Court of Appeals rejected the view "that mental capacity is an all or nothing matter and that only insanity . . . negates criminal intent." *Id.*, at 20, 208 N. W. 2d, at 662. Aligning itself with the "majority . . . view," the court permitted defendants to present relevant psychiatric "testimony bearing on in-

[4] At the time of *Lynch*, Michigan courts used a two-part test for insanity derived from the Michigan Supreme Court's decision in *People* v. *Durfee*, 62 Mich. 487, 494, 29 N. W. 109, 112 (1886). The *Durfee* test asked "1) whether defendant knew what he was doing was right or wrong; and 2) if he did, did he have the power, the will power, to resist doing the wrongful act?" *People* v. *Martin*, 386 Mich. 407, 418, 192 N. W. 2d 215, 220 (1971). See also *Carpenter*, 464 Mich., at 234, n. 7, 627 N. W. 2d, at 281, n. 7.

tent." *Id.*, at 20–21, 208 N. W. 2d, at 662–663. See also *id.*, at 20, 208 N. W. 2d, at 662 (noting that "such medical proof" is "sometimes called proof of diminished or partial responsibility").

In 1975, two years after the Michigan Court of Appeals' decision in *Lynch*, the Michigan Legislature enacted "a comprehensive statutory scheme setting forth the requirements for and the effects of asserting a defense based on either mental illness or mental retardation." *Carpenter*, 464 Mich., at 226, 627 N. W. 2d, at 277. See also 1975 Mich. Pub. Acts pp. 384–388. That legislation, which remained in effect at the time of the April 1993 shooting at issue here, provided that "[a] person is legally insane if, as a result of mental illness . . . or . . . mental retardation . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.*, at 386 (codified as amended, Mich. Comp. Laws Ann. § 768.21a(1) (West 2000)). The legislature required defendants in felony cases to notify the prosecution and the court at least 30 days before trial of their intent to assert an insanity defense. 1975 Mich. Pub. Acts p. 385 (codified as amended, § 768.20a(1)). Defendants raising an insanity defense, the legislature further provided, must submit to a court-ordered psychiatric examination. *Id.*, at 385 (codified as amended, § 768.20a(2)).

The 1975 Act also introduced the verdict of "guilty but mentally ill" for defendants who suffer from mental illness but do not satisfy the legal definition of insanity. *Id.*, at 387 (codified as amended, § 768.36(1) (West Cum. Supp. 2013)). The legislature provided for the psychiatric evaluation and treatment of defendants found "guilty but mentally ill" but did not exempt them from the sentencing provisions applicable to defendants without mental illness. *Id.*, at 387–388 (codified as amended, §§ 768.36(3)–(4)).

Although the 1975 Act did not specifically address the defense of diminished capacity, the Michigan Court of Appeals

ruled in 1978 that the defense "comes within th[e] codified definition of legal insanity." *People* v. *Mangiapane*, 85 Mich. App. 379, 395, 271 N. W. 2d 240, 249. Therefore, the court held, a defendant claiming that he lacked the "mental capacity to entertain the specific intent required as an element of the crime with which he [was] charged" had to comply with the statutory procedural requirements applicable to insanity defenses, including the requirements of pretrial notice and submission to court-ordered examination. *Ibid.*

Because the 1975 Act did not indicate which party bears the burden of proof on the issue of insanity, Michigan courts continued to apply the common-law burden-shifting framework in effect at the time of the insanity defense's codification. See *People* v. *McRunels*, 237 Mich. App. 168, 172, 603 N. W. 2d 95, 98 (1999). Under that framework, a criminal defendant bore the initial burden of presenting some evidence of insanity, at which point the burden shifted to the prosecution to prove the defendant's sanity beyond a reasonable doubt. See *In re Certified Question*, 425 Mich. 457, 465–466, 390 N. W. 2d 620, 623–624 (1986); *People* v. *Savoie*, 419 Mich. 118, 126, 349 N. W. 2d 139, 143 (1984). The Michigan Court of Appeals applied the same burden-shifting framework to the diminished-capacity defense. See *People* v. *Denton*, 138 Mich. App. 568, 571–572, 360 N. W. 2d 245, 247–248 (1984).

In 1994, however, the Michigan Legislature amended Mich. Comp. Laws Ann. § 768.21a, the statute codifying the insanity defense, to provide that the defendant bears "the burden of proving the defense of insanity by a preponderance of the evidence." 1994 Mich. Pub. Acts p. 252 (codified at § 768.21a(3)). In *Carpenter*, the defendant argued that the trial court had erred by applying the 1994 Act to require him to establish his diminished-capacity defense by a preponderance of the evidence. 464 Mich., at 225–226, 235, 627 N. W. 2d, at 277, 282. Rejecting this contention, the Michigan Court of Appeals affirmed the defendant's convictions. See

People v. *Carpenter*, No. 204051, 1999 WL 33438799 (July 16, 1999) (*per curiam*). Consistent with its decision in *Mangiapane*, the court held that the 1994 statutory amendments applied to defendants raising the diminished-capacity defense, and it further held that requiring defendants to establish their diminished capacity by a preponderance of the evidence did not unconstitutionally relieve the prosecution of its burden to prove the *mens rea* elements of a crime beyond a reasonable doubt. *Id.*, at *1–*2.

In turn, the Michigan Supreme Court also affirmed, but it did so on an entirely different ground. As earlier stated, see *supra*, at 355–356, the court concluded that in no case could criminal defendants invoke the diminished-capacity defense, for that defense was not encompassed within the "comprehensive statutory scheme" the Michigan Legislature had enacted to govern defenses based on mental illness or retardation. *Carpenter*, 464 Mich., at 236, 627 N. W. 2d, at 282. Noting that previously it had "acknowledged in passing the concept of the diminished capacity defense,"[5] Michigan's

[5] *Carpenter* cited three decisions in which the Michigan Supreme Court had previously mentioned the diminished-capacity defense: (1) *People* v. *Lloyd*, 459 Mich. 433, 450, 590 N. W. 2d 738, 745 (1999) (*per curiam*), which held that defense counsel was not constitutionally ineffective in presenting a diminished-capacity defense rather than an insanity defense; (2) *People* v. *Pickens*, 446 Mich. 298, 329–331, 521 N. W. 2d 797, 811–812 (1994), which rejected a defendant's claim that his attorney rendered ineffective assistance by failing to pursue a diminished-capacity defense; and (3) *People* v. *Griffin*, 433 Mich. 860, 444 N. W. 2d 139, 140 (1989) (*per curiam*), a summary order remanding a case to the trial court for a hearing on the defendant's claim that the defendant's attorney was ineffective "for failing to explore defenses of diminished capacity and insanity." See *Carpenter*, 464 Mich., at 232–233, 627 N. W. 2d, at 281. See also 683 F. 3d 740, 746–749, 751 (CA6 2012) (describing additional Michigan Supreme Court decisions that mention the diminished-capacity defense, but acknowledging that the Michigan Supreme Court "did not squarely address the validity of the defense until" its 2001 decision in *Carpenter*); App. to Brief for Respondent A–1, A–3 to A–4 (citing eight pre-*Carpenter* Michigan Supreme Court decisions mentioning the diminished-capacity defense).

high court emphasized that it had "never specifically authorized . . . use [of the defense] in Michigan courts." *Id.*, at 232–233, 627 N. W. 2d, at 281. Squarely addressing the issue for the first time, the court concluded that the diminished-capacity defense was incompatible with the Michigan Legislature's "conclusiv[e] determin[ation]" of the circumstances under which "mental incapacity can serve as a basis for relieving [a defendant] from criminal responsibility." *Id.*, at 237, 627 N. W. 2d, at 283. The statutory scheme enacted by the Michigan Legislature, the court held, "created an all or nothing insanity defense." *Ibid.* But cf. *supra*, at 362. A defendant who is "mentally ill or retarded yet not legally insane," the court explained, "may be found 'guilty but mentally ill,'" but the legislature had foreclosed the use of "evidence of mental incapacity short of insanity . . . to avoid or reduce criminal responsibility by negating specific intent." 464 Mich., at 237, 627 N. W. 2d, at 283.

2

The Michigan Court of Appeals concluded that applying *Carpenter* retroactively to Lancaster's case did not violate due process, for *Carpenter* "concerned an unambiguous statute that was interpreted by the [Michigan] Supreme Court for the first time." App. to Pet. for Cert. 77a. As earlier Michigan Court of Appeals decisions indicate, see *supra*, at 361–363, the bearing of the 1975 legislation on the diminished-capacity defense may not have been apparent pre-*Carpenter*. But in light of our precedent and the history recounted above, see Part II–B–1, *supra*, the Michigan Court of Appeals' decision applying *Carpenter* retroactively does not warrant disapprobation as "an unreasonable application of . . . clearly established [f]ederal law." 28 U. S. C. §2254(d)(1).

This case is a far cry from *Bouie*, where, unlike *Rogers*, the Court held that the retroactive application of a judicial decision violated due process. In *Bouie*, the South Carolina

Supreme Court had unexpectedly expanded "narrow and precise statutory language" that, as written, did not reach the petitioners' conduct. 378 U. S., at 352. In *Carpenter*, by contrast, the Michigan Supreme Court rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature. *Carpenter* thus presents the inverse of the situation this Court confronted in *Bouie*. Rather than broadening a statute that was narrow on its face, *Carpenter* disapproved lower court precedent recognizing a defense Michigan's high court found, on close inspection, to lack statutory grounding. The situation we confronted in *Bouie* bears scant resemblance to this case, and our resolution of that controversy hardly makes disallowance of Lancaster's diminished-capacity defense an unreasonable reading of this Court's law.

On the other hand, as the Sixth Circuit recognized, see 683 F. 3d, at 749–751, Lancaster's argument against applying *Carpenter* retroactively is arguably less weak than the argument opposing retroactivity we rejected in *Rogers*. Unlike the year and a day rule at issue in *Rogers*, the diminished-capacity defense is not an "outdated relic of the common law" widely rejected by modern courts and legislators. 532 U. S., at 462. To the contrary, the Model Penal Code sets out a version of the defense. See ALI, Model Penal Code § 4.02(1), pp. 216–217 (1985) ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense."). See also *id.*, Comment 2, at 219 ("The Institute perceived no justification for a limitation on evidence that may bear significantly on a determination of the mental state of the defendant at the time of the commission of the crime."). And not long before the 1993 shooting at issue here, the American Bar Association had approved criminal-justice guidelines that (1) favored the admissibility of mental-health

evidence offered to negate *mens rea*, and (2) reported that a majority of States allowed presentation of such evidence in at least some circumstances. See ABA Criminal Justice Mental Health Standards 7–6.2, and Commentary, pp. 347–349, and n. 2 (1989). See also *Clark* v. *Arizona*, 548 U. S. 735, 800 (2006) (KENNEDY, J., dissenting) (reporting that in 2006, "a substantial majority of the States" permitted the introduction of "mental-illness evidence to negate *mens rea*").

Furthermore, the year and a day rule was mentioned only three times in dicta in Tennessee reported decisions. *Rogers*, 532 U. S., at 464. The diminished-capacity defense, by contrast, had been adhered to repeatedly by the Michigan Court of Appeals. See *supra*, at 361–363. It had also been "'acknowledged in passing'" in Michigan Supreme Court decisions and was reflected in the Michigan State Bar's pattern jury instructions. 683 F. 3d, at 746–749 (quoting *Carpenter*, 464 Mich., at 232, 627 N. W. 2d, at 281).

These considerations, however, are hardly sufficient to warrant federal habeas relief under 28 U. S. C. §2254(d)(1)'s demanding standard. See *Williams* v. *Taylor*, 529 U. S. 362, 410 (2000) ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."). *Rogers* did not hold that a newly announced judicial rule may be applied retroactively only if the rule it replaces was an "outdated relic" rarely appearing in a jurisdiction's case law. 532 U. S., at 462–467. Distinguishing *Rogers*, a case in which we *rejected* a due process claim, thus does little to bolster Lancaster's argument that the Michigan Court of Appeals' decision unreasonably applied clearly established federal law. See *Williams*, 529 U. S., at 412 (the phrase "clearly established [f]ederal law" in §2254(d)(1) "refers to the *holdings* . . . of this Court's decisions as of the time of the relevant state-court decision" (emphasis added)).

This Court has never found a due process violation in circumstances remotely resembling Lancaster's case—*i. e.*,

where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute. Fairminded jurists could conclude that a state supreme court decision of that order is not "unexpected and indefensible by reference to [existing] law." *Rogers*, 532 U. S., at 462 (internal quotation marks omitted). Lancaster therefore is not entitled to federal habeas relief on his due process claim.

* * *

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

Reversed.

Syllabus

SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* CLOER

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

No. 12–236. Argued March 19, 2013—Decided May 20, 2013

The National Childhood Vaccine Injury Act of 1986 (NCVIA or Act) established a no-fault compensation system to stabilize the vaccine market and expedite compensation to injured parties. *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 227–228. Under the Act, "[a] proceeding for compensation" is "initiated" by "service upon the Secretary" of Health and Human Services and "the filing of a petition containing" specified documentation with the clerk of the Court of Federal Claims, who then "immediately" forwards the petition for assignment to a special master. 42 U. S. C. § 300aa–11(a)(1). An attorney may not charge a fee for "services in connection with [such] a petition," § 300aa–15(e)(3), but a court may award attorney's fees and costs "incurred [by a claimant] in any proceeding on" an unsuccessful "petition filed under section 300aa–11," if that petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought," § 300aa–15(e)(1).

In 1997, shortly after receiving her third Hepatitis-B vaccine, respondent Cloer began to experience symptoms that eventually led to a multiple sclerosis (MS) diagnosis in 2003. In 2004, she learned of a link between MS and the Hepatitis-B vaccine, and in 2005, she filed a claim for compensation under the NCVIA, alleging that the vaccine caused or exacerbated her MS. After reviewing the petition and its supporting documentation, the Chief Special Master concluded that Cloer's claim was untimely because the Act's 36-month limitations period began to run when she had her first MS symptoms in 1997. The Federal Circuit ultimately agreed that Cloer's petition was untimely. Cloer then sought attorney's fees and costs (collectively, fees). The en banc Federal Circuit found that she was entitled to recover fees on her untimely petition.

Held: An untimely NCVIA petition may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim. Pp. 376–382.

(a) As in any statutory construction case, this Court proceeds from the understanding that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP America Production Co.* v. *Burton*, 549 U. S. 84, 91. Nothing in either

the NCVIA's attorney's fees provision, which ties eligibility to "any proceeding on such petition" and refers specifically to "a petition filed under section 300aa–11," § 300aa–15(e)(1), or the referenced § 300aa–11 suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing. As the term "filed" is commonly understood, an application is filed "when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz* v. *Bennett*, 531 U. S. 4, 8. Applying this ordinary meaning to the text at issue, it is clear that an NCVIA petition delivered to the court clerk, forwarded for processing, and adjudicated in a proceeding before a special master is a "petition filed under section 300aa–11." So long as it was brought in good faith and with a reasonable basis, it is eligible for an award of attorney's fees, even if it is ultimately unsuccessful. Had Congress intended otherwise, it could have easily limited fee awards to timely petitions.

The Government's argument that the 36-month limitations period is a statutory prerequisite for filing lacks textual support. First, there is no cross-reference to the Act's limitations provision in its fees provision, § 300aa–15(e), or the referenced § 300aa–11(a)(1). Second, reading the provision to provide that "no petition may be *filed* for compensation" late, as the Government asks, would require the Court to conclude that a petition like Cloer's, which was "filed" under that term's ordinary meaning but was later found to be untimely, was never filed at all. This Court's "inquiry ceases [where, as here,] 'the statutory language is unambiguous and "the statutory scheme is coherent and consistent."'" *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450.

The Government's contrary position is also inconsistent with the fees provision's purpose, which was to avoid "limit[ing] petitioners' ability to obtain qualified assistance" by making awards available for "nonprevailing, good-faith claims." H. R. Rep. No. 99–908, pt. 1, p. 22. Pp. 376–380.

(b) The Government's two additional lines of argument for barring the award of attorney's fees for untimely petitions are unpersuasive. First, the canon of construction favoring strict construction of waivers of sovereign immunity, the presumption favoring the retention of familiar common-law principles, and the policy argument that the NCVIA should be construed so as to minimize complex and costly fees litigation must all give way when, as here, the statute's words "are unambiguous." *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254. Second, even if the NCVIA's plain text requires that special masters occasionally carry out "shadow trials" to determine whether late petitions were brought in good faith and with a reasonable basis, that is not such an absurd burden as to require departure from the words of the Act. This

is especially true where Congress has specifically provided for such "shadow trials" by permitting the award of attorney's fees "in any proceeding [on an unsuccessful] petition" if such petition was brought in good faith and with a reasonable basis. § 300aa–15(e)(1). Pp. 380–382.

675 F. 3d 1358, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and KAGAN, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to all but Part II–B.

Benjamin J. Horwich argued the cause for petitioner. With him on the briefs were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Michael S. Raab*, *Anisha S. Dasgupta*, *Vincent J. Matanoski*, *William B. Schultz*, and *David Benor*.

Robert T. Fishman argued the cause for respondent. With him on the brief were *Mari C. Bush* and *Robert T. Moxley*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.†

The National Childhood Vaccine Injury Act of 1986 (NCVIA or Act), 100 Stat. 3756, 42 U. S. C. § 300aa–1 *et seq.*, provides that a court may award attorney's fees and costs "incurred [by a claimant] in any proceeding on" an unsuccessful vaccine-injury "petition filed under section 300aa–11," if that petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." § 300aa–15(e)(1). The Act's limitations provision states that "no petition may be filed for compensation" more than 36 months after the claimant's initial symptoms occur. § 300aa–16(a)(2). The question before us is whether an un-

**Robert J. Krakow* and *Kevin Conway* filed a brief for the Elizabeth Birt Center for Autism Law and Advocacy et al. as *amici curiae* urging affirmance.

Clifford J. Shoemaker and *Peter H. Meyers* filed a brief for the National Vaccine Information Center et al. as *amici curiae*.

†JUSTICE SCALIA and JUSTICE THOMAS join all but Part II–B of this opinion.

timely petition can garner an award of attorney's fees. We agree with a majority of the en banc Court of Appeals for the Federal Circuit that it can.

I

A

The NCVIA "establishes a no-fault compensation program 'designed to work faster and with greater ease than the civil tort system.'" *Bruesewitz* v. *Wyeth LLC*, 562 U. S. 223, 228 (2011) (quoting *Shalala* v. *Whitecotton*, 514 U. S. 268, 269 (1995)). Congress enacted the NCVIA to stabilize the vaccine market and expedite compensation to injured parties after complaints mounted regarding the inefficiencies and costs borne by both injured consumers and vaccine manufacturers under the previous civil tort compensation regime. 562 U. S., at 227–228; H. R. Rep. No. 99–908, pt. 1, pp. 6–7 (1986) (hereinafter H. R. Rep.).

The compensation program's procedures are straightforward. First, "[a] proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary [for the Department of Health and Human Services] and the filing of a petition containing the matter prescribed by subsection (c) of this section with the United States Court of Federal Claims." 42 U. S. C. § 300aa–11(a)(1). Subsection (c) provides in relevant part that a petition must include "an affidavit, and supporting documentation, demonstrating that the person who suffered such injury" was actually vaccinated and suffered an injury. § 300aa–11(c)(1). Next, upon receipt of an NCVIA petition, "[t]he clerk of the United States Court of Federal Claims shall immediately forward the filed petition to the chief special master for assignment to a special master." § 300aa–11(a)(1). This special master then "makes an informal adjudication of the petition." *Bruesewitz*, 562 U. S., at 228 (citing § 300aa–12(d)(3)). A successful claimant may recover medical costs, lost earning capacity, and an award

for pain and suffering, 42 U. S. C. § 300aa–15(a), with compensation paid out from a federal trust fund supported by an excise tax levied on each dose of certain covered vaccines, see 26 U. S. C. §§ 4131, 4132, 9510; 42 U. S. C. § 300aa–15(f)(4)(A). But under the Act's limitations provision, "no petition may be filed for compensation under the Program for [a vaccine-related] injury after the expiration of 36 months after the date of the occurrence of the first symptom or manifestation of onset or of the significant aggravation of" the alleged injury. § 300aa–16(a)(2).

The Act also includes an unusual scheme for compensating attorneys who work on NCVIA petitions. See § 300aa–15(e).[1] "No attorney may charge any fee for services in connection with a petition filed under section 300aa–11 of this title." § 300aa–15(e)(3).[2] But a court may award attorney's fees in certain circumstances. In the case of successful petitions, the award of attorney's fees is automatic. § 300aa–15(e)(1) ("In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover . . . reasonable attorneys' fees, and . . . other costs"). For unsuccessful petitions, "the special master or court may

[1] The relevant paragraph provides:

"(1) In awarding compensation on a petition filed under section 300aa–11 of this title the special master or court shall also award as part of such compensation an amount to cover—

"(A) reasonable attorneys' fees, and

"(B) other costs,

"incurred in any proceeding on such petition. If the judgment of the United States Court of Federal Claims on such a petition does not award compensation, the special master or court may award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." § 300aa–15(e).

[2] For simplicity, we refer to attorney's fees and costs as simply attorney's fees.

award an amount of compensation to cover petitioner's reasonable attorneys' fees and other costs incurred in any proceeding on such petition if the special master or court determines that the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought." *Ibid.* In other words, "[a]ttorney's fees are provided, not only for successful cases, but even for unsuccessful claims that are not frivolous." *Bruesewitz*, 562 U. S., at 229.

B

Respondent, Dr. Melissa Cloer, received three Hepatitis-B immunizations from September 1996 to April 1997. Shortly after receiving the third vaccine, Dr. Cloer began to experience numbness and strange sensations in her left forearm and hand. She sought treatment in 1998 and 1999, but the diagnoses she received were inconclusive. By then, Dr. Cloer was experiencing numbness in her face, arms, and legs, and she had difficulty walking. She intermittently suffered these symptoms until 2003, when she began to experience the full manifestations of, and was eventually diagnosed with, multiple sclerosis (MS). In 2004, Dr. Cloer became aware of a link between MS and the Hepatitis-B vaccine, and in September 2005, she filed a claim for compensation under the NCVIA, alleging that the vaccinations she received had caused or exacerbated her MS.

Dr. Cloer's petition was sent by the clerk of the Court of Federal Claims to the Chief Special Master, who went on to adjudicate it. After reviewing the petition and its supporting documentation, the Chief Special Master concluded that Dr. Cloer's claim was untimely because the Act's 36-month limitations period began to run when she first experienced the symptoms of MS in 1997. *Cloer* v. *Secretary of Health and Human Servs.*, No. 05–1002V, 2008 WL 2275574, *1, *10 (Fed. Cl., May 15, 2008) (opinion of Golkiewicz, Chief Special Master) (citing § 300aa–16(a)(2) (NCVIA's limitations provi-

sion)). Relying on Federal Circuit precedent, the Chief Special Master also rejected Dr. Cloer's argument that the NCVIA's limitations period should be subject to equitable tolling. *Id.*, at *9 (citing *Brice* v. *Secretary of Health and Human Servs.*, 240 F. 3d 1367, 1373 (2001)). A divided panel of the Federal Circuit reversed the Chief Special Master, concluding that the NCVIA's limitations period did not commence until "the medical community at large objectively recognize[d] a link between the vaccine and the injury." *Cloer* v. *Secretary of Health and Human Servs.*, 603 F. 3d 1341, 1346 (2010).

The en banc court then reversed the panel's decision, *Cloer* v. *Secretary of Health and Human Servs.*, 654 F. 3d 1322 (2011), cert. denied, 566 U. S. 956 (2012), and held that the statute's limitations period begins to run on "the calendar date of the occurrence of the first medically recognized symptom or manifestation of onset of the injury claimed by the petitioner." 654 F. 3d, at 1324–1325. The Court of Appeals also held that the Act's limitations provision was nonjurisdictional and subject to equitable tolling in limited circumstances, overruling its prior holding in *Brice*. 654 F. 3d, at 1341–1344. The court concluded, however, that Dr. Cloer was ineligible for tolling and that her petition was untimely. *Id.*, at 1344–1345.

Following this decision, Dr. Cloer moved for an award of attorney's fees. The en banc Federal Circuit agreed with her that a person who files an untimely NCVIA petition "assert[ing] a reasonable limitations argument" may recover fees and costs so long as "'the petition was brought in good faith and there was a reasonable basis for the claim for which the petition was brought.'" 675 F. 3d 1358, 1359–1361 (2012) (quoting § 300aa–15(e)(1)). Six judges disagreed with this conclusion and instead read the NCVIA to bar such awards for untimely petitions. *Id.*, at 1364–1368 (Bryson, J., dissenting). We granted the Government's petition for writ of certiorari. 568 U. S. 1021 (2012). We now affirm.

II

A

As in any statutory construction case, "[w]e start, of course, with the statutory text," and proceed from the understanding that "[u]nless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP America Production Co.* v. *Burton*, 549 U. S. 84, 91 (2006). The Act's fees provision ties eligibility for attorney's fees broadly to "any proceeding on such petition," referring specifically to "a petition filed under section 300aa–11." 42 U. S. C. §§ 300aa–15(e)(1), (3). Section 300aa–11 provides that "[a] proceeding for compensation" is "initiated" by "service upon the Secretary" and "the filing of a petition containing" certain documentation with the clerk of the Court of Federal Claims who then "immediately forward[s] the filed petition" for assignment to a special master. § 300aa–11(a)(1). See *supra*, at 372.

Nothing in these two provisions suggests that the reason for the subsequent dismissal of a petition, such as its untimeliness, nullifies the initial filing of that petition. We have explained that "[a]n application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record." *Artuz* v. *Bennett*, 531 U. S. 4, 8 (2000). When this ordinary meaning is applied to the text of the statute, it is clear that an NCVIA petition which is delivered to the clerk of the court, forwarded for processing, and adjudicated in a proceeding before a special master is a "petition filed under section 300aa–11." 42 U. S. C. § 300aa–15(e)(1). And so long as such a petition was brought in good faith and with a reasonable basis, it is eligible for an award of attorney's fees, even if it is ultimately unsuccessful. *Ibid.* If Congress had intended to limit fee awards to timely petitions, it could easily have done so. But the NCVIA instead authorizes courts to award attorney's fees for those unsuccessful petitions

"brought in good faith and [for which] there was a reasonable basis." *Ibid.*[3]

The Government argues that the Act's limitations provision, which states that "no petition may be filed for compensation" 36 months after a claimant's initial symptoms began, § 300aa–16(a)(2), constitutes "a statutory prerequisite to the filing of a petition 'for compensation under the Program,'" Brief for Petitioner 16. Thus, the Government contends, a petition that fails to comply with these time limits is not "a petition filed under section 300aa–11" and is therefore ineligible for fees under § 300aa–15(e)(1). See 675 F. 3d, at 1364–1366 (Bryson, J., dissenting).

The Government's argument lacks textual support. First, as noted, there is no cross-reference to the Act's limitations provision in its fees provision, § 300aa–15(e), or the other section it references, § 300aa–11(a)(1). When these two linked sections are read in tandem they simply indicate that petitions filed with the clerk of the court are eligible for attorney's fees so long as they comply with the other requirements of the Act's fees provision. By its terms, the NCVIA requires nothing more for the award of attorney's fees. A petition filed in violation of the limitations period will not result in the payment of compensation, of course, but it is still a petition filed under § 300aa–11(a)(1).[4]

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[3] The en banc dissent reasoned that a dismissal for untimeliness does not constitute a judgment on the merits of a petition. See 675 F. 3d 1358, 1365 (CA Fed. 2012) (opinion of Bryson, J.). That argument is not pressed here by the Government, which acknowledged at oral argument that dismissals for untimeliness result in judgment against the petitioner. Tr. of Oral Arg. 12–13.

[4] The Government suggests that giving the words of their statute their plain meaning would produce incongruous results; notably, it might indicate that "a failure to comply with the limitations provision would not even bar recovery under the Compensation Program itself because 42 U. S. C. 300aa–13 ('Determination of eligibility and compensation') does not expressly cross-reference the limitations provision." Brief for Peti-

When the Act does require compliance with the limitations period, it provides so expressly. For example, § 300aa–11(a)(2)(A) prevents claimants from bringing suit against vaccine manufacturers "unless a petition has been filed, *in accordance with section 300aa–16 of this title* [the limitations provision], for compensation under the Program for such injury or death." (Emphasis added.) We have long held that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates* v. *United States*, 522 U. S. 23, 29–30 (1997) (internal quotation marks omitted). The absence of any cross-reference to the limitations provision in either the fees provision, § 300aa–15(e)(1), or the instructions for initiating a compensation proceeding, § 300aa–11(a)(1), indicates that a petition can be "filed" without being "in accordance with [the limitations provision]." Tellingly, nothing in § 300aa–11(a)(1) requires a petitioner to allege or demonstrate the timeliness of his or her petition to initiate such a proceeding.[5]

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tioner 18. The Government's argument assumes that both sections are equivalently affected by absence of a cross-reference. This is incorrect. The Government is right that because "the law typically treats a limitations defense as an affirmative defense," *John R. Sand & Gravel Co.* v. *United States*, 552 U. S. 130, 133 (2008), a failure to apply the limitations provision to the section outlining the conditions under which compensation should be awarded would be "contrary to [the Act's] plain meaning and would produce an absurd result," *Milavetz, Gallop & Milavetz, P. A.* v. *United States*, 559 U. S. 229, 252 (2010). In contrast, giving the Act's fees provision its plain meaning would produce no such absurd result. It would simply allow petitioners to recover attorney's fees for untimely petitions.

[5] If the NCVIA's limitations period were jurisdictional, then we might reach a different conclusion because the Chief Special Master would have lacked authority to act on Dr. Cloer's untimely petition in the first place. But the Government chose not to seek certiorari from the Federal Circuit's en banc decision holding that the period is nonjurisdictional, see *Cloer* v. *Secretary of Health and Human Servs.*, 654 F. 3d 1332, 1341–1344 (2011), and the Government now acknowledges that the NCVIA contains no

Second, to adopt the Government's position, we would have to conclude that a petition like Dr. Cloer's, which was "filed" under the ordinary meaning of that term but was later found to be untimely, was never filed at all because, on the Government's reading, "no petition may be *filed* for compensation" late. § 300aa–16(a)(2) (emphasis added). Yet the court below identified numerous instances throughout the NCVIA where the word "filed" is given its ordinary meaning, 675 F. 3d, at 1361, and the Government does not challenge this aspect of its decision. Indeed, the Government's reading would produce anomalous results with respect to these other NCVIA provisions. Consider § 300aa–12(b)(2), which provides that "[w]ithin 30 days after the Secretary receives service of any petition filed under section 300aa–11 of this title the Secretary shall publish notice of such petition in the Federal Register." If the NCVIA's limitations provision worked to void the filing of an untimely petition, then one would expect the Secretary to make timeliness determinations prior to publishing such notice or to strike any petitions found to be untimely from the Federal Register. But there is no indication that the Secretary does either of these things.[6]

The Government asks us to adopt a different definition of the term "filed" for a single subsection so that for fees purposes, and only for fees purposes, a petition filed out of time must be treated retroactively as though it was never filed in the first place. Nothing in the text or structure of the statute requires the unusual result the Government asks us to accept. In the NCVIA, the word "filed" carries its common meaning. See *Artuz*, 531 U. S., at 8. That "no petition may be filed for compensation" after the limitations period has run does not mean that a late petition was never filed at all.

"clear statement" that § 300aa–16's filing deadlines carry jurisdictional consequences. See Reply Brief 7 (discussing *Sebelius* v. *Auburn Regional Medical Center*, 568 U. S. 145 (2013)).

[6] Dr. Cloer's petition was published, and remains, in the Federal Register. See 70 Fed. Reg. 73011, 73014 (2005).

Our "inquiry ceases [in a statutory construction case] if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002) (internal quotation marks omitted). The text of the statute is clear: Like any other unsuccessful petition, an untimely petition brought in good faith and with a reasonable basis that is filed with—meaning delivered to and received by—the clerk of the Court of Federal Claims is eligible for an award of attorney's fees.

B

The Government's position is also inconsistent with the goals of the fees provision itself. A stated purpose of the Act's fees scheme was to avoid "limit[ing] petitioners' ability to obtain qualified assistance" by making fees awards available for "non-prevailing, good-faith claims." H. R. Rep., at 22. The Government does not explain why Congress would have intended to discourage counsel from representing petitioners who, because of the difficulty of distinguishing between the initial symptoms of a vaccine-related injury and an unrelated malady, see, *e. g.*, *Smith* v. *Secretary of Health and Human Servs.*, No. 02–93V, 2006 WL 5610517, *6–*7 (Fed. Cl., July 21, 2006) (opinion of Golkiewicz, Chief Special Master), may have good-faith claims with a reasonable basis that will only later be found untimely.

III

The Government offers two additional lines of argument for barring the award of attorney's fees for untimely petitions. It first invokes two canons of construction: the canon favoring strict construction of waivers of sovereign immunity and the "'presumption favoring the retention of long-established and familiar [common-law] principles.'" Brief for Petitioner 32 (quoting *United States* v. *Texas*, 507 U. S. 529, 534 (1993)). Similarly, the Government also argues that

the NCVIA should be construed so as to minimize complex and costly fees litigation. But as the Government acknowledges, such canons and policy arguments come into play only "[t]o the extent that the Vaccine Act is ambiguous." Brief for Petitioner 28. These "rules of thumb" give way when "the words of a statute are unambiguous," as they are here. *Connecticut Nat. Bank* v. *Germain*, 503 U. S. 249, 253–254 (1992).

Second, the Government argues that permitting the recovery of attorney's fees for untimely petitions will force special masters to carry out costly and wasteful "shadow trials," with no benefit to claimants, in order to determine whether these late petitions were brought in good faith and with a reasonable basis. We reiterate that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000) (internal quotation marks omitted). Consequently, even if the plain text of the NCVIA requires that special masters occasionally carry out such "shadow trials," that is not such an absurd burden as to require departure from the words of the Act. This is particularly true here because Congress has specifically provided for such "shadow trials" by permitting the award of attorney's fees "in *any* proceeding on [an unsuccessful] petition" if such petition was brought in good faith and with a reasonable basis, 42 U. S. C. § 300aa–15(e)(1) (emphasis added), irrespective of the reasons for the petition's failure, see, *e. g.*, *Caves* v. *Secretary of Health and Human Servs.*, No. 07–443V, 2012 WL 6951286, *2, *13 (Fed. Cl., Dec. 20, 2012) (opinion of Moran, Special Master) (awarding attorney's fees despite petitioner's failure to prove causation).

In any event, the Government's fears appear to us exaggerated. Special masters consistently make fee determina-

tions on the basis of the extensive documentation required by § 300aa–11(c) and included with the petition.[7] Indeed, when adjudicating the timeliness of a petition, the special master may often have to develop a good sense of the merits of a case, and will therefore be able to determine if a reasonable basis exists for the petitioner's claim, including whether there is a good-faith reason for the untimely filing. In this case, for example, the Chief Special Master conducted a "review of the record as a whole," including the medical evidence that would have supported the merits of Dr. Cloer's claim, before determining that her petition was untimely. *Cloer*, 2008 WL 2275574, *1–*2, *10.

The Government also argues that permitting attorney's fees on untimely petitions will lead to the filing of more untimely petitions. But the Government offers no evidence to support its speculation. Additionally, this argument is premised on the assumption that in the pursuit of fees, attorneys will choose to bring claims lacking good faith or a reasonable basis in derogation of their ethical duties. There is no basis for such an assumption. Finally, the special masters have shown themselves more than capable of discerning untimely claims supported by good faith and a reasonable basis from those that are specious. *Supra*, at 381 and this page.

* * *

We hold that an NCVIA petition found to be untimely may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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[7] See, *e. g.*, *Wells* v. *Secretary of Health and Human Servs.*, 28 Fed. Cl. 647, 649–651 (1993); *Rydzewski* v. *Secretary of Health and Human Servs.*, No. 99–571V, 2008 WL 382930, *2–*6 (Fed. Cl., Jan. 29, 2008) (opinion of Moran, Special Master); *Hamrick* v. *Secretary of Health and Human Servs.*, No. 99–683V, 2007 WL 4793152, *2–*3, *5–*9 (Fed. Cl., Nov. 19, 2007) (same).

Syllabus

McQUIGGIN, WARDEN *v.* PERKINS

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

No. 12–126. Argued February 25, 2013—Decided May 28, 2013

Rodney Henderson was found stabbed to death after leaving a party in Flint, Michigan, with respondent Floyd Perkins and Damarr Jones. Perkins was charged with murder. Jones, the key prosecution witness, testified that Perkins alone committed the murder while Jones looked on. Perkins, however, testified that Jones and Henderson left him during the evening, and that he later saw Jones with blood on his clothing. Perkins was convicted of first-degree murder and sentenced to life in prison without the possibility of parole. His conviction became final in 1997.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) gives a state prisoner one year to file a federal habeas petition, starting from "the date on which the judgment became final." 28 U. S. C. § 2244(d)(1)(A). But if the petition alleges newly discovered evidence, the filing deadline is one year from "the date on which the factual predicate of the claim . . . could have been discovered through . . . due diligence." § 2244(d)(1)(D).

More than 11 years after his conviction became final, Perkins filed his federal habeas petition, alleging, *inter alia*, ineffective assistance of trial counsel. To overcome AEDPA's time limitations, he asserted newly discovered evidence of actual innocence, relying on three affidavits, the most recent dated July 16, 2002, each pointing to Jones as the murderer. The District Court found that, even if the affidavits could be characterized as evidence newly discovered, Perkins had failed to show diligence entitling him to equitable tolling of AEDPA's limitations period. Alternatively, the court found, Perkins had not shown that, taking account of all the evidence, no reasonable juror would have convicted him. The Sixth Circuit reversed. Acknowledging that Perkins' petition was untimely and that he had not diligently pursued his rights, the court held that Perkins' actual-innocence claim allowed him to present his ineffective-assistance-of-counsel claim as if it had been filed on time. In so ruling, the court apparently considered Perkins' delay irrelevant to appraisal of his actual-innocence claim.

Held:

1. Actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it

was in *Schlup* v. *Delo*, 513 U. S. 298, and *House* v. *Bell*, 547 U. S. 518, or expiration of the AEDPA statute of limitations, as in this case. Pp. 391–398.

(a) Perkins, who waited nearly six years from the date of the 2002 affidavit to file his petition, maintains that an actual-innocence plea can overcome AEDPA's one-year limitations period. This Court's decisions support his view. The Court has not resolved whether a prisoner may be entitled to habeas relief based on a freestanding actual-innocence claim, *Herrera* v. *Collins*, 506 U. S. 390, 404–405, but it has recognized that a prisoner "otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence," *id.*, at 404.

The Court has applied this "fundamental miscarriage of justice exception" to overcome various procedural defaults, including, as most relevant here, failure to observe state procedural rules, such as filing deadlines. See *Coleman* v. *Thompson*, 501 U. S. 722, 750. The exception, the Court's decisions bear out, survived AEDPA's passage. See, *e. g.*, *Calderon* v. *Thompson*, 523 U. S. 538, 558; *House*, 547 U. S., at 537–538. These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U. S., at 324. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations. Pp. 391–394.

(b) The State urges that recognition of a miscarriage of justice exception would render § 2244(d)(1)(D) superfluous. That is not so, for AEDPA's time limitations apply to the typical case in which no actual-innocence claim is made, while the exception applies to a severely confined category: cases in which new evidence shows "it is more likely than not that 'no reasonable juror' would have convicted [the petitioner]," *Schlup*, 513 U. S., at 329. Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by § 2244(d)(1)(D)'s triggering provision. Nor does Congress' inclusion of a miscarriage of justice exception in §§ 2244(b)(2)(B) and 2254(e)(2) indicate an intent to preclude courts from applying the exception in § 2244(d)(1)(D) cases. Congress did not simply incorporate the miscarriage of justice exception into §§ 2244(b)(2)(B) and 2254(e)(2). Rather, Congress constrained the exception's application with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court. The more rational inference to draw from the incorporation of a modified version of the exception into other provisions of AEDPA is that, in a case not governed by those provisions, the exception survived AEDPA's passage intact and unrestricted. Pp. 394–398.

Syllabus

2. A federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown. A petitioner invoking the miscarriage of justice exception "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U. S., at 327. Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Taking account of the delay in the context of the merits of a petitioner's actual-innocence claim, rather than treating timeliness as a threshold inquiry, is tuned to the exception's underlying rationale of ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U. S., at 404. Pp. 398–400.

3. Here, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive, absent cause, which this Court does not currently see, for the Sixth Circuit to upset that evaluation. Under *Schlup*'s demanding standard, the gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." 513 U. S., at 316. Pp. 400–401.

670 F. 3d 665, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS, J., joined, and in which ALITO, J., joined as to Parts I, II, and III, *post*, p. 401.

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 *Mark G. Sands* and *John S. Pallas*, Assistant Attorneys General.

Chad A. Readler argued the cause for respondent. With him on the brief were *Eric E. Murphy*, *Allison E. Haedt*, and *Jason Burnette*.*

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Luther Strange*, Attorney General of Alabama, *John C. Neiman, Jr.*, Solicitor General, *Andrew L. Brasher*, Deputy Solicitor General, and *Kasdin E. Miller*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *John Suthers* of Colo-

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the "actual innocence" gateway to federal habeas review applied in *Schlup* v. *Delo*, 513 U. S. 298 (1995), and further explained in *House* v. *Bell*, 547 U. S. 518 (2006). In those cases, a convincing showing of actual innocence enabled habeas petitioners to overcome a procedural bar to consideration of the merits of their constitutional claims. Here, the question arises in the context of 28 U. S. C. § 2244(d)(1), the statute of limitations on federal habeas petitions prescribed in the Antiterrorism and Effective Death Penalty Act of 1996. Specifically, if the petitioner does not file her federal habeas petition, at the latest, within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," § 2244(d)(1)(D), can the time bar be overcome by a convincing showing that she committed no crime?

We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."

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rado, *Samuel S. Olens* of Georgia, *Lawrence Wasden* of Idaho, *Gregory F. Zoeller* of Indiana, *Derek Schmidt* of Kansas, *William J. Schneider* of Maine, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Gary King* of New Mexico, *Wayne Stenehjem* of North Dakota, *E. Scott Pruitt* of Oklahoma, *Robert E. Cooper, Jr.*, of Tennessee, *Mark Shurtleff* of Utah, *Robert M. McKenna* of Washington, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming.

Briefs of *amici curiae* urging affirmance were filed for Former and Current Law Enforcement Officials by *George H. Kendall* and *Pierre H. Bergeron*; and for the Innocence Network by *Lori R. Mason*, *Maureen P. Alger*, and *Kyle P. Reynolds*.

Schlup, 513 U. S., at 329; see *House*, 547 U. S., at 538 (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup*, 513 U. S., at 332.

In the instant case, the Sixth Circuit acknowledged that habeas petitioner Perkins (respondent here) had filed his petition after the statute of limitations ran out, and had "failed to diligently pursue his rights." Order in No. 09–1875 (Feb. 24, 2010), p. 2 (Certificate of Appealability). Nevertheless, the Court of Appeals reversed the decision of the District Court denying Perkins' petition, and held that Perkins' actual-innocence claim allowed him to pursue his habeas petition as if it had been filed on time. 670 F. 3d 665, 670 (2012). The appeals court apparently considered a petitioner's delay irrelevant to appraisal of an actual-innocence claim. See *ibid.*

We vacate the Court of Appeals' judgment and remand the case. Our opinion clarifies that a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown. See Brief for Respondent 45 (habeas court "could . . . hold the unjustified delay *against the petitioner* when making credibility findings as to whether the [actual-innocence] exception has been met").

I

A

On March 4, 1993, respondent Floyd Perkins attended a party in Flint, Michigan, in the company of his friend, Rodney Henderson, and an acquaintance, Damarr Jones. The three men left the party together. Henderson was later discovered on a wooded trail, murdered by stab wounds to his head.

Perkins was charged with the murder of Henderson. At trial, Jones was the key witness for the prosecution. He testified that Perkins alone committed the murder while Jones looked on. App. 55.

Chauncey Vaughn, a friend of Perkins and Henderson, testified that, prior to the murder, Perkins had told him he would kill Henderson, *id.*, at 39, and that Perkins later called Vaughn, confessing to his commission of the crime, *id.*, at 36–38. A third witness, Torriano Player, also a friend of both Perkins and Henderson, testified that Perkins told him, had he known how Player felt about Henderson, he would not have killed Henderson. *Id.*, at 74.

Perkins, testifying in his own defense, offered a different account of the episode. He testified that he left Henderson and Jones to purchase cigarettes at a convenience store. When he exited the store, Perkins related, Jones and Henderson were gone. *Id.*, at 84. Perkins said that he then visited his girlfriend. *Id.*, at 87. About an hour later, Perkins recalled, he saw Jones standing under a streetlight with blood on his pants, shoes, and plaid coat. *Id.*, at 90.

The jury convicted Perkins of first-degree murder. He was sentenced to life in prison without the possibility of parole on October 27, 1993. The Michigan Court of Appeals affirmed Perkins' conviction and sentence, and the Michigan Supreme Court denied Perkins leave to appeal on January 31, 1997. Perkins' conviction became final on May 5, 1997.

B

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a state prisoner ordinarily has one year to file a federal petition for habeas corpus, 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). If the petition alleges newly discovered evidence, however, the filing deadline is one year from "the date on which the

factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." § 2244(d)(1)(D).

Perkins filed his federal habeas corpus petition on June 13, 2008, more than 11 years after his conviction became final. He alleged, *inter alia*, ineffective assistance on the part of his trial attorney, depriving him of his Sixth Amendment right to competent counsel. To overcome AEDPA's time limitations, Perkins asserted newly discovered evidence of actual innocence. He relied on three affidavits, each pointing to Jones, not Perkins, as Henderson's murderer.

The first affidavit, dated January 30, 1997, was submitted by Perkins' sister, Ronda Hudson. Hudson stated that she had heard from a third party, Louis Ford, that Jones bragged about stabbing Henderson and had taken his clothes to the cleaners after the murder. App. to Pet. for Cert. 54a–55a. The second affidavit, dated March 16, 1999, was subscribed to by Demond Louis, Chauncey Vaughn's younger brother. Louis stated that, on the night of the murder, Jones confessed to him that he had just killed Henderson. Louis also described the clothes Jones wore that night, bloodstained orange shoes and orange pants, and a colorful shirt. *Id.*, at 50a–53a. The next day, Louis added, he accompanied Jones, first to a dumpster where Jones disposed of the bloodstained shoes, and then to the cleaners. Finally, Perkins presented the July 16, 2002 affidavit of Linda Fleming, an employee at Pro-Clean Cleaners in 1993. She stated that, on or about March 4, 1993, a man matching Jones's description entered the shop and asked her whether bloodstains could be removed from the pants and a shirt he brought in. The pants were orange, she recalled, and heavily stained with blood, as was the multicolored shirt left for cleaning along with the pants. *Id.*, at 48a–49a.

The District Court found the affidavits insufficient to entitle Perkins to habeas relief. Characterizing the affidavits as newly discovered evidence was "dubious," the District Court

observed, in light of what Perkins knew about the underlying facts at the time of trial. *Id.*, at 29a. But even assuming qualification of the affidavits as evidence newly discovered, the District Court next explained, "[Perkins'] petition [was] untimely under § 2244(d)(1)(D)." *Ibid.* "[If] the statute of limitations began to run as of the date of the latest of th[e] affidavits, July 16, 2002," the District Court noted, then "absent tolling, [Perkins] had until July 16, 2003 in which to file his habeas petition." *Ibid.* Perkins, however, did not file until nearly five years later, on June 13, 2008.

Under Sixth Circuit precedent, the District Court stated, "a habeas petitioner who demonstrates a credible claim of actual innocence based on new evidence may, in exceptional circumstances, be entitled to equitable tolling of habeas limitations." *Id.*, at 30a. But Perkins had not established exceptional circumstances, the District Court determined. In any event, the District Court observed, equitable tolling requires diligence and Perkins "ha[d] failed utterly to demonstrate the necessary diligence in exercising his rights." *Id.*, at 31a. Alternatively, the District Court found that Perkins had failed to meet the strict standard by which pleas of actual innocence are measured: He had not shown that, taking account of all the evidence, "it is more likely than not that no reasonable juror would have convicted him," or even that the evidence was new. *Id.*, at 30a–31a.

Perkins appealed the District Court's judgment. Although recognizing that AEDPA's statute of limitations had expired and that Perkins had not diligently pursued his rights, the Sixth Circuit granted a certificate of appealability limited to a single question: Is reasonable diligence a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits? Certificate of Appealability 2–3.

On consideration of the certified question, the Court of Appeals reversed the District Court's judgment. Adhering to Circuit precedent, *Souter* v. *Jones*, 395 F. 3d 577, 597–602

(2005), the Sixth Circuit held that Perkins' gateway actual-innocence allegations allowed him to present his ineffective-assistance-of-counsel claim as if it were filed on time. On remand, the Court of Appeals instructed, "the [D]istrict [C]ourt [should] fully consider whether Perkins assert[ed] a credible claim of actual innocence." 670 F. 3d, at 676.

We granted certiorari to resolve a Circuit conflict on whether AEDPA's statute of limitations can be overcome by a showing of actual innocence. 568 U. S. 977 (2012). Compare, *e. g., San Martin* v. *McNeil*, 633 F. 3d 1257, 1267–1268 (CA11 2011) ("A court . . . may consider an untimely § 2254 petition if, by refusing to consider the petition for untimeliness, the court thereby would endorse a 'fundamental miscarriage of justice' because it would require that an individual who is actually innocent remain imprisoned."), with, *e. g.*, *Escamilla* v. *Jungwirth*, 426 F. 3d 868, 871–872 (CA7 2005) ("Prisoners claiming to be innocent, like those contending that other events spoil the conviction, must meet the statutory requirement of timely action."). See also *Rivas* v. *Fischer*, 687 F. 3d 514, 548 (CA2 2012) (collecting cases).

II

A

In *Holland* v. *Florida*, 560 U. S. 631 (2010), this Court addressed the circumstances in which a federal habeas petitioner could invoke the doctrine of "equitable tolling." *Holland* held that "a [habeas] petitioner is entitled to equitable tolling only if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.*, at 649 (internal quotation marks omitted). As the courts below comprehended, Perkins does not qualify for equitable tolling. In possession of all three affidavits by July 2002, he waited nearly six years to seek federal postconviction relief. "Such a delay falls far short of demonstrating the . . . diligence" required to entitle a petitioner to equitable tolling.

App. to Pet. for Cert. 31a (District Court opinion). See also Certificate of Appealability 2.

Perkins, however, asserts not an excuse for filing after the statute of limitations has run. Instead, he maintains that a plea of actual innocence can overcome AEDPA's one-year statute of limitations. He thus seeks an equitable *exception* to § 2244(d)(1), not an extension of the time statutorily prescribed. See *Rivas*, 687 F. 3d, at 547, n. 42 (distinguishing from "equitable tolling" a plea to override the statute of limitations when actual innocence is shown).

Decisions of this Court support Perkins' view of the significance of a convincing actual-innocence claim. We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera* v. *Collins*, 506 U. S. 390, 404–405 (1993). We have recognized, however, that a prisoner "otherwise subject to defenses of abusive or successive use of the writ [of habeas corpus] may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." *Id.*, at 404 (citing *Sawyer* v. *Whitley*, 505 U. S. 333 (1992)). See also *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims (here, ineffective assistance of counsel) on the merits notwithstanding the existence of a procedural bar to relief. "This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U. S., at 404.

We have applied the miscarriage of justice exception to overcome various procedural defaults. These include "suc-

cessive" petitions asserting previously rejected claims, see *Kuhlmann* v. *Wilson*, 477 U. S. 436, 454 (1986) (plurality opinion), "abusive" petitions asserting in a second petition claims that could have been raised in a first petition, see *McCleskey* v. *Zant*, 499 U. S. 467, 494–495 (1991), failure to develop facts in state court, see *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1, 11–12 (1992), and failure to observe state procedural rules, including filing deadlines, see *Coleman* v. *Thompson*, 501 U. S. 722, 750 (1991); *Carrier*, 477 U. S., at 495–496.

The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage. In *Calderon* v. *Thompson*, 523 U. S. 538 (1998), we applied the exception to hold that a federal court may, consistent with AEDPA, recall its mandate in order to revisit the merits of a decision. *Id.*, at 558 ("The miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence."). In *Bousley* v. *United States*, 523 U. S. 614, 622 (1998), we held, in the context of § 2255, that actual innocence may overcome a prisoner's failure to raise a constitutional objection on direct review. Most recently, in *House*, we reiterated that a prisoner's proof of actual innocence may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error. 547 U. S., at 537–538.

These decisions "see[k] to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U. S., at 324. Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA's statute of limitations.

As just noted, see *supra*, at 392, we have held that the miscarriage of justice exception applies to state procedural rules, including filing deadlines. *Coleman*, 501 U. S., at 750.

A federal court may invoke the miscarriage of justice exception to justify consideration of claims defaulted in state court under state timeliness rules. See *ibid.* The State's reading of AEDPA's time prescription would thus accord greater force to a federal deadline than to a similarly designed state deadline. It would be passing strange to interpret a statute seeking to promote federalism and comity as requiring stricter enforcement of federal procedural rules than procedural rules established and enforced by the *States*.

B

The State ties to § 2244(d)'s text its insistence that AEDPA's statute of limitations precludes courts from considering late-filed actual-innocence gateway claims. "Section 2244(d)(1)(D)," the State contends, "forecloses any argument that a habeas petitioner has unlimited time to present new evidence in support of a constitutional claim." Brief for Petitioner 17. That is so, the State maintains, because AEDPA prescribes a comprehensive system for determining when its one-year limitations period begins to run. "Included within that system," the State observes, "is a specific trigger for the precise circumstance presented here: a constitutional claim based on new evidence." *Ibid.* Section 2244(d)(1)(D) runs the clock from "the date on which the factual predicate of the claim . . . could have been discovered through the exercise of due diligence." In light of that provision, the State urges, "there is no need for the courts to act in equity to provide additional time for persons who allege actual innocence as a gateway to their claims of constitutional error." *Ibid.* Perkins' request for an equitable exception to the statute of limitations, the State charges, would "rende[r] superfluous this carefully scripted scheme." *Id.*, at 18.

The State's argument in this regard bears blinders. AEDPA's time limitations apply to the typical case in which no allegation of actual innocence is made. The miscarriage

of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows "it is more likely than not that no reasonable juror would have convicted [the petitioner]." *Schlup*, 513 U. S., at 329 (internal quotation marks omitted). Section 2244(d)(1)(D) is both modestly more stringent (because it requires diligence) and dramatically less stringent (because it requires no showing of innocence). Many petitions that could not pass through the actual-innocence gateway will be timely or not measured by § 2244(d)(1)(D)'s triggering provision. That provision, in short, will hardly be rendered superfluous by recognition of the miscarriage of justice exception.

The State further relies on provisions of AEDPA other than § 2244(d)(1)(D), namely, §§ 2244(b)(2)(B) and 2254(e)(2), to urge that Congress knew how to incorporate the miscarriage of justice exception when it was so minded. Section 2244(b)(2)(B), the State observes, provides that a petitioner whose first federal habeas petition has already been adjudicated when new evidence comes to light may file a second-or-successive petition when, and only when, the facts underlying the new claim would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). And § 2254(e)(2), which generally bars evidentiary hearings in federal habeas proceedings initiated by state prisoners, includes an exception for prisoners who present new evidence of their innocence. See §§ 2254(e)(2)(A)(ii), (B) (permitting evidentiary hearings in federal court if "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

But Congress did not simply incorporate the miscarriage of justice exception into §§ 2244(b)(2)(B) and 2254(e)(2). Rather, Congress constrained the application of the exception. Prior to AEDPA's enactment, a court could grant re-

lief on a second-or-successive petition, then known as an "abusive" petition, if the petitioner could show that "a fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey*, 499 U. S., at 495. Section 2244(b)(2)(B) limits the exception to cases in which "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and the petitioner can establish that no reasonable factfinder "would have found [her] guilty of the underlying offense" by "clear and convincing evidence." Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof ("clear and convincing evidence") and to satisfy a diligence requirement that did not exist prior to AEDPA's passage.

Likewise, petitioners asserting actual innocence pre-AEDPA could obtain evidentiary hearings in federal court even if they failed to develop facts in state court. See *Keeney*, 504 U. S., at 12 ("A habeas petitioner's failure to develop a claim in state-court proceedings will be excused and a hearing mandated if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."). Under AEDPA, a petitioner seeking an evidentiary hearing must show diligence and, in addition, establish her actual innocence by clear and convincing evidence. §§ 2254(e)(2)(A)(ii), (B).

Sections 2244(b)(2)(B) and 2254(e)(2) thus reflect Congress' will to *modify* the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court. These provisions do not demonstrate Congress' intent to preclude courts from applying the exception, unmodified, to "the type of petition at issue here"—an untimely first federal habeas petition alleging a gateway actual-innocence claim. *House*, 547 U. S., at 539.[1] The more rational inference to draw from Congress'

[1] In *House*, we rejected the analogous argument that AEDPA replaced the standard for actual-innocence gateway claims prescribed in *Schlup* v. *Delo*, 513 U. S. 298, 327 (1995) (petitioner "must show that it is more likely

incorporation of a modified version of the miscarriage of justice exception in §§ 2244(b)(2)(B) and 2254(e)(2) is simply this: In a case not governed by those provisions, *i. e.*, a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.[2]

Our reading of the statute is supported by the Court's opinion in *Holland*. "[E]quitable principles have traditionally governed the substantive law of habeas corpus," *Holland* reminded, and affirmed that "we will not construe a statute to displace courts' traditional equitable authority absent the clearest command." 560 U. S., at 646 (internal quotation marks omitted). The text of § 2244(d)(1) contains no clear command countering the courts' equitable authority to invoke the miscarriage of justice exception to overcome expiration of the statute of limitations governing a first federal habeas petition. As we observed in *Holland*:

> "AEDPA seeks to eliminate delays in the federal habeas review process. But AEDPA seeks to do so without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law . . . . When Congress codified new rules governing this pre-

than not that no reasonable juror would have convicted him in the light of the new evidence"), with a "clear and convincing" evidence requirement. 547 U. S., at 539 (internal quotation marks omitted). As here, the State relied on §§ 2244(b)(2)(B)(ii) and 2254(e)(2) to support its argument. But "[n]either provision address[ed] the type of petition at issue . . . [,] a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." *Ibid.* Consequently, we held inapplicable to first petitions the stricter standard AEDPA prescribed for second-or-successive petitions. *Ibid.*

[2] Prior to AEDPA, it is true, this Court had not ruled that a credible claim of actual innocence could supersede a federal statute of limitations. The reason why that is so is evident: Pre-AEDPA, petitions for federal habeas relief were not governed by any statute of limitations. Notably, we said in *Coleman* v. *Thompson*, 501 U. S. 722 (1991), that a petitioner who failed to comply with a timeliness requirement in *state* court could nevertheless plead her claims on the merits in federal court if she could show that "failure to consider the claims [would] result in a fundamental miscarriage of justice." *Id.*, at 750.

viously judicially managed area of law, it did so without losing sight of the fact that the writ of habeas corpus plays a vital role in protecting constitutional rights." *Id.*, at 648–649 (citations and internal quotation marks omitted).[3]

III

Having rejected the State's argument that § 2244(d)(1)(D) precludes a court from entertaining an untimely first federal habeas petition raising a convincing claim of actual innocence, we turn to the State's further objection to the Sixth Circuit's opinion. Even if a habeas petitioner asserting a credible claim of actual innocence may overcome AEDPA's statute of limitations, the State argues, the Court of Appeals erred in finding that no threshold diligence requirement at all applies to Perkins' petition.

While formally distinct from its argument that § 2244(d)(1)(D)'s text forecloses a late-filed claim alleging actual innocence, the State's contention makes scant sense. Section 2244(d)(1)(D) requires a habeas petitioner to file a claim within one year of the time in which new evidence "could

[3] For eight pages, the dissent stridently insists that federal (although not state) statutes of limitations allow no exceptions not contained in the text. Well, not quite so, the dissent ultimately acknowledges. *Post*, at 408. Even AEDPA's statute of limitations, the dissent admits, is subject to equitable tolling. But that is because equitable tolling "can be seen as a reasonable assumption of genuine legislative intent." *Post*, at 410. Why is it not an equally reasonable assumption that Congress would want a limitations period to yield when what is at stake is a State's incarceration of an individual for a crime, it has become clear, no reasonable person would find he committed? For all its bluster, the dissent agrees with the Court on a crucial point: Congress legislates against the backdrop of existing law. *Post*, at 410, and n. 2. At the time of AEDPA's enactment, multiple decisions of this Court applied the miscarriage of justice exception to overcome various threshold barriers to relief. See *supra*, at 392–393. It is hardly "unprecedented," therefore, to conclude that "Congress intended or could have anticipated [a miscarriage of justice] exception" when it enacted AEDPA. *Post*, at 410–411.

have been discovered through the exercise of due diligence." It would be bizarre to hold that a habeas petitioner who asserts a convincing claim of actual innocence may overcome the statutory time bar § 2244(d)(1)(D) erects, yet simultaneously encounter a court-fashioned diligence barrier to pursuit of her petition. See 670 F. 3d, at 673 ("Requiring reasonable diligence effectively makes the concept of the actual innocence gateway redundant, since petitioners . . . seek [an equitable exception only] when they were not reasonably diligent in complying with § 2244(d)(1)(D).").

While we reject the State's argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold, we hold that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner's proof of innocence. To invoke the miscarriage of justice exception to AEDPA's statute of limitations, we repeat, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U. S., at 327. Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. Perkins so acknowledges. See Brief for Respondent 52 (unjustified delay may figure in determining "whether a petitioner has made a sufficient showing of innocence"). As we stated in *Schlup*, "[a] court may consider how the timing of the submission and the likely credibility of [a petitioner's] affiants bear on the probable reliability of . . . evidence [of actual innocence]." 513 U. S., at 332. See also *House*, 547 U. S., at 537.

Considering a petitioner's diligence, not discretely, but as part of the assessment whether actual innocence has been convincingly shown, attends to the State's concern that it will be prejudiced by a prisoner's untoward delay in proffering new evidence. The State fears that a prisoner might "lie in wait and use stale evidence to collaterally attack his

conviction . . . when an elderly witness has died and cannot appear at a hearing to rebut new evidence." Brief for Petitioner 25. The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim. Moreover, the deceased witness' prior testimony, which would have been subject to cross-examination, could be introduced in the event of a new trial. See *Crawford* v. *Washington*, 541 U. S. 36, 53–54 (2004) (recognizing exception to the Confrontation Clause where witness is unavailable and the defendant had a prior opportunity for cross-examination). And frivolous petitions should occasion instant dismissal. See 28 U. S. C. § 2254 Rule 4. Focusing on the merits of a petitioner's actual-innocence claim and taking account of delay in that context, rather than treating timeliness as a threshold inquiry, is tuned to the rationale underlying the miscarriage of justice exception—*i. e.*, ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U. S., at 404.[4]

IV

We now return to the case at hand. The District Court proceeded properly in first determining that Perkins' claim was filed well beyond AEDPA's limitations period and that equitable tolling was unavailable to Perkins because he could demonstrate neither exceptional circumstances nor diligence. See *supra*, at 390. The District Court then found that Perkins' alleged newly discovered evidence, *i. e.*, the information contained in the three affidavits, was "substantially available to [Perkins] at trial." App. to Pet. for Cert. 31a. Moreover, the proffered evidence, even if "new," was hardly adequate

[4] We note one caveat: A showing that delay was part of a deliberate attempt to manipulate the case, say, by waiting until a key prosecution witness died or was deported, might raise a different ground for withholding equitable relief. No such contention was presented here, however, so we do not discuss the point.

to show that, had it been presented at trial, no reasonable juror would have convicted Perkins. *Id.*, at 30a–31a.

The Sixth Circuit granted a certificate of appealability limited to the question whether reasonable diligence is a precondition to reliance on actual innocence as a gateway to adjudication of a federal habeas petition on the merits. We have explained that untimeliness, although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence. On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation. We stress once again that the *Schlup* standard is demanding. The gateway should open only when a petition presents "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." 513 U. S., at 316.

* * *

For the reasons stated, the judgment of 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 THE CHIEF JUSTICE and JUSTICE THOMAS join, and with whom JUSTICE ALITO joins as to Parts I, II, and III, dissenting.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that a "1-year period of limitation shall apply" to a state prisoner's application for a writ of habeas corpus in federal court. 28 U. S. C. §2244(d)(1). The gaping hole in today's opinion for the Court is its failure to answer the crucial question upon which all else depends: What is the source of the Court's power to fashion what

it concedes is an "exception" to this clear statutory command?

That question is unanswered because there is no answer. This Court has no such power, and not one of the cases cited by the opinion says otherwise. The Constitution vests legislative power only in Congress, which never enacted the exception the Court creates today. That inconvenient truth resolves this case.

I

A

"Actual innocence" has, until today, been an exception only to judge-made, prudential barriers to habeas relief, or as a means of channeling judges' statutorily conferred discretion not to apply a procedural bar. Never before have we applied the exception to circumvent a categorical *statutory* bar to relief. We have not done so because we have no power to do so. Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect.

Before AEDPA, the Supreme Court had developed an array of doctrines, see, *e. g.*, *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) (procedural default); *McCleskey* v. *Zant*, 499 U. S. 467, 489 (1991) (abuse of the writ), to limit the habeas practice that it had radically expanded in the early or mid-20th century to include review of the merits of conviction and not merely jurisdiction of the convicting court, see *Stone* v. *Powell*, 428 U. S. 465, 475–478 (1976) (citing *Frank* v. *Mangum*, 237 U. S. 309 (1915)); *Brown* v. *Allen*, 344 U. S. 443, 533–534 (1953) (Jackson, J., concurring in result); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 483–499 (1963). For example, the doctrine of procedural default holds that a state prisoner's default of his federal claims "in state court pursuant to an independent and adequate state procedural rule" bars federal habeas review of those claims. *Coleman* v. *Thomp-*

son, 501 U. S. 722, 750 (1991). That doctrine is not a statutory or jurisdictional command; rather, it is a "prudential" rule "grounded in 'considerations of comity and concerns for the orderly administration of criminal justice.'" *Dretke* v. *Haley*, 541 U. S. 386, 392–393 (2004) (quoting *Francis* v. *Henderson*, 425 U. S. 536, 538–539 (1976)).

And what courts have created, courts can modify. One judge-made exception to procedural default allows a petitioner to proceed where he can demonstrate "cause" for the default and "prejudice." See *Coleman*, *supra*, at 750. As relevant here, we have also expressed a willingness to excuse a petitioner's default, even absent a showing of cause, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray* v. *Carrier*, 477 U. S. 478, 496 (1986); see *Schlup* v. *Delo*, 513 U. S. 298, 326–327 (1995); *House* v. *Bell*, 547 U. S. 518, 536–537 (2006).

There is nothing inherently inappropriate (as opposed to merely unwise) about judge-created exceptions to judge-made barriers to relief. Procedural default, for example, raises "no question of a federal district court's power to entertain an application for a writ of habeas corpus." *Francis*, *supra*, at 538. Where a petitioner would, but for a judge-made doctrine like procedural default, have a good habeas claim, it offends no command of Congress's for a federal court to consider the petition. But that free-and-easy approach has no place where a statutory bar to habeas relief is at issue. "[T]he power to award the writ by any of the courts of the United States, must be given by written law," *Ex parte Bollman*, 4 Cranch 75, 94 (1807) (Marshall, C. J.), and "judgments about the proper scope of the writ are 'normally for Congress to make,'" *Felker* v. *Turpin*, 518 U. S. 651, 664 (1996) (quoting *Lonchar* v. *Thomas*, 517 U. S. 314, 323 (1996)). One would have thought it too obvious to mention that this Court is dutybound to enforce AEDPA, not amend it.

B

Because we have no "equitable" power to discard statutory barriers to habeas relief, we cannot simply extend judge-made exceptions to judge-made barriers into the statutory realm. The Court's insupportable leap from judge-made procedural bars to *all* procedural bars, including *statutory* bars, does all the work in its opinion—and there is not a whit of precedential support for it. *McCleskey* v. *Zant* applied a "miscarriage of justice" exception to the judge-made abuse-of-the-writ doctrine. 499 U. S., at 487–489, 495. *Coleman* v. *Thompson* and *Murray* v. *Carrier* applied it to the judge-made procedural-default doctrine. 501 U. S., at 750; 477 U. S., at 496. *Keeney* v. *Tamayo-Reyes*, 504 U. S. 1 (1992), applied it to a variant of procedural default: a state prisoner's failure adequately to develop material facts in state court. *Id.*, at 8. *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), a plurality opinion, applied it to a statute that merely said lower federal courts "'need not'" entertain successive petitions, thus leaving them with "*discretion* to entertain successive petitions under some circumstances." *Id.*, at 449, 451 (emphasis added). Not one of the cases on which the Court relies today supports the extraordinary premise that courts can create out of whole cloth an exception to a statutory bar to relief.

The opinion for the Court also trots out post-AEDPA cases to prove the irrelevant point that "[t]he miscarriage of justice exception . . . survived AEDPA's passage." *Ante,* at 393. What it ignores, yet again, is that after AEDPA's passage, as before, the exception applied only to *nonstatutory* obstacles to relief. *Bousley* v. *United States* and *House* v. *Bell* were applications of the judge-made doctrine of procedural default. See *Bousley*, 523 U. S. 614, 623 (1998); *id.*, at 625 (Stevens, J., concurring in part and dissenting in part) ("I agree with the Court's central holding . . . that none of its *judge-made rules* foreclose petitioner's collateral attack . . ." (emphasis added)); *id.*, at 630 (SCALIA, J., dissenting); *House*,

supra, at 522. *Calderon* v. *Thompson*, 523 U. S. 538 (1998), a non-AEDPA case, involved the courts of appeals' "inherent power to recall their mandates, subject to review for an abuse of discretion," *id.*, at 549; it stands only for the proposition that the miscarriage-of-justice exception is an appropriate "'means of channeling'" that discretion, *id.*, at 559 (quoting *McCleskey*, *supra*, at 496).

The Court's opinion, in its way, acknowledges the dearth of precedential support for its holding. "Prior to AEDPA," it concedes, "this Court had not ruled that a credible claim of actual innocence could supersede a federal statute of limitations." *Ante*, at 397, n. 2. Its explanation for this lack of precedent is that before AEDPA, "petitions for federal habeas relief were not governed by any statute of limitations." *Ibid.* That is true but utterly unprobative. There are many statutory bars to relief other than statutes of limitations, and we had never (and before today, have never) created an actual-innocence exception to *any* of them. The reason why is obvious: Judicially amending a validly enacted statute in this way is a flagrant breach of the separation of powers.

II

The Court has no qualms about transgressing such a basic principle. It does not even attempt to cloak its act of judicial legislation in the pretense that it is merely construing the statute; indeed, it freely admits that its opinion recognizes an "exception" that the statute does not contain. *Ante*, at 392. And it dismisses, with a series of transparent non sequiturs, Michigan's overwhelming textual argument that the statute provides no such exception and envisions none.

The key textual point is that two provisions of § 2244, working in tandem, provide a comprehensive path to relief for an innocent prisoner who has newly discovered evidence that supports his constitutional claim. Section 2244(d)(1)(D) gives him a fresh year in which to file, starting on "the date

on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," while §2244(b)(2)(B) lifts the bar on second or successive petitions. Congress clearly anticipated the scenario of a habeas petitioner with a credible innocence claim and addressed it by crafting an exception (and an exception, by the way, more restrictive than the one that pleases the Court today). One cannot assume that Congress left room for other, judge-made applications of the actual-innocence exception, any more than one would add another gear to a Swiss watch on the theory that the watchmaker surely would have included it if he had thought of it. In both cases, the intricate craftsmanship tells us that the designer arranged things just as he wanted them.

The Court's feeble rejoinder is that its (judicially invented) version of the "actual innocence" exception applies only to a "severely confined category" of cases. *Ante*, at 395. Since cases qualifying for the actual-innocence exception will be rare, it explains, the statutory path for innocent petitioners will not "be rendered superfluous." *Ibid.* That is no answer at all. That the Court's exception would not *entirely* frustrate Congress's design does not weaken the force of the State's argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent. By the Court's logic, a statute banning littering could simply be deemed to contain an exception for cigarette butts; after all, the statute as thus amended would still cover *something*. That is not how a court respectful of the separation of powers should interpret statutes.

Even more bizarre is the Court's concern that applying AEDPA's statute of limitations without recognizing an atextual actual-innocence exception would "accord greater force to a federal deadline than to a similarly designed state deadline." *Ante*, at 394; see also *ante*, at 397, n. 2. The Court terms that outcome "passing strange," *ante*, at 394, but it is not strange at all. Only *federal* statutes of limitations bind

federal habeas courts with the force of law; a state statute of limitations is given effect on federal habeas review only by virtue of the *judge-made* doctrine of procedural default.[1] See *Coleman*, 501 U. S., at 730–731. With its eye firmly fixed on something it likes—a shiny new exception to a statute unloved in the best circles—the Court overlooks this basic distinction, which would not trouble a second-year law student armed with a copy of Hart & Wechsler. The Court simply ignores basic legal principles where they pose an obstacle to its policy-driven, free-form improvisation.

The Court's statutory-construction blooper reel does not end there. Congress's express inclusion of innocence-based exceptions in two neighboring provisions of AEDPA confirms, one would think, that there is no actual-innocence exception to § 2244(d)(1). Section 2244(b)(2)(B), as already noted, lifts the bar on claims presented in second or successive petitions where "the factual predicate for the claim could not have been discovered previously through . . . due diligence" and "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found" the petitioner guilty. Section 2254(e)(2) permits a district court to hold an evidentiary hearing where a diligent state prisoner's claim relies on new facts that "would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found" him guilty. Ordinarily, we would draw from the express enumeration of these two actual-innocence exceptions the inference that no others were intended.

The Court's twisting path to the contrary conclusion is not easy to follow, but I will try. In the Court's view, the key fact here is that these two provisions of AEDPA codified

[1] If the Court is really troubled by this disparity, there is a way to resolve it that is consistent with the separation of powers: revise our judge-made procedural-default doctrine to give absolute preclusive effect to state statutes of limitations.

what had previously been judge-made barriers to relief and applied to them a stricter actual-innocence standard than the courts had been applying. See *ante,* at 395–396. From this, the Court reasons that Congress made a conscious choice not also to apply the more restrictive actual-innocence standard to the statute of limitations. Ergo, the Court concludes, we are free to apply the more lenient version of the actual-innocence exception. *Ante,* at 396–397. That clever account ignores the background against which Congress legislated. *Of course* Congress did not "constrain" application of the actual-innocence exception to the statute of limitations. It felt no need to do so, because it had no reason whatsoever to suspect that *any* version of the exception would *apply* to the statute of limitations. The collective efforts of respondent and the majority have turned up not a single instance where this Court has applied the actual-innocence exception to *any* statutory barrier to habeas relief, much less to a statute of limitations. See Part I–B, *supra*. What has been said of equitable tolling applies in spades to nontolling judicial inventions: "Congress cannot intend to incorporate, by silence, various forms of equitable tolling that were not generally-recognized in the common law at the time of enactment." Bain & Colella, Interpreting Federal Statutes of Limitations, 37 Creighton L. Rev. 493, 503 (2004). The only conceivable relevance of §§ 2244(b)(2)(B) and 2254(e)(2) is (1) as we have said, that no other actual-innocence exception was intended, and (2) that *if* Congress had anticipated that this Court would amend § 2244(d)(1) to add an actual-innocence exception (which it surely did not), it would have desired the more stringent formulation and not the expansive formulation applied today, which it specifically rejected for those other provisions.

III

Three years ago, in *Holland* v. *Florida*, 560 U. S. 631 (2010), we held that AEDPA's statute of limitations is subject to equitable tolling. That holding offers no support for

importing a novel actual-innocence exception. Equitable tolling—extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute—seeks to vindicate what might be considered the genuine intent of the statute. By contrast, suspending the statute because of a separate policy that the court believes should trump it ("actual innocence") is a blatant overruling. Moreover, the doctrine of equitable tolling is centuries old, and dates from a time when the separation of the legislative and judicial powers was incomplete. See, *e. g.*, *Bree* v. *Holbech*, 2 Doug. 655, 656, 99 Eng. Rep. 415, 416 (K. B. 1781) (Mansfield, J.); *South-Sea Co.* v. *Wymondsell*, 24 E. R. 1004, 3 P. Wms. 143, 144 (1732); *Booth* v. *Warrington*, 2 E. R. 111, 112–113, 4 Bro. P. C. 163, 165–166 (1714); see also *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396–397 (1946); *Exploration Co.* v. *United States*, 247 U. S. 435, 446–447 (1918); *Bailey* v. *Glover*, 21 Wall. 342, 348 (1875); *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1304–1305 (No. 12,782) (CCNH 1828) (Story, J.); *Jones* v. *Conoway*, 4 Yeates 109 (Pa. 1804). As Professor Manning has explained, until the Glorious Revolution of 1688, the Crown retained "pretensions to independent legislative authority, and English judges continued to serve as the Crown's agents, in theory and practice a component of the executive. Given these conditions, which distinguish the old English from the American constitutional context, it is not surprising to find a similarly indistinct line between appropriate legislative and judicial functions in matters of interpretation." Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 36–37 (2001) (footnote omitted). Thus, the doctrine of the equity of the statute, of which equitable tolling was an example, was reflected in Blackstone's Commentaries "two-thirds of the way through the eighteenth century." *Id.*, at 52.

American courts' later adoption of the English equitable-tolling practice need not be regarded as a violation of the

separation of powers, but can be seen as a reasonable assumption of genuine legislative intent. Colonial legislatures would have assumed that equitable tolling would attend any statute of limitations they adopted. In any case, equitable tolling surely represents such a reasonable assumption today. "It is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle." *Young* v. *United States*, 535 U. S. 43, 49–50 (2002) (internal quotation marks and citations omitted); see Manning, What Divides Textualists From Purposivists? 106 Colum. L. Rev. 70, 81–82, and n. 42 (2006). Congress, being well aware of the longstanding background presumption of equitable tolling, "may provide otherwise if it wishes to do so." *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). The majority and dissenting opinions in *Holland* disputed whether that presumption had been overcome, but all agreed that the presumption existed and was a legitimate tool for construing statutes of limitations. See *Holland*, 560 U. S., at 645–646; *id.*, at 660 (SCALIA, J., dissenting).

Here, by contrast, the Court has ambushed Congress with an utterly unprecedented (and thus unforeseeable) maneuver. Congressional silence, "while permitting an inference that Congress intended to apply *ordinary* background" principles, "cannot show that it intended to apply an unusual modification of those rules." *Meyer* v. *Holley*, 537 U. S. 280, 286 (2003).[2] Because there is no plausible basis for infer-

[2] The Court concedes that "Congress legislates against the backdrop of existing law," but protests that "[a]t the time of AEDPA's enactment, multiple decisions of this Court applied the miscarriage of justice exception to overcome various threshold barriers to relief." *Ante*, at 398, n. 3. That is right, of course, but only at an uninformative level of generality; the relevant inquiry is, to *which* barriers had we applied the exception? Whistling past the graveyard, the Court refuses to engage with this question.

ring that Congress intended or could have anticipated this exception, its adoption here amounts to a pure judicial override of the statute Congress enacted. "It is wrong for us to reshape" AEDPA "on the very lathe of judge-made habeas jurisprudence it was designed to repair." *Stewart* v. *Martinez-Villareal*, 523 U. S. 637, 647 (1998) (SCALIA, J., dissenting).

* * *

"It would be marvellously inspiring to be able to boast that we have a criminal-justice system in which a claim of 'actual innocence' will always be heard, no matter how late it is brought forward, and no matter how much the failure to bring it forward at the proper time is the defendant's own fault." *Bousley*, 523 U. S., at 635 (SCALIA, J., dissenting). I suspect it is this vision of perfect justice through abundant procedure that impels the Court today. Of course, "we do not have such a system, and no society unwilling to devote unlimited resources to repetitive criminal litigation ever could." *Ibid.* Until today, a district court could dismiss an untimely petition without delving into the underlying facts. From now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim. The Court notes "that tenable actual-innocence gateway pleas are rare." *Ante*, at 386. That discouraging reality, intended as reassurance, is in truth "the condemnation of the procedure which has encouraged frivolous cases." *Brown*, 344 U. S., at 537 (Jackson, J., concurring in result).

It has now been 60 years since *Brown* v. *Allen*, in which we struck the Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions. Even after AEDPA's pass through the Augean stables, no one in a position to observe the functioning of our byzantine federal habeas system can believe it

an efficient device for separating the truly deserving from the multitude of prisoners pressing false claims. "[F]loods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own . . . . It must prejudice the occasional meritorious applicant to be buried in a flood of worthless ones." *Id.*, at 536–537.

The "inundation" that Justice Jackson lamented in 1953 "consisted of 541" federal habeas petitions filed by state prisoners. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 143 (1970). By 1969, that number had grown to 7,359. *Ibid.* In the year ending on September 30, 2012, 15,929 such petitions were filed. Administrative Office of the United States Courts, Judicial Business of the United States Courts 3 (Sept. 30, 2012) (Table C–2). Today's decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints.

I respectfully dissent.

Syllabus

TREVINO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 11–10189. Argued February 25, 2013—Decided May 28, 2013

In *Martinez* v. *Ryan*, 566 U. S. 1, 17, this Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Martinez* regarded a prisoner from Arizona, where state procedural law required the prisoner to raise the claim during his first state collateral review proceeding. *Ibid.* This case regards a prisoner from Texas, where state procedural law does not require a defendant to raise his ineffective-assistance-of-trial-counsel claim on collateral review. Rather, Texas law appears to permit a prisoner to raise such a claim on direct review, but the structure and design of the Texas system make it virtually impossible for a prisoner to do so. The question presented in this case is whether, despite this difference, the rule set out in *Martinez* applies in Texas.

Petitioner Trevino was convicted of capital murder in Texas state court and sentenced to death after the jury found insufficient mitigating circumstances to warrant a life sentence. Neither new counsel appointed for his direct appeal nor new counsel appointed for state collateral review raised the claim that Trevino's trial counsel provided ineffective assistance during the penalty phase by failing to adequately investigate and present mitigating circumstances. When that claim was finally raised in Trevino's federal habeas petition, the District Court stayed the proceedings so Trevino could raise it in state court. The state court found the claim procedurally defaulted because of Trevino's failure to raise it in his initial state postconviction proceedings, and the federal court then concluded that this failure was an independent and adequate state ground barring the federal courts from considering the claim. The Fifth Circuit affirmed. Its decision predated *Martinez*, but that court has since concluded that *Martinez* does not apply in Texas because *Martinez*'s good-cause exception applies only where state law says that a defendant must initially raise his ineffective-assistance-of-trial-counsel claim in initial state collateral review proceedings, while

Texas law appears to permit a defendant to raise that claim on direct appeal.

Held: Where, as here, a State's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, the exception recognized in *Martinez* applies. Pp. 421–429.

(a) A finding that a defendant's state-law "procedural default" rests on "an independent and adequate state ground" ordinarily prevents a federal habeas court from considering the defendant's federal constitutional claim. *Coleman* v. *Thompson*, 501 U. S. 722, 729–730. However, a "prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Martinez*, *supra*, at 10. In *Martinez*, the Court recognized a "narrow exception" to *Coleman*'s statement "that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default." 566 U. S., at 9. That exception allows a federal habeas court to find "cause" to excuse such default where (1) the ineffective-assistance-of-trial-counsel claim was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law requires that the claim "be raised in an initial-review collateral proceeding." *Id.*, at 14, 17. Pp. 421–423.

(b) The difference between the Texas law—which in theory grants permission to bring an ineffective-assistance-of-trial-counsel claim on direct appeal but in practice denies a meaningful opportunity to do so—and the Arizona law at issue in *Martinez*—which required the claim to be raised in an initial collateral review proceeding—does not matter in respect to the application of *Martinez*. Pp. 423–429.

(1) This conclusion is supported by two characteristics of Texas' procedures. First, Texas procedures make it nearly impossible for an ineffective-assistance-of-trial-counsel claim to be presented on direct review. The nature of an ineffective-assistance claim means that the trial record is likely to be insufficient to support the claim. And a motion for a new trial to develop the record is usually inadequate because of Texas rules regarding time limits on the filing, and the disposal, of such motions and the availability of trial transcripts. Thus, a writ of habeas corpus is normally needed to gather the facts necessary for evaluating these claims in Texas. Second, were *Martinez* not to apply, the Texas procedural system would create significant unfairness because Texas

Syllabus

courts in effect have directed defendants to raise ineffective-assistance-of-trial-counsel claims on collateral, rather than on direct, review. Texas can point to only a few cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal. Texas suggests that there are other mechanisms by which a prisoner can expand the record on appeal, but these mechanisms seem special and limited in their application, and cannot overcome the Texas courts' own well-supported determination that collateral review normally is the preferred procedural route for raising an ineffective-assistance-of-trial-counsel claim. Respondent also argues that there is no equitable problem here, where appellate counsel's failure to bring a substantial ineffective-assistance claim on direct appeal may constitute cause to excuse the procedural default, but respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective. Pp. 423–428.

(2) The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for applying that exception here. The right involved—adequate assistance of trial counsel—is similarly and critically important. In both instances practical considerations—the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim—argue strongly for initial consideration of the claim during collateral, not on direct, review. See *Martinez*, 566 U. S., at 13. In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity for review of an ineffective-assistance-of-trial-counsel claim. See *id.*, at 11. Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that grants permission but denies a fair, meaningful opportunity to develop the claim is a distinction without a difference. Pp. 428–429.

449 Fed. Appx. 415, vacated and remanded.

BREYER, J., delivered the opinion for the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C. J., filed a dissenting opinion, in which ALITO, J., joined, *post*, p. 430. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 434.

Warren Alan Wolf argued the cause for petitioner. With him on the briefs were *Seth P. Waxman*, *Catherine M. A. Carroll*, and *Annie L. Owens*.

Andrew S. Oldham, Deputy Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Greg Abbott*, Attorney General, *Jonathan F. Mitchell*, Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Adam W. Aston*, Deputy Solicitor General, and *James P. Sullivan* and *Arthur C. D'Andrea*, Assistant Solicitors General.*

JUSTICE BREYER delivered the opinion of the Court.

In *Martinez* v. *Ryan*, 566 U. S. 1 (2012), we considered the right of a state prisoner to raise, in a federal habeas corpus proceeding, a claim of ineffective assistance of trial counsel. In that case an Arizona procedural rule required a defendant convicted at trial to raise a claim of ineffective assistance of trial counsel during his first state collateral review proceeding—or lose the claim. The defendant in *Martinez* did not comply with the state procedural rule. But he ar-

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**Robert C. Owen*, *Jordan M. Steiker*, *James Marcus*, *Maurie Levin*, *Gretchen S. Sween*, and *David Dow* filed a brief for the University of Texas School of Law Capital Punishment Clinic et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of Utah et al. by *John E. Swallow*, Attorney General of Utah, *Bridget K. Romano*, Solicitor General, *Laura B. Dupaix*, and *Dan Schweitzer*, and by the Attorneys General for their respective States as follows: *Luther Strange* of Alabama, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Pamela Jo Bondi* of Florida, *Sam Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Tom Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *Douglas F. Gansler* of Maryland, *Timothy C. Fox* of Montana, *Catherine Cortez Masto* of Nevada, *Gary K. King* of New Mexico, *Michael DeWine* of Ohio, *Ellen F. Rosenblum* of Oregon, *Kathleen G. Kane* of Pennsylvania, *Alan Wilson* of South Carolina, *Robert E. Cooper, Jr.*, of Tennessee, and *Gregory A. Phillips* of Wyoming; for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*; and for the Families of Linda Salinas and Other Crime Victims by *Ryan P. Bates*.

Ralph Haney Brock filed a brief for the State Bar of Texas as *amicus curiae*.

gued that the federal habeas court should excuse his state procedural failing, on the ground that he had good "cause" for not raising the claim at the right time, namely, that he not only lacked effective counsel during trial but also lacked effective counsel during his first state collateral review proceeding.

We held that lack of counsel on collateral review might excuse defendant's state-law procedural default. We wrote:

> "[A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.*, at 17.

At the same time we qualified our holding. We said that the holding applied where state procedural law said that "claims of ineffective assistance of trial counsel *must* be raised in an initial-review collateral proceeding." *Ibid.* (emphasis added).

In this case Texas state law does not say "must." It does not on its face *require* a defendant initially to raise an ineffective-assistance-of-trial-counsel claim in a state collateral review proceeding. Rather, that law appears at first glance to permit (but not require) the defendant initially to raise a claim of ineffective assistance of trial counsel on direct appeal. The structure and design of the Texas system in actual operation, however, make it "virtually impossible" for an ineffective-assistance claim to be presented on direct review. See *Robinson* v. *State*, 16 S. W. 3d 808, 810–811 (Tex. Crim. App. 2000). We must now decide whether the *Martinez* exception applies in this procedural regime. We conclude that it does.

I

A Texas state-court jury convicted petitioner, Carlos Trevino, of capital murder. After a subsequent penalty-phase hearing, the jury found that Trevino "would commit criminal

acts of violence in the future which would constitute a continuing threat to society," that he "actually caused the death of Linda Salinas or, if he did not actually cause her death, he intended to kill her or another, or he anticipated a human life would be taken," and that "there were insufficient mitigating circumstances to warrant a sentence of life imprisonment" rather than death. 449 Fed. Appx. 415, 418 (CA5 2011). The judge consequently imposed a sentence of death.

Eight days later, the judge appointed new counsel to handle Trevino's direct appeal. App. 1, 3. Seven months after sentencing, when the trial transcript first became available, that counsel filed an appeal. The Texas Court of Criminal Appeals then considered and rejected Trevino's appellate claims. Trevino's appellate counsel *did not claim that Trevino's trial counsel had been constitutionally ineffective during the penalty phase of the trial court proceedings. Id.*, at 12–24.

About six months after sentencing, the trial judge appointed Trevino a different new counsel to seek *state collateral relief.* As Texas' procedural rules provide, that third counsel initiated collateral proceedings while Trevino's appeal still was in progress. This new counsel first sought postconviction relief (through collateral review) in the trial court itself. After a hearing, the trial court denied relief; and the Texas Court of Criminal Appeals affirmed that denial. *Id.*, at 25–26, 321–349. Trevino's postconviction claims included a claim that his trial counsel was constitutionally ineffective during the penalty phase of Trevino's trial, but it *did not include a claim that trial counsel's ineffectiveness consisted in part of a failure adequately to investigate and to present mitigating circumstances during the penalty phase of Trevino's trial. Id.*, at 321–349; see *Wiggins* v. *Smith*, 539 U. S. 510, 523 (2003) (counsel's failure to investigate and present mitigating circumstances deprived defendant of effective assistance of counsel).

Trevino then filed a petition in federal court seeking a writ of habeas corpus. The Federal District Court appointed another new counsel to represent him. And that counsel claimed for the first time that Trevino had not received constitutionally effective counsel during the penalty phase of his trial in part because of trial counsel's failure to adequately investigate and present mitigating circumstances during the penalty phase. App. 438, 456–478. Federal habeas counsel pointed out that Trevino's trial counsel had presented only one witness at the sentencing phase, namely, Trevino's aunt. The aunt had testified that Trevino had had a difficult upbringing, that his mother had an alcohol problem, that his family was on welfare, and that he had dropped out of high school. She had added that Trevino had a child, that he was good with children, and that he was not violent. *Id.*, at 285–291.

Federal habeas counsel then told the federal court that Trevino's trial counsel should have found and presented at the penalty phase other mitigating matters that his own investigation had brought to light. These included, among other things, that Trevino's mother abused alcohol while she was pregnant with Trevino, that Trevino weighed only four pounds at birth, that throughout his life Trevino suffered the deleterious effects of Fetal Alcohol Syndrome, that as a child Trevino had suffered numerous head injuries without receiving adequate medical attention, that Trevino's mother had abused him physically and emotionally, that from an early age Trevino was exposed to, and abused, alcohol and drugs, that Trevino had attended school irregularly and performed poorly, and that Trevino's cognitive abilities were impaired. *Id.*, at 66–67.

The federal court stayed proceedings to permit Trevino to raise this claim in state court. The state court held that because Trevino had not raised this claim during his initial postconviction proceedings, he had procedurally defaulted the claim, *id.*, at 27–28; and the Federal District Court then

denied Trevino's ineffective-assistance-of-trial-counsel claim, *id.*, at 78–79. The District Court concluded in relevant part that, despite the fact that "even the most minimal investigation . . . would have revealed a wealth of additional mitigating evidence," an independent and adequate state ground (namely, Trevino's failure to raise the issue during his state postconviction proceeding) barred the federal habeas court from considering the ineffective-assistance-of-trial-counsel claim. *Id.*, at 131–132. See *Coleman* v. *Thompson*, 501 U. S. 722, 729–730 (1991).

Trevino appealed. The Fifth Circuit, without considering the merits of Trevino's ineffective-assistance-of-trial-counsel claim, agreed with the District Court that an independent, adequate state ground, namely, Trevino's procedural default, barred its consideration. 449 Fed. Appx., at 426. Although the Circuit decided Trevino's case before this Court decided *Martinez*, the Fifth Circuit's reasoning in a later case, *Ibarra* v. *Thaler*, 687 F. 3d 222 (2012), makes clear that the Fifth Circuit would have found that *Martinez* would have made no difference.

That is because in *Ibarra* the Circuit recognized that *Martinez* had said that its good-cause exception applies where state law says that a criminal defendant *must* initially raise his claim of ineffective assistance of trial counsel in initial state collateral review proceedings. 687 F. 3d, at 225–226. Texas law, the Circuit pointed out, does not say explicitly that the defendant *must* initially raise the claim in state collateral review proceedings. Rather Texas law on its face appears to *permit* a criminal defendant to raise such a claim on direct appeal. *Id.*, at 227. And the Circuit held that that fact means that *Martinez* does not apply in Texas. 687 F. 3d, at 227. Since the Circuit's holding in *Ibarra* (that *Martinez* does not apply in Texas) would similarly govern this case, we granted certiorari here to determine whether *Martinez* applies in Texas.

II

A

We begin with *Martinez*. We there recognized the historic importance of federal habeas corpus proceedings as a method for preventing individuals from being held in custody in violation of federal law. *Martinez*, 566 U. S., at 8–15. See generally *Preiser* v. *Rodriguez*, 411 U. S. 475, 484–485 (1973). In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.

We similarly recognized the importance of federal habeas corpus principles designed to prevent federal courts from interfering with a State's application of its own firmly established, consistently followed, constitutionally proper procedural rules. *Martinez*, *supra*, at 9. Those principles have long made clear that a conviction that rests upon a defendant's state-law "procedural default" (for example, the defendant's failure to raise a claim of error at the time or in the place that state law requires) normally rests upon "an independent and adequate state ground." *Coleman*, 501 U. S., at 729–730. And where a conviction rests upon such a ground, a federal habeas court normally cannot consider the defendant's federal constitutional claim. *Ibid.*; see *Martinez*, 566 U. S., at 9.

At the same time, we pointed out that "[t]he 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." *Id.*, at 10. And we turned to the issue directly before the Court: whether Martinez had shown "cause" to excuse his state procedural failing. *Ibid.*

Martinez argued that his lawyer should have raised, but did not raise, his claim of ineffective assistance of trial counsel during state collateral review proceedings. *Id.*, at 7. He added that this failure, itself amounting to ineffective assistance, was the "cause" of, and ought to excuse, his procedural default. *Id.*, at 10. But this Court had previously held that "[n]egligence on the part of a prisoner's *postconviction* attorney does *not* qualify as 'cause,'" primarily because a "principal," such as the prisoner, "bears the risk of negligent conduct on the part of his agent," the attorney. *Maples* v. *Thomas*, 565 U. S. 266, 280–281 (2012) (quoting *Coleman*, *supra*, at 753–754; emphasis added). Martinez, in effect, argued for an exception to *Coleman*'s broad statement of the law.

We ultimately held that a "narrow exception" should "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." *Martinez*, 566 U. S., at 9. We did so for three reasons. First, the "right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system." *Id.*, at 12.

Second, ineffective assistance of counsel on *direct appellate review* could amount to "cause," excusing a defendant's failure to raise (and thus procedurally defaulting) a constitutional claim. *Ibid.* But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. *Id.*, at 13. That is because review of such a claim normally requires a different attorney, because it often "depend[s] on evidence outside the trial record," and because efforts to expand the record on direct appeal may run afoul of "[a]bbreviated deadlines," depriving the new attorney of "adequate time . . . to investigate the ineffective-assistance claim." *Ibid.*

Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective-assistance-of-trial-counsel claim during initial-review collateral proceedings could (were *Coleman* read broadly) deprive a defendant of any review of that claim at all. *Martinez*, *supra*, at 11.

We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find "cause," thereby excusing a defendant's procedural default, where (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding." *Martinez*, *supra*, at 14, 17.

B

Here state law differs from that in *Martinez* in respect to the fourth requirement. Unlike Arizona, Texas does not expressly *require* the defendant to raise a claim of ineffective assistance of trial counsel in an initial *collateral review* proceeding. Rather Texas law on its face appears to permit (but not require) the defendant to raise the claim on *direct appeal*. Does this difference matter?

1

Two characteristics of the relevant Texas procedures lead us to conclude that it should *not* make a difference in respect to the application of *Martinez*. First, Texas procedure makes it "virtually impossible for appellate counsel to adequately present an ineffective assistance [of trial counsel] claim" on direct review. *Robinson*, 16 S. W. 3d, at 810–811. As the Texas Court of Criminal Appeals itself has pointed

out, "the inherent nature of most ineffective assistance" of trial counsel "claims" means that the trial court record will often fail to "contai[n] the information necessary to substantiate" the claim. *Ex parte Torres*, 943 S. W. 2d 469, 475 (1997) (en banc).

As the Court of Criminal Appeals has also noted, a convicted defendant may make a motion in the trial court for a new trial in order to develop the record on appeal. See *Reyes* v. *State*, 849 S. W. 2d 812, 816 (1993). And, in principle, the trial court could, in connection with that motion, allow the defendant *some* additional time to develop a further record. *Ibid.* But that motion-for-new-trial "vehicle is often inadequate because of time constraints and because the trial record has generally not been transcribed at this point." *Torres*, *supra*, at 475. See Tex. Rule App. Proc. 21.4 (2013) (motion for a new trial must be made within 30 days of sentencing); Rules 21.8(a), (c) (trial court must dispose of motion within 75 days of sentencing); Rules 35.2(b), 35.3(c) (transcript must be prepared within 120 days of sentencing where a motion for a new trial is filed and this deadline may be extended). Thus, as the Court of Criminal Appeals has concluded, in Texas "a writ of habeas corpus" issued in state collateral proceedings ordinarily "is essential to gathering the facts necessary to . . . evaluate [ineffective-assistance-of-trial-counsel] claims." *Torres*, *supra*, at 475. See *Robinson*, *supra*, at 810–811 (noting that there is "not generally a realistic opportunity to adequately develop the record for appeal in post-trial motions" and that "[t]he time requirements for filing and presenting a motion for new trial would have made it virtually impossible for appellate counsel to adequately present an ineffective assistance claim to the trial court").

See also *Thompson* v. *State*, 9 S. W. 3d 808, 813–814, and n. 6 (Tex. Crim. App. 1999) ("[I]n the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy the dual prongs of *Strickland*";

only "[r]arely will a reviewing court be provided the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of the claim . . . "); *Goodspeed* v. *State*, 187 S. W. 3d 390, 392 (Tex. Crim. App. 2005) (similar); *Andrews* v. *State*, 159 S. W. 3d 98, 102–103 (Tex. Crim. App. 2005) (similar); *Ex parte Brown*, 158 S. W. 3d 449, 453 (Tex. Crim. App. 2005) (*per curiam*) (similar); *Jackson* v. *State*, 973 S. W. 2d 954, 957 (Tex. Crim. App. 1998) (*per curiam*) (similar). See also 42 G. Dix & J. Schmolesky, Texas Practice Series §29:76, pp. 844–845 (3d ed. 2011) (hereinafter Texas Practice) (explaining that "[o]ften" the requirement that a claim of ineffective assistance of trial counsel be supported by a record containing direct evidence of why counsel acted as he did "will require that the claim . . . be raised in postconviction habeas proceedings where a full record on the matter can be raised").

This opinion considers whether, as a systematic matter, Texas affords meaningful review of a claim of ineffective assistance of trial counsel. The present capital case illustrates why it does not. The trial court appointed new counsel for Trevino eight days after sentencing. Counsel thus had 22 days to decide whether, and on what grounds, to make a motion for a new trial. She then *may* have had an additional 45 days to provide support for the motion but *without the help of a transcript* (which did not become available until much later—seven months after the trial). It would have been difficult, perhaps impossible, within that timeframe to investigate Trevino's background, determine whether trial counsel had adequately done so, and then develop evidence about additional mitigating background circumstances. See *Reyes*, *supra*, at 816 ("[M]otions for new trial [must] be supported by affidavit . . . specifically showing the truth of the grounds of attack").

Second, were *Martinez* not to apply, the Texas procedural system would create significant unfairness. That is because Texas courts in effect have directed defendants to raise

claims of ineffective assistance of trial counsel on collateral, rather than on direct, review. As noted, they have explained why direct review proceedings are likely inadequate. See *supra*, at 423–425. They have held that failure to raise the claim on direct review does not bar the defendant from raising the claim in collateral proceedings. See, *e. g.*, *Robinson*, 16 S. W. 3d, at 813; *Ex parte Duffy*, 607 S. W. 2d 507, 512–513 (Tex. Crim. App. 1980) (overruled on other grounds by *Hernandez* v. *State*, 988 S. W. 2d 770 (Tex. Crim. App. 1999)). They have held that the defendant's decision to raise the claim on direct review does not bar the defendant from also raising the claim in collateral proceedings. See, *e. g.*, *Lopez* v. *State*, 343 S. W. 3d 137, 143 (Tex. Crim. App. 2011); *Torres*, *supra*, at 475. They have suggested that appellate counsel's failure to raise the claim on direct review does not constitute "ineffective assistance of counsel." See *Sprouse* v. *State*, No. AP–74933, 2007 WL 283152, *7 (Tex. Crim. App., Jan. 31, 2007) (unpublished). And Texas' highest criminal court has explicitly stated that "[a]s a general rule" the defendant "should *not* raise an issue of ineffective assistance of counsel on direct appeal," but rather in collateral review proceedings. *Mata* v. *State*, 226 S. W. 3d 425, 430, n. 14 (2007) (internal quotation marks omitted). See *Robinson*, *supra*, at 810 ("[A] post-conviction writ proceeding, rather than a motion for new trial, is the preferred method for gathering the facts necessary to substantiate" an ineffective-assistance-of-trial-counsel claim).

The criminal bar, not surprisingly, has taken this strong judicial advice seriously. See Guidelines and Standards for Texas Capital Counsel, 69 Tex. B. J. 966, 977, Guideline 12.2(B)(1)(d) (2006) ("[S]tate habeas corpus is the first opportunity for a capital client to raise challenges to the effectiveness of trial or direct appeal counsel"). Texas now can point to only a comparatively small number of cases in which a defendant has used the motion-for-a-new-trial mechanism to expand the record on appeal and then received a hearing

on his ineffective-assistance-of-trial-counsel claim on direct appeal. Brief for Respondent 35–36, and n. 6 (citing, *inter alia*, *State* v. *Morales*, 253 S. W. 3d 686, 689–691 (Tex. Crim. App. 2008); *Robertson* v. *State*, 187 S. W. 3d 475, 480–481 (Tex. Crim. App. 2006)). And, of those, precisely one case involves trial counsel's investigative failures of the kind at issue here. See *Armstrong* v. *State*, No. AP–75706, 2010 WL 359020 (Tex. Crim. App., Jan. 27, 2010) (unpublished). How could federal law deny defendants the benefit of *Martinez* solely because of the existence of a theoretically available procedural alternative, namely, direct appellate review, that Texas procedures render so difficult, and in the typical case all but impossible, to use successfully, and which Texas courts so strongly discourage defendants from using?

Respondent argues that Texas courts enforce the relevant time limits more flexibly than we have suggested. Sometimes, for example, an appellate court can abate an appeal and remand the case for further record development in the trial court. See *Cooks* v. *State*, 240 S. W. 3d 906 (Tex. Crim. App. 2007). But the procedural possibilities to which Texas now points seem special, limited in their application, and, as far as we can tell, rarely used. See 43A Texas Practice § 50:15, at 636–639; 43B *id.*, § 56:235, at 607–609. *Cooks*, for example, the case upon which respondent principally relies, involved a remand for further record development, but in circumstances where the lower court wrongly failed to give a defendant new counsel in time to make an ordinary new trial motion. 240 S. W. 3d, at 911. We do not believe that this, or other, special, rarely used procedural possibilities can overcome the Texas courts' own well-supported determination that collateral review normally constitutes the preferred—and indeed as a practical matter, the only—method for raising an ineffective-assistance-of-trial-counsel claim.

Respondent further argues that there is no equitable problem to be solved in Texas because if counsel fails to bring a

substantial claim of ineffective assistance of trial counsel *on direct appeal*, the ineffectiveness of *appellate* counsel may constitute cause to excuse the procedural default. See *Murray* v. *Carrier*, 477 U. S. 478 (1986). But respondent points to no case in which such a failure by appellate counsel has been deemed constitutionally ineffective. And that lack of authority is not surprising given the fact that the Texas Court of Criminal Appeals has directed defendants to bring such claims on collateral review.

2

For the reasons just stated, we believe that the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal. What the Arizona law prohibited by explicit terms, Texas law precludes as a matter of course. And, that being so, we can find no significant difference between this case and *Martinez*. The very factors that led this Court to create a narrow exception to *Coleman* in *Martinez* similarly argue for the application of that exception here.

The right involved—adequate assistance of counsel at trial—is similarly and critically important. In both instances practical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review. See *Martinez*, 566 U. S., at 13; see also *Massaro* v. *United States*, 538 U. S. 500, 505 (2003). In both instances failure to consider a lawyer's "ineffectiveness" during an initial-review collateral proceeding as a potential "cause" for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim. See *Martinez*, *supra*, at 11.

Thus, for present purposes, a distinction between (1) a State that denies permission to raise the claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systemic operation, denies a meaningful opportunity to do so is a distinction without a difference. In saying this, we do not (any more than we did in *Martinez*) seek to encourage States to tailor direct appeals so that they provide a fuller opportunity to raise ineffective-assistance-of-trial-counsel claims. That is a matter for the States to decide. And, as we have said, there are often good reasons for hearing the claim initially during collateral proceedings.

III

For these reasons, we conclude that where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in *Martinez* applies:

> "[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." 566 U. S., at 17.

Given this holding, Texas submits that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim. Brief for Respondent 58–60. We leave that matter to be determined on remand. Likewise, we do not decide here whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective.

For these reasons we vacate the Fifth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE ALITO joins, dissenting.

In our federal system, the "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington* v. *Richter*, 562 U. S. 86, 103 (2011). "Federal courts sitting in habeas," we have said, "are not an alternative forum for trying . . . issues which a prisoner made insufficient effort to pursue in state proceedings." *Williams* v. *Taylor*, 529 U. S. 420, 437 (2000). This basic principle reflects the fact that federal habeas review " 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.' " *Richter*, *supra*, at 103 (quoting *Harris* v. *Reed*, 489 U. S. 255, 282 (1989) (KENNEDY, J., dissenting)).

In order to prevent circumvention of the state courts and the unjustified intrusion on state sovereignty that results, we have held that "a state prisoner [who] fails to exhaust state remedies . . . [or] has failed to meet the State's procedural requirements for presenting his federal claims" will not be entitled to federal habeas relief unless he can show "cause" to excuse his default. *Coleman* v. *Thompson*, 501 U. S. 722, 732, 750 (1991). There is an exception to that rule where "failure to consider the claims will result in a fundamental miscarriage of justice," *ibid.*; that exception is not at issue here.

Cause comes in different forms, but the one relevant here is attorney error. We recognized in *Coleman* that "[w]here a [habeas] petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default." *Id.*, at 754. But we simultaneously recognized that "[a] different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel." *Ibid.* In that situa-

tion, we held, "it is the petitioner who must bear the burden of a failure to follow state procedural rules." *Ibid.* Because the error in *Coleman* occurred during state postconviction proceedings, a point at which the habeas petitioner had no constitutional right to counsel, the petitioner had to bear the cost of his default. *Id.*, at 757.

Last Term, in *Martinez* v. *Ryan*, we announced 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." 566 U. S. 1, 9 (2012). In *Martinez*, Arizona law did not allow defendants to raise ineffective assistance of counsel claims on direct appeal; they could *only* raise such claims in state collateral proceedings. *Id.*, at 6. We held that while Arizona was free to structure its state court procedures in this way, its "decision is not without consequences for the State's ability to assert a procedural default in later proceedings." *Id.*, at 13. "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." *Ibid.* Thus, "within the context of this state procedural framework," attorney error would qualify as cause to excuse procedural default if it occurred in the first proceeding at which the prisoner was "allow[ed]" to raise his trial ineffectiveness claim. *Id.*, at 13, 16.

We were unusually explicit about the narrowness of our decision: "The holding in this case does not concern attorney errors in other kinds of proceedings," and "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." *Id.*, at 16. "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." *Id.*, at 17. In "all but the limited circum-

stances recognized here," we said, "[t]he rule of *Coleman* governs." *Id.*, at 16.

This aggressively limiting language was not simply a customary nod to the truism that "we decide only the case before us." *Upjohn Co.* v. *United States*, 449 U. S. 383, 396 (1981). It was instead an important part of our explanation for why "[t]his limited qualification to *Coleman* does not implicate the usual concerns with upsetting reliance interests protected by *stare decisis* principles." *Martinez*, *supra*, at 15. The fact that the exception was clearly delineated ensured that the *Coleman* rule would remain administrable. And because States could readily anticipate how such a sharply defined exception would apply to various procedural frameworks, the exception could be reconciled with our concerns for comity and equitable balancing that led to *Coleman*'s baseline rule in the first place. See *Coleman*, *supra*, at 750–751. The States had a clear choice, which they could make with full knowledge of the consequences: If a State "deliberately cho[se] to move trial-ineffectiveness claims outside of the direct-appeal process" through a "decision to bar defendants from raising" them there, then—and only then—would "counsel's ineffectiveness in an initial-review collateral proceeding qualif[y] as cause for a procedural default." *Martinez*, 566 U. S., at 13, 16–17.

Today, with hardly a mention of these concerns, the majority throws over the crisp limit we made so explicit just last Term. We announced in *Martinez* that the exception applies "where the State barred the defendant from raising the claims on direct appeal." *Id.*, at 17. But today, the Court takes all the starch out of its rule with an assortment of adjectives, adverbs, and modifying clauses: *Martinez*'s "narrow exception" now applies whenever the "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity" to raise his claim on direct appeal. *Ante*, at 428–429.

The questions raised by this equitable equation are as endless as will be the state-by-state litigation it takes to work them out. We are not told, for example, how meaningful is meaningful enough, how meaningfulness is to be measured, how unlikely highly unlikely is, how often a procedural framework's "operation" must be reassessed, or what case qualifies as the "typical" case. Take just this last example: The case before us involved a jury trial (hardly typical), a capital conviction (even less typical), and—as the majority emphasizes—a particular species of ineffectiveness claim that depends on time-consuming investigation of personal background and other mitigating circumstances. *Ante*, at 425. Yet the majority holds it up, apparently, as a case that is typical in the relevant sense, saying that "[t]he present capital case illustrates" the "systematic" working of Texas's procedural framework. *Ibid.*

Given that the standard is so opaque and malleable, the majority cannot describe the exception applied here as narrow, and does not do so. Gone are the repeated words of limitation that characterized the *Martinez* opinion. Gone too is the clear choice that *Martinez* gave the States about how to structure their criminal justice systems. Now, the majority offers them a gamble: If a State allows defendants to bring ineffectiveness claims both on direct appeal and in postconviction proceedings, then a prisoner *might* have to comply with state procedural requirements in order to preserve the availability of federal habeas review, *if* a federal judge decides that the state system gave the defendant (or enough other "typical" defendants) a sufficiently meaningful opportunity to press his claim.

This invitation to litigation will, in precisely the manner that *Coleman* foreclosed, "'frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" 501 U. S., at 748 (quoting *Engle* v. *Isaac*, 456 U. S. 107, 128 (1982)). In what I suspect (though cannot know) will be a broad swath of cases, the

Court's approach will excuse procedural defaults that, under *Coleman*, should preclude federal review. But even in cases where federal courts ultimately decide that the habeas petitioner cannot establish cause under the new standard, the years of procedural wrangling it takes to reach that decision will themselves undermine the finality of sentences necessary to effective criminal justice. Because that approach is inconsistent with *Coleman*, *Martinez* itself, and the principles of equitable discretion and comity at the heart of both, I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

I dissent for the reasons set forth in my dissent in *Martinez* v. *Ryan*, 566 U. S. 1 (2012). That opinion sought to minimize the impact of its novel holding as follows:

> "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." *Id.*, at 17.

I wrote in my dissent:

> "That line lacks any principled basis, and will not last." *Id.*, at 19, n. 1.

The Court says today:

> "Texas law on its face appears to permit (but not require) the defendant to raise the claim on direct appeal. Does this difference matter?" "[W]e can find no significant difference between this case and *Martinez*." *Ante*, at 423, 428 (emphasis removed).

Syllabus

MARYLAND *v.* KING

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 12–207. Argued February 26, 2013—Decided June 3, 2013

After his 2009 arrest on first- and second-degree assault charges, respondent King was processed through a Wicomico County, Maryland, facility, where booking personnel used a cheek swab to take a DNA sample pursuant to the Maryland DNA Collection Act (Act). The swab was matched to an unsolved 2003 rape, and King was charged with that crime. He moved to suppress the DNA match, arguing that the Act violated the Fourth Amendment, but the Circuit Court Judge found the law constitutional. King was convicted of rape. The Maryland Court of Appeals set aside the conviction, finding unconstitutional the portions of the Act authorizing DNA collection from felony arrestees.

Held: When officers make an arrest supported by probable cause to hold for a serious offense and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment. Pp. 442–466.

(a) DNA testing may "significantly improve both the criminal justice system and police investigative practices," *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 55, by making it "possible to determine whether a biological tissue matches a suspect with near certainty," *id.*, at 62. Maryland's Act authorizes law enforcement authorities to collect DNA samples from, as relevant here, persons charged with violent crimes, including first-degree assault. A sample may not be added to a database before an individual is arraigned, and it must be destroyed if, *e. g.*, he is not convicted. Only identity information may be added to the database. Here, the officer collected a DNA sample using the common "buccal swab" procedure, which is quick and painless, requires no "surgical intrusio[n] beneath the skin," *Winston* v. *Lee*, 470 U. S. 753, 760, and poses no threat to the arrestee's "health or safety," *id.*, at 763. Respondent's identification as the rapist resulted in part through the operation of the Combined DNA Index System (CODIS), which connects DNA laboratories at the local, state, and national level, and which standardizes the points of comparison, *i. e.*, loci, used in DNA analysis. Pp. 442–446.

(b) The framework for deciding the issue presented is well established. Using a buccal swab inside a person's cheek to obtain a DNA sample is a search under the Fourth Amendment. And the fact that

the intrusion is negligible is of central relevance to determining whether the search is reasonable, "the ultimate measure of the constitutionality of a governmental search," *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652. Because the need for a warrant is greatly diminished here, where the arrestee was already in valid police custody for a serious offense supported by probable cause, the search is analyzed by reference to "reasonableness, not individualized suspicion," *Samson* v. *California*, 547 U. S. 843, 855, n. 4, and reasonableness is determined by weighing "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy," *Wyoming* v. *Houghton*, 526 U. S. 295, 300. Pp. 446–448.

(c) In this balance of reasonableness, great weight is given to both the significant government interest at stake in the identification of arrestees and DNA identification's unmatched potential to serve that interest. Pp. 449–461.

(1) The Act serves a well-established, legitimate government interest: the need of law enforcement officers in a safe and accurate way to process and identify persons and possessions taken into custody. "[P]robable cause provides legal justification for arresting a [suspect], and for a brief period of detention to take the administrative steps incident to arrest," *Gerstein* v. *Pugh*, 420 U. S. 103, 113–114; and the "validity of the search of a person incident to a lawful arrest" is settled, *United States* v. *Robinson*, 414 U. S. 218, 224. Individual suspicion is not necessary. The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" have different origins and different constitutional justifications than, say, the search of a place not incident to arrest, *Illinois* v. *Lafayette*, 462 U. S. 640, 643, which depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois* v. *Gates*, 462 U. S. 213, 238. And when probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests. First, the government has an interest in properly identifying "who has been arrested and who is being tried." *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 191. Criminal history is critical to officers who are processing a suspect for detention. They already seek identity information through routine and accepted means: comparing booking photographs to sketch artists' depictions, showing mugshots to potential witnesses, and comparing fingerprints against electronic databases of known criminals and unsolved crimes. The only difference between DNA analysis and fingerprint databases is the unparalleled accuracy DNA provides. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his

or her actions that are available to the police. Second, officers must ensure that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 330. DNA allows officers to know the type of person being detained. Third, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials." *Bell* v. *Wolfish*, 441 U. S. 520, 534. An arrestee may be more inclined to flee if he thinks that continued contact with the criminal justice system may expose another serious offense. Fourth, an arrestee's past conduct is essential to assessing the danger he poses to the public, which will inform a court's bail determination. Knowing that the defendant is wanted for a previous violent crime based on DNA identification may be especially probative in this regard. Finally, in the interests of justice, identifying an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned. Pp. 449–456.

(2) DNA identification is an important advance in the techniques long used by law enforcement to serve legitimate police concerns. Police routinely have used scientific advancements as standard procedures for identifying arrestees. Fingerprinting, perhaps the most direct historical analogue to DNA technology, has, from its advent, been viewed as a natural part of "the administrative steps incident to arrest." *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 58. However, DNA identification is far superior. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, and DNA identification is markedly more accurate. It may not be as fast as fingerprinting, but rapid fingerprint analysis is itself of recent vintage, and the question of how long it takes to process identifying information goes to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Rapid technical advances are also reducing DNA processing times. Pp. 456–461.

(d) The government interest is not outweighed by respondent's privacy interests. Pp. 461–465.

(1) By comparison to the substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is minimal. Reasonableness must be considered in the context of an individual's legitimate privacy expectations, which necessarily diminish when he is taken into police custody. *Bell*, *supra*, at 557. Such searches thus differ from the so-called special needs searches of, *e. g.*, otherwise law-abiding motorists at checkpoints. See *Indianapolis* v. *Edmond*, 531 U. S. 32. The reasonableness inquiry considers two other circumstances in which particularized suspicion is

not categorically required: "diminished expectations of privacy [and a] minimal intrusio[n]." *Illinois* v. *McArthur*, 531 U. S. 326, 330. An invasive surgery may raise privacy concerns weighty enough for the search to require a warrant, notwithstanding the arrestee's diminished privacy expectations, but a buccal swab, which involves a brief and minimal intrusion with "virtually no risk, trauma, or pain," *Schmerber* v. *California*, 384 U. S. 757, 771, does not increase the indignity already attendant to normal incidents of arrest. Pp. 461–464.

(2) The processing of respondent's DNA sample's CODIS loci also did not intrude on his privacy in a way that would make his DNA identification unconstitutional. Those loci came from noncoding DNA parts that do not reveal an arrestee's genetic traits and are unlikely to reveal any private medical information. Even if they could provide such information, they are not in fact tested for that end. Finally, the Act provides statutory protections to guard against such invasions of privacy. Pp. 464–465.

425 Md. 550, 42 A. 3d 549, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, BREYER, and ALITO, JJ., joined. SCALIA, J., filed a dissenting opinion, in which GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined, *post*, p. 466.

Katherine Winfree, Chief Deputy Attorney General of Maryland, argued the cause for petitioner. With her on the briefs were *Douglas F. Gansler*, Attorney General, and *Brian S. Kleinbord*, *Robert Taylor, Jr.*, *Mary Ann Rapp Ince*, *Daniel J. Jawor*, and *Carrie J. Williams*, Assistant Attorneys General.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Breuer*, *Elaine J. Goldenberg*, *Robert A. Parker*, and *Christopher J. Smith.*

Kannon K. Shanmugam argued the cause for respondent. With him on the brief were *James M. McDonald*, *David M. Horniak*, *Paul B. DeWolfe*, and *Stephen B. Mercer.**

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Enid A. Camps*, Deputy Attorney General, *Dane R. Gillette*, Chief Assistant Attorney General, *Gerald A. Engler*, Senior Assistant Attorney General,

JUSTICE KENNEDY delivered the opinion of the Court.

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He

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and *Susan Duncan Lee*, Acting State Solicitor General, by *Kevin T. Kane*, Chief State's Attorney of Connecticut, and by the Attorneys General and former Attorneys General for their respective jurisdictions as follows: *Luther Strange* of Alabama, *Michael C. Geraghty* of Alaska, *Tom Horne* of Arizona, *Dustin McDaniel* of Arkansas, *John W. Suthers* of Colorado, *Joseph R. Biden III* of Delaware, *Irvin B. Nathan* of the District of Columbia, *Pamela Jo Bondi* of Florida, *Samuel S. Olens* of Georgia, *David M. Louie* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Gregory F. Zoeller* of Indiana, *Thomas J. Miller* of Iowa, *Derek Schmidt* of Kansas, *Jack Conway* of Kentucky, *James D. "Buddy" Caldwell* of Louisiana, *William J. Schneider* of Maine, *Martha Coakley* of Massachusetts, *Bill Schuette* of Michigan, *Lori Swanson* of Minnesota, *Jim Hood* of Mississippi, *Chris Koster* of Missouri, *Steve Bullock* of Montana, *Jon Bruning* of Nebraska, *Catherine Cortez Masto* of Nevada, *Michael A. Delaney* of New Hampshire, *Jeffrey S. Chiesa* of New Jersey, *Gary K. King* of New Mexico, *Eric T. Schneiderman* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Michael DeWine* of Ohio, *E. Scott Pruitt* of Oklahoma, *Ellen F. Rosenblum* of Oregon, *Linda L. Kelly* of Pennsylvania, *Guillermo Somoza-Colombani* of Puerto Rico, *Peter F. Kilmartin* of Rhode Island, *Alan Wilson* of South Carolina, *Marty J. Jackley* of South Dakota, *Robert E. Cooper, Jr.*, of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Kenneth T. Cuccinelli II* of Virginia, *Robert M. McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *J. B. Van Hollen* of Wisconsin, and *Gregory A. Phillips* of Wyoming; for Susana Martinez, Governor of New Mexico, by *Jeffrey S. Bucholtz*; for DNA Saves et al. by *Jonathan S. Franklin* and *Mark Emery*; for the Global Alliance for Rapid DNA Testing by *Theodore B. Olson*, *Amir C. Tayrani*, and *John W. Wolfe*; for the Maryland Chiefs of Police Association, Inc., et al. by *Karen J. Kruger*, *George Nilson*, *Suzanne Sangree*, and *Marc P. Hansen*; for the Maryland Coalition Against Sexual Assault et al. by *William C. Sammons*; for the Maryland Crime Victims' Resource Center, Inc., et al. by *Neal Kumar Katyal*, *Dominic F. Perella*, *Julie A. Grohovsky*, and *Russell P. Butler*; for the National District Attorneys Association by *Albert C. Locher*; and for the National Governors Association et al. by *Prashant K. Khetan*, *Lisa E. Soronen*, and *Richard Weintraub*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Michael T. Risher*, *Peter C. Meier*, *Steven R. Shapiro*, *Ezekiel R. Edwards*, and *Brandon J. Buskey*; for the Council

raped her. The police were unable to identify or apprehend the assailant based on any detailed description or other evidence they then had, but they did obtain from the victim a sample of the perpetrator's DNA.

In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun. As part of a routine booking procedure for serious offenses, his DNA sample was taken by applying a cotton swab or filter paper—known as a buccal swab—to the inside of his cheeks. The DNA was found to match the DNA taken from the Salisbury rape victim. King was tried and convicted for the rape. Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.

The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person. It set the rape conviction aside. This

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for Responsible Genetics by *Matthew S. Hellman*; for the Electronic Frontier Foundation by *Jennifer Lynch*, *Lee Tien*, and *Hanni Fakhoury*; for the Electronic Privacy Information Center et al. by *Marc Rotenberg*; for the National Association of Criminal Defense Lawyers by *Lisa S. Blatt*, *Anthony J. Franze*, and *Jonathan Hacker*; for the National Association of Federal Defenders by *William M. Jay* and *Sarah S. Gannett*; for the Public Defender Service for the District of Columbia by *Sandra K. Levick*; for Veterans for Common Sense by *Eric D. Miller*; and for Robert Nussbaum et al. by *Danielle Spinelli*, *Annie L. Owens*, and *Nicole Ries Fox*.

Briefs of *amici curiae* were filed for Genetics, Genomics and Forensic Science Researchers by *Michael L. Foreman*; for the Howard University School of Law Civil Rights Clinic by *Aderson B. François*; for the Los Angeles County District Attorney by *Irene Wakabayashi*, *Phyllis Asayama*, and *Roberta Schwartz*; and for 14 Scholars of Forensic Evidence by *Erin Murphy*, *pro se*.

Court granted certiorari and now reverses the judgment of the Maryland court.

I

When King was arrested on April 10, 2009, for menacing a group of people with a shotgun and charged in state court with both first- and second-degree assault, he was processed for detention in custody at the Wicomico County Central Booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to provisions of the Maryland DNA Collection Act (or Act).

On July 13, 2009, King's DNA record was uploaded to the Maryland DNA database, and three weeks later, on August 4, 2009, his DNA profile was matched to the DNA sample collected in the unsolved 2003 rape case. Once the DNA was matched to King, detectives presented the forensic evidence to a grand jury, which indicted him for the rape. Detectives obtained a search warrant and took a second sample of DNA from King, which again matched the evidence from the rape. He moved to suppress the DNA match on the grounds that Maryland's DNA collection law violated the Fourth Amendment. The Circuit Court Judge upheld the statute as constitutional. King pleaded not guilty to the rape charges but was convicted and sentenced to life in prison without the possibility of parole.

In a divided opinion, the Maryland Court of Appeals struck down the portions of the Act authorizing collection of DNA from felony arrestees as unconstitutional. The majority concluded that a DNA swab was an unreasonable search in violation of the Fourth Amendment because King's "expectation of privacy is greater than the State's purported interest in using King's DNA to identify him." 425 Md. 550, 561, 42 A. 3d 549, 556 (2012). In reaching that conclusion the Maryland court relied on the decisions of various other courts that have concluded that DNA identification of arrestees is impermissible. See, *e. g.*, *People* v. *Buza*, 129 Cal.

Rptr. 3d 753 (App. 2011) (officially depublished); *Mario W.* v. *Kaipio*, 228 Ariz. 207, 265 P. 3d 389 (App. 2011).

Both federal and state courts have reached differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges. This Court granted certiorari, 568 U. S. 1006 (2012), to address the question. King is the respondent here.

II

The advent of DNA technology is one of the most significant scientific advancements of our era. The full potential for use of genetic markers in medicine and science is still being explored, but the utility of DNA identification in the criminal justice system is already undisputed. Since the first use of forensic DNA analysis to catch a rapist and murderer in England in 1986, see J. Butler, Fundamentals of Forensic DNA Typing 5 (2010) (hereinafter Butler), law enforcement, the defense bar, and the courts have acknowledged DNA testing's "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *District Attorney's Office for Third Judicial Dist.* v. *Osborne*, 557 U. S. 52, 55 (2009).

A

The current standard for forensic DNA testing relies on an analysis of the chromosomes located within the nucleus of all human cells. "The DNA material in chromosomes is composed of 'coding' and 'noncoding' regions. The coding regions are known as *genes* and contain the information necessary for a cell to make proteins. . . . Non-protein-coding regions . . . are not related directly to making proteins, [and] have been referred to as 'junk' DNA." Butler 25. The adjective "junk" may mislead the layperson, for in fact this is the DNA region used with near certainty to identify a per-

son. The term apparently is intended to indicate that this particular noncoding region, while useful and even dispositive for purposes like identity, does not show more far-reaching and complex characteristics like genetic traits.

Many of the patterns found in DNA are shared among all people, so forensic analysis focuses on "repeated DNA sequences scattered throughout the human genome," known as "short tandem repeats" (STRs). *Id.*, at 147–148. The alternative possibilities for the size and frequency of these STRs at any given point along a strand of DNA are known as "alleles," *id.*, at 25; and multiple alleles are analyzed in order to ensure that a DNA profile matches only one individual. Future refinements may improve present technology, but even now STR analysis makes it "possible to determine whether a biological tissue matches a suspect with near certainty." *Osborne*, *supra*, at 62.

The Act authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary." Md. Pub. Saf. Code Ann. §2–504(a)(3)(i) (Lexis 2011). Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law Code Ann. §14–101 (Lexis 2012). Once taken, a DNA sample may not be processed or placed in a database before the individual is arraigned (unless the individual consents). Md. Pub. Saf. Code Ann. §2–504(d)(1) (Lexis 2011). It is at this point that a judicial officer ensures that there is probable cause to detain the arrestee on a qualifying serious offense. If "all qualifying criminal charges are determined to be unsupported by probable cause . . . the DNA sample shall be immediately destroyed." §2–504(d)(2)(i). DNA samples are also destroyed if "a criminal action begun against the individual . . . does not result in a conviction," "the conviction is finally reversed or vacated and no new trial is permitted,"

or "the individual is granted an unconditional pardon." § 2–511(a)(1).

The Act also limits the information added to a DNA database and how it may be used. Specifically, "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." § 2–505(b)(1). No purpose other than identification is permissible: "A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." § 2–512(c). Tests for familial matches are also prohibited. See § 2–506(d) ("A person may not perform a search of the statewide DNA data base for the purpose of identification of an offender in connection with a crime for which the offender may be a biological relative of the individual from whom the DNA sample was acquired"). The officers involved in taking and analyzing respondent's DNA sample complied with the Act in all respects.

Respondent's DNA was collected in this case using a common procedure known as a "buccal swab." "Buccal cell collection involves wiping a small piece of filter paper or a cotton swab similar to a Q-tip against the inside cheek of an individual's mouth to collect some skin cells." Butler 86. The procedure is quick and painless. The swab touches inside an arrestee's mouth, but it requires no "surgical intrusio[n] beneath the skin," *Winston* v. *Lee*, 470 U. S. 753, 760 (1985), and it poses no "threa[t] to the health or safety" of arrestees, *id.*, at 763.

B

Respondent's identification as the rapist resulted in part through the operation of a national project to standardize collection and storage of DNA profiles. Authorized by Congress and supervised by the Federal Bureau of Investigation (FBI), the Combined DNA Index System (CODIS) connects DNA laboratories at the local, state, and national level. Since its authorization in 1994, the CODIS system has grown to include all 50 States and a number of fed-

eral agencies. CODIS collects DNA profiles provided by local laboratories taken from arrestees, convicted offenders, and forensic evidence found at crime scenes. To participate in CODIS, a local laboratory must sign a memorandum of understanding agreeing to adhere to quality standards and submit to audits to evaluate compliance with the federal standards for scientifically rigorous DNA testing. Butler 270.

One of the most significant aspects of CODIS is the standardization of the points of comparison in DNA analysis. The CODIS database is based on 13 loci at which the STR alleles are noted and compared. These loci make possible extreme accuracy in matching individual samples, with a "random match probability of approximately 1 in 100 trillion (assuming unrelated individuals)." *Ibid.* The CODIS loci are from the nonprotein coding junk regions of DNA, and "are not known to have any association with a genetic disease or any other genetic predisposition. Thus, the information in the database is only useful for human identity testing." *Id.*, at 279. STR information is recorded only as a "string of numbers"; and the DNA identification is accompanied only by information denoting the laboratory and the analyst responsible for the submission. *Id.*, at 270. In short, CODIS sets uniform national standards for DNA matching and then facilitates connections between local law enforcement agencies who can share more specific information about matched STR profiles.

All 50 States require the collection of DNA from felony convicts, and respondent does not dispute the validity of that practice. See Brief for Respondent 48. Twenty-eight States and the Federal Government have adopted laws similar to the Maryland Act authorizing the collection of DNA from some or all arrestees. See Brief for State of California et al. as *Amici Curiae* 4, n. 1 (States Brief) (collecting state statutes). Although those statutes vary in their particulars, such as what charges require a DNA sample, their similarity means that this case implicates more than the specific Mary-

land law. At issue is a standard, expanding technology already in widespread use throughout the Nation.

III

A

Although the DNA swab procedure used here presents a question the Court has not yet addressed, the framework for deciding the issue is well established. The Fourth Amendment, binding on the States by the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." It can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search. Virtually any "intrusio[n] into the human body," *Schmerber* v. *California*, 384 U. S. 757, 770 (1966), will work an invasion of " 'cherished personal security' that is subject to constitutional scrutiny," *Cupp* v. *Murphy*, 412 U. S. 291, 295 (1973) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 24–25 (1968)). The Court has applied the Fourth Amendment to police efforts to draw blood, see *Schmerber*, *supra*; *Missouri* v. *McNeely*, *ante*, p. 141, scraping an arrestee's fingernails to obtain trace evidence, see *Cupp*, *supra*, and even to "a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis," *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 616 (1989).

A buccal swab is a far more gentle process than a venipuncture to draw blood. It involves but a light touch on the inside of the cheek; and although it can be deemed a search within the body of the arrestee, it requires no "surgical intrusions beneath the skin." *Winston*, *supra*, at 760. The fact that an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.

B

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. "[T]he Fourth

Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner." *Schmerber*, *supra*, at 768. "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652 (1995). In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred "some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion." *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 560–561 (1976) (citation and footnote omitted).

In some circumstances, such as "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois* v. *McArthur*, 531 U. S. 326, 330 (2001). Those circumstances diminish the need for a warrant, either because "the public interest is such that neither a warrant nor probable cause is required," *Maryland* v. *Buie*, 494 U. S. 325, 331 (1990), or because an individual is already on notice, for instance because of his employment, see *Skinner*, *supra*, or the conditions of his release from government custody, see *Samson* v. *California*, 547 U. S. 843 (2006), that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the "interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer." *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 667 (1989).

The instant case can be addressed with this background. The Maryland DNA Collection Act provides that, in order to obtain a DNA sample, all arrestees charged with serious crimes must furnish the sample on a buccal swab applied, as

noted, to the inside of the cheeks. The arrestee is already in valid police custody for a serious offense supported by probable cause. The DNA collection is not subject to the judgment of officers whose perspective might be "colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' " *Terry*, *supra*, at 12 (quoting *Johnson* v. *United States*, 333 U. S. 10, 14 (1948)). As noted by this Court in a different but still instructive context involving blood testing, "[b]oth the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them . . . . Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Skinner*, *supra*, at 622. Here, the search effected by the buccal swab of respondent falls within the category of cases this Court has analyzed by reference to the proposition that the "touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson*, *supra*, at 855, n. 4.

Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is required is merely to acknowledge that "rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." *McArthur*, *supra*, at 331. This application of "traditional standards of reasonableness" requires a court to weigh "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming* v. *Houghton*, 526 U. S. 295, 300 (1999). An assessment of reasonableness to determine the lawfulness of requiring this class of arrestees to provide a DNA sample is central to the instant case.

IV

A

The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that "probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein* v. *Pugh*, 420 U. S. 103, 113–114 (1975). Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested." *Weeks* v. *United States*, 232 U. S. 383, 392 (1914), overruled on other grounds, *Mapp* v. *Ohio*, 367 U. S. 643 (1961). "The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged." *United States* v. *Robinson*, 414 U. S. 218, 224 (1973). Even in that context, the Court has been clear that individual suspicion is not necessary, because "[t]he constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." *Michigan* v. *DeFillippo*, 443 U. S. 31, 35 (1979).

The "routine administrative procedure[s] at a police station house incident to booking and jailing the suspect" derive from different origins and have different constitutional justifications than, say, the search of a place, *Illinois* v. *Lafayette*, 462 U. S. 640, 643 (1983); for the search of a place not incident to an arrest depends on the "fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois* v. *Gates*, 462 U. S. 213, 238 (1983). The interests are further different when an individual is formally processed

into police custody. Then "the law is in the act of subjecting the body of the accused to its physical dominion." *People* v. *Chiagles*, 237 N. Y. 193, 197, 142 N. E. 583, 584 (1923) (Cardozo, J.). When probable cause exists to remove an individual from the normal channels of society and hold him in legal custody, DNA identification plays a critical role in serving those interests.

First, "[i]n every criminal case, it is known and must be known who has been arrested and who is being tried." *Hiibel* v. *Sixth Judicial Dist. Court of Nev., Humboldt Cty.*, 542 U. S. 177, 191 (2004). An individual's identity is more than just his name or Social Security number, and the government's interest in identification goes beyond ensuring that the proper name is typed on the indictment. Identity has never been considered limited to the name on the arrestee's birth certificate. In fact, a name is of little value compared to the real interest in identification at stake when an individual is brought into custody. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity. Disguises used while committing a crime may be supplemented or replaced by changed names, and even changed physical features." *Jones* v. *Murray*, 962 F. 2d 302, 307 (CA4 1992). An "arrestee may be carrying a false ID or lie about his identity," and "criminal history records . . . can be inaccurate or incomplete." *Florence* v. *Board of Chosen Freeholders of County of Burlington*, 566 U. S. 318, 336 (2012).

A suspect's criminal history is a critical part of his identity that officers should know when processing him for detention. It is a common occurrence that "[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals. Hours after the Oklahoma City bombing, Timothy McVeigh was stopped by a state trooper who noticed he was driving without a license plate. Police stopped serial killer Joel Rifkin for the same reason. One of the terrorists

involved in the September 11 attacks was stopped and ticketed for speeding just two days before hijacking Flight 93." *Id.*, at 334–335 (citations omitted). Police already seek this crucial identifying information. They use routine and accepted means as varied as comparing the suspect's booking photograph to sketch artists' depictions of persons of interest, showing his mugshot to potential witnesses, and of course making a computerized comparison of the arrestee's fingerprints against electronic databases of known criminals and unsolved crimes. In this respect the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.

The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. Like a fingerprint, the 13 CODIS loci are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use. A DNA profile is useful to the police because it gives them a form of identification to search the records already in their valid possession. In this respect the use of DNA for identification is no different than matching an arrestee's face to a wanted poster of a previously unidentified suspect; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee's fingerprints to those recovered from a crime scene. See Tr. of Oral Arg. 19. DNA is another metric of identification used to connect the arrestee with his or her public persona, as reflected in records of his or her actions that are available to the police. Those records may be linked to the arrestee by a variety of relevant forms of identification, including name, alias, date and time of previous convictions and the name then used, photograph, Social Security number, or CODIS profile. These data, found in official records, are checked as a routine matter to produce a

more comprehensive record of the suspect's complete identity. Finding occurrences of the arrestee's CODIS profile in outstanding cases is consistent with this common practice. It uses a different form of identification than a name or fingerprint, but its function is the same.

Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate "risks for facility staff, for the existing detainee population, and for a new detainee." *Florence*, *supra*, at 330. DNA identification can provide untainted information to those charged with detaining suspects and detaining the property of any felon. For these purposes officers must know the type of person whom they are detaining, and DNA allows them to make critical choices about how to proceed.

> "Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in [certain cases, such as] where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim." *Hiibel*, *supra*, at 186.

Recognizing that a name alone cannot address this interest in identity, the Court has approved, for example, "a visual inspection for certain tattoos and other signs of gang affiliation as part of the intake process," because "[t]he identification and isolation of gang members before they are admitted protects everyone." *Florence, supra,* at 331.

Third, looking forward to future stages of criminal prosecution, "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials."

Bell v. *Wolfish*, 441 U. S. 520, 534 (1979). A person who is arrested for one offense but knows that he has yet to answer for some past crime may be more inclined to flee the instant charges, lest continued contact with the criminal justice system expose one or more other serious offenses. For example, a defendant who had committed a prior sexual assault might be inclined to flee on a burglary charge, knowing that in every State a DNA sample would be taken from him after his conviction on the burglary charge that would tie him to the more serious charge of rape. In addition to subverting the administration of justice with respect to the crime of arrest, this ties back to the interest in safety; for a detainee who absconds from custody presents a risk to law enforcement officers, other detainees, victims of previous crimes, witnesses, and society at large.

Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. "The government's interest in preventing crime by arrestees is both legitimate and compelling." *United States* v. *Salerno*, 481 U. S. 739, 749 (1987). DNA identification of a suspect in a violent crime provides critical information to the police and judicial officials in making a determination of the arrestee's future dangerousness. This inquiry always has entailed some scrutiny beyond the name on the defendant's driver's license. For example, Maryland law requires a judge to take into account not only "the nature and circumstances of the offense charged" but also "the defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community." Md. Rules 4–216(f)(1)(A), (C) (2013). Knowing that the defendant is wanted for a previous violent crime based on DNA identification is especially probative of the court's consideration of "the danger of the defendant to the alleged victim, another person, or the community." Rule 4–216(f)(1)(G);

see also 18 U. S. C. § 3142 (2006 ed. and Supp. V) (similar requirements).

This interest is not speculative. In considering laws to require collecting DNA from arrestees, government agencies around the Nation found evidence of numerous cases in which felony arrestees would have been identified as violent through DNA identification matching them to previous crimes but who later committed additional crimes because such identification was not used to detain them. See Denver's Study on Preventable Crimes (2009) (three examples), online at http://www.denverda.org/DNA_Documents/Denver%27s%20Preventable%20Crimes%20Study.pdf (all Internet materials as visited May 31, 2013, and available in Clerk of Court's case file); Chicago's Study on Preventable Crimes (2005) (five examples), online at http://www.denverda.org/DNA_Documents/Arrestee_Database/Chicago%20Preventable%20Crimes-Final.pdf; Maryland Study on Preventable Crimes (2008) (three examples), online at http://www.denverda.org/DNA_Documents/MarylandDNAarresteestudy.pdf.

Present capabilities make it possible to complete a DNA identification that provides information essential to determining whether a detained suspect can be released pending trial. See, *e. g.*, States Brief 18, n. 10 ("DNA identification database samples have been processed in as few as two days in California, although around 30 days has been average"). Regardless of when the initial bail decision is made, release is not appropriate until a further determination is made as to the person's identity in the sense not only of what his birth certificate states but also what other records and data disclose to give that identity more meaning in the whole context of who the person really is. And even when release is permitted, the background identity of the suspect is necessary for determining what conditions must be met before release is allowed. If release is authorized, it may take time for the conditions to be met, and so the time before actual

release can be substantial. For example, in the federal system, defendants released conditionally are detained on average for 112 days; those released on unsecured bond for 37 days; on personal recognizance for 36 days; and on other financial conditions for 27 days. See Dept. of Justice, Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2004, p. 45 (NCJ 213476, Dec. 2006), online at https://www.bjs.gov/content/pub/pdf/cfjs04.pdf. During this entire period, additional and supplemental data establishing more about the person's identity and background can provide critical information relevant to the conditions of release and whether to revisit an initial release determination. The facts of this case are illustrative. Though the record is not clear, if some thought were being given to releasing respondent on bail on the gun charge, a release that would take weeks or months in any event, when the DNA report linked him to the prior rape, it would be relevant to the conditions of his release. The same would be true with a supplemental fingerprint report.

Even if an arrestee is released on bail, development of DNA identification revealing the defendant's unknown violent past can and should lead to the revocation of his conditional release. See 18 U. S. C. § 3145(a) (2006 ed.) (providing for revocation of release); see also States Brief 11–12 (discussing examples where bail and diversion determinations were reversed after DNA identified the arrestee's violent history). Pretrial release of a person charged with a dangerous crime is a most serious responsibility. It is reasonable in all respects for the State to use an accepted database to determine if an arrestee is the object of suspicion in other serious crimes, suspicion that may provide a strong incentive for the arrestee to escape and flee.

Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense. "[P]rompt [DNA] testing . . . would

speed up apprehension of criminals before they commit additional crimes, and prevent the grotesque detention of . . . innocent people." J. Dwyer, P. Neufeld, & B. Scheck, Actual Innocence 245 (2000).

Because proper processing of arrestees is so important and has consequences for every stage of the criminal process, the Court has recognized that the "governmental interests underlying a station-house search of the arrestee's person and possessions may in some circumstances be even greater than those supporting a search immediately following arrest." *Lafayette*, 462 U. S., at 645. Thus, the Court has been reluctant to circumscribe the authority of the police to conduct reasonable booking searches. For example, "[t]he standards traditionally governing a search incident to lawful arrest are not . . . commuted to the stricter *Terry* standards." *Robinson*, 414 U. S., at 234. Nor are these interests in identification served only by a search of the arrestee himself. "[I]nspection of an arrestee's personal property may assist the police in ascertaining or verifying his identity." *Lafayette*, *supra*, at 646. And though the Fifth Amendment's protection against self-incrimination is not, as a general rule, governed by a reasonableness standard, the Court has held that "questions . . . reasonably related to the police's administrative concerns . . . fall outside the protections of *Miranda* [v. *Arizona*, 384 U. S. 436 (1966),] and the answers thereto need not be suppressed." *Pennsylvania* v. *Muniz*, 496 U. S. 582, 601–602 (1990) (opinion of Brennan, J.).

B

DNA identification represents an important advance in the techniques used by law enforcement to serve legitimate police concerns for as long as there have been arrests, concerns the courts have acknowledged and approved for more than a century. Law enforcement agencies routinely have used scientific advancements in their standard procedures for the identification of arrestees. "Police had been using photogra-

phy to capture the faces of criminals almost since its invention." S. Cole, Suspect Identities 20 (2001). Courts did not dispute that practice, concluding that a "sheriff in making an arrest for a felony on a warrant has the right to exercise a discretion" "[if] he should deem it necessary to the safekeeping of a prisoner, and to prevent his escape, or to enable him the more readily to retake the prisoner if he should escape, to take his photograph." *State ex rel. Bruns* v. *Clausmeier*, 154 Ind. 599, 601, 603, 57 N. E. 541, 542 (1900). By the time that it had become "the daily practice of the police officers and detectives of crime to use photographic pictures for the discovery and identification of criminals," the courts likewise had come to the conclusion that "it would be [a] matter of regret to have its use unduly restricted upon any fanciful theory or constitutional privilege." *Shaffer* v. *United States*, 24 App. D. C. 417, 426 (1904).

Beginning in 1887, some police adopted more exacting means to identify arrestees, using the system of precise physical measurements pioneered by the French anthropologist Alphonse Bertillon. Bertillon identification consisted of 10 measurements of the arrestee's body, along with a "scientific analysis of the features of the face and an exact anatomical localization of the various scars, marks, &c., of the body." Defense of the Bertillon System, N. Y. Times, Jan. 20, 1896, p. 3. "[W]hen a prisoner was brought in, his photograph was taken according to the Bertillon system, and his body measurements were then made. The measurements were made . . . and noted down on the back of a card or a blotter, and the photograph of the prisoner was expected to be placed on the card. This card, therefore, furnished both the likeness and description of the prisoner, and was placed in the rogues' gallery, and copies were sent to various cities where similar records were kept." *People ex rel. Jones* v. *Diehl*, 53 App. Div. 645, 646, 65 N. Y. S. 801, 802 (1900). As in the present case, the point of taking this information about each arrestee was not limited to verifying that the proper name

was on the indictment. These procedures were used to "facilitate the recapture of escaped prisoners," to aid "the investigation of their past records and personal history," and "to preserve the means of identification for . . . future supervision after discharge." *Hodgeman* v. *Olsen*, 86 Wash. 615, 619, 150 P. 1122, 1124 (1915); see also *McGovern* v. *Van Riper*, 137 N. J. Eq. 24, 33–34, 43 A. 2d 514, 519 (Ch. 1945) ("[C]riminal identification is said to have two main purposes: (1) The identification of the accused as the person who committed the crime for which he is being held; and (2) the identification of the accused as the same person who has been previously charged with, or convicted of, other offenses against the criminal law").

Perhaps the most direct historical analogue to the DNA technology used to identify respondent is the familiar practice of fingerprinting arrestees. From the advent of this technique, courts had no trouble determining that fingerprinting was a natural part of "the administrative steps incident to arrest." *County of Riverside* v. *McLaughlin*, 500 U. S. 44, 58 (1991). In the seminal case of *United States* v. *Kelly*, 55 F. 2d 67 (CA2 1932), Judge Augustus Hand wrote that routine fingerprinting did not violate the Fourth Amendment precisely because it fit within the accepted means of processing an arrestee into custody:

> "Finger printing seems to be no more than an extension of methods of identification long used in dealing with persons under arrest for real or supposed violations of the criminal laws. It is known to be a very certain means devised by modern science to reach the desired end, and has become especially important in a time when increased population and vast aggregations of people in urban centers have rendered the notoriety of the individual in the community no longer a ready means of identification.
>
> . . . . .
>
> "We find no ground in reason or authority for interfering with a method of identifying persons charged with

> crime which has now become widely known and frequently practiced." *Id.*, at 69–70.

By the middle of the 20th century, it was considered "elementary that a person in lawful custody may be required to submit to photographing and fingerprinting as part of routine identification processes." *Smith* v. *United States*, 324 F. 2d 879, 882 (CADC 1963) (Burger, J.) (citations omitted).

DNA identification is an advanced technique superior to fingerprinting in many ways, so much so that to insist on fingerprints as the norm would make little sense to either the forensic expert or a layperson. The additional intrusion upon the arrestee's privacy beyond that associated with fingerprinting is not significant, see Part V, *infra*, and DNA is a markedly more accurate form of identifying arrestees. A suspect who has changed his facial features to evade photographic identification or even one who has undertaken the more arduous task of altering his fingerprints cannot escape the revealing power of his DNA.

Respondent's primary objection to this analogy is that DNA identification is not as fast as fingerprinting, and so it should not be considered to be the 21st-century equivalent. See Tr. of Oral Arg. 53. But rapid analysis of fingerprints is itself of recent vintage. The FBI's vaunted Integrated Automated Fingerprint Identification System (IAFIS) was only "launched on July 28, 1999. Prior to this time, the processing of . . . fingerprint submissions was largely a manual, labor-intensive process, taking weeks or months to process a single submission." Federal Bureau of Investigation, Integrated Automated Fingerprint Identification System, online at http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis. It was not the advent of this technology that rendered fingerprint analysis constitutional in a single moment. The question of how long it takes to process identifying information obtained from a valid search goes only to the efficacy of the search for its purpose of prompt identification, not the constitutionality of the search. Cf.

Ontario v. *Quon*, 560 U. S. 746, 763–764 (2010). Given the importance of DNA in the identification of police records pertaining to arrestees and the need to refine and confirm that identity for its important bearing on the decision to continue release on bail or to impose new conditions, DNA serves an essential purpose despite the existence of delays such as the one that occurred in this case. Even so, the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical advances. See, *e. g.*, Attorney General DeWine Announces Significant Drop in DNA Turnaround Time (Jan. 4, 2013) (DNA processing time reduced from 125 days in 2010 to 20 days in 2012), online at http://www.ohioattorneygeneral.gov/Media/News-Releases/January-2013/Attorney-General-DeWine-Announces-Significant-Drop; Gov. Jindal Announces Elimination of DNA Backlog, DNA Unit Now Operating in Real Time (Nov. 17, 2011) (average DNA report time reduced from a year or more in 2009 to 20 days in 2011), online at http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=3102. And the FBI has already begun testing devices that will enable police to process the DNA of arrestees within 90 minutes. See Brief for National District Attorneys Association as *Amicus Curiae* 20–21; Tr. of Oral Arg. 17. An assessment and understanding of the reasonableness of this minimally invasive search of a person detained for a serious crime should take account of these technical advances. Just as fingerprinting was constitutional for generations prior to the introduction of IAFIS, DNA identification of arrestees is a permissible tool of law enforcement today. New technology will only further improve its speed and therefore its effectiveness. And, as noted above, actual release of a serious offender as a routine matter takes weeks or months in any event. By identifying not only who the arrestee is but also what other available records disclose about his past to show who he is, the police can ensure that they have the proper person under arrest and that they have made the nec-

essary arrangements for his custody; and, just as important, they can also prevent suspicion against or prosecution of the innocent.

In sum, there can be little reason to question "the legitimate interest of the government in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution." 3 W. LaFave, Search and Seizure § 5.3(c), p. 216 (5th ed. 2012). To that end, courts have confirmed that the Fourth Amendment allows police to take certain routine "administrative steps incident to arrest—*i. e.*, . . . book[ing], photograph[ing], and fingerprint[ing]." *McLaughlin*, 500 U. S., at 58. DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is "no more than an extension of methods of identification long used in dealing with persons under arrest." *Kelly*, 55 F. 2d, at 69. In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest.

V

A

By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. True, a significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy. In considering those expectations in this case, however, the necessary predicate of a valid arrest for a serious offense is fundamental. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable

depends on the context within which a search takes place." *New Jersey* v. *T. L. O.*, 469 U. S. 325, 337 (1985). "[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State." *Vernonia School Dist. 47J*, 515 U. S., at 654.

The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy. For example, when weighing the invasiveness of urinalysis of high school athletes, the Court noted that "[l]egitimate privacy expectations are even less with regard to student athletes. . . . Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." *Id.*, at 657. Likewise, the Court has used a context-specific benchmark inapplicable to the public at large when "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively," *Skinner*, 489 U. S., at 627, or when "the 'operational realities of the workplace' may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts," *Von Raab*, 489 U. S., at 671.

The expectations of privacy of an individual taken into police custody "necessarily [are] of a diminished scope." *Bell*, 441 U. S., at 557. "[B]oth the person and the property in his immediate possession may be searched at the station house." *United States* v. *Edwards*, 415 U. S. 800, 803 (1974). A search of the detainee's person when he is booked into custody may "'involve a relatively extensive exploration,'" *Robinson*, 414 U. S., at 227, including "requir[ing] at least some detainees to lift their genitals or cough in a squatting position," *Florence*, 566 U. S., at 334.

In this critical respect, the search here at issue differs from the sort of programmatic searches of either the public at large or a particular class of regulated but otherwise law-abiding citizens that the Court has previously labeled as "'special needs'" searches. *Chandler* v. *Miller*, 520 U. S. 305, 314 (1997). When the police stop a motorist at a check-

point, see *Indianapolis* v. *Edmond*, 531 U. S. 32 (2000), or test a political candidate for illegal narcotics, see *Chandler*, *supra*, they intrude upon substantial expectations of privacy. So the Court has insisted on some purpose other than "to detect evidence of ordinary criminal wrongdoing" to justify these searches in the absence of individualized suspicion. *Edmond*, *supra*, at 38. Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial, however, his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen. The special needs cases, though in full accord with the result reached here, do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, a detainee has a reduced expectation of privacy.

The reasonableness inquiry here considers two other circumstances in which the Court has held that particularized suspicion is not categorically required: "diminished expectations of privacy [and] minimal intrusions." *McArthur*, 531 U. S., at 330. This is not to suggest that any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery, see *Winston*, 470 U. S. 753, or a search of the arrestee's home, see *Chimel* v. *California*, 395 U. S. 752 (1969), involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable," *McArthur*, *supra*, at 331, the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

Here, by contrast to the approved standard procedures incident to any arrest detailed above, a buccal swab involves an even more brief and still minimal intrusion. A gentle rub along the inside of the cheek does not break the skin,

and it "involves virtually no risk, trauma, or pain." *Schmerber*, 384 U. S., at 771. "A crucial factor in analyzing the magnitude of the intrusion . . . is the extent to which the procedure may threaten the safety or health of the individual," *Winston*, *supra*, at 761, and nothing suggests that a buccal swab poses any physical danger whatsoever. A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest.

B

In addition the processing of respondent's DNA sample's 13 CODIS loci did not intrude on respondent's privacy in a way that would make his DNA identification unconstitutional.

First, as already noted, the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee. While science can always progress further, and those progressions may have Fourth Amendment consequences, alleles at the CODIS loci "are not at present revealing information beyond identification." Katsanis & Wagner, Characterization of the Standard and Recommended CODIS Markers, 58 J. For. Sci. S169, S171 (2013). The argument that the testing at issue in this case reveals any private medical information at all is open to dispute.

And even if noncoding alleles could provide some information, they are not in fact tested for that end. It is undisputed that law enforcement officers analyze DNA for the sole purpose of generating a unique identifying number against which future samples may be matched. This parallels a similar safeguard based on actual practice in the school drug-testing context, where the Court deemed it "significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic." *Vernonia School Dist. 47J*, *supra*, at 658. If in the future police analyze samples to determine, for instance, an arrestee's predisposition for a particular disease

or other hereditary factors not relevant to identity, that case would present additional privacy concerns not present here.

Finally, the Act provides statutory protections that guard against further invasion of privacy. As noted above, the Act requires that "[o]nly DNA records that directly relate to the identification of individuals shall be collected and stored." Md. Pub. Saf. Code Ann. §2–505(b)(1). No purpose other than identification is permissible: "A person may not willfully test a DNA sample for information that does not relate to the identification of individuals as specified in this subtitle." §2–512(c). This Court has noted often that "a 'statutory or regulatory duty to avoid unwarranted disclosures' generally allays . . . privacy concerns." *NASA* v. *Nelson*, 562 U. S. 134, 155 (2011) (quoting *Whalen* v. *Roe*, 429 U. S. 589, 605 (1977)). The Court need not speculate about the risks posed "by a system that did not contain comparable security provisions." *Id.*, at 606. In light of the scientific and statutory safeguards, once respondent's DNA was lawfully collected the STR analysis of respondent's DNA pursuant to CODIS procedures did not amount to a significant invasion of privacy that would render the DNA identification impermissible under the Fourth Amendment.

* * *

In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and

analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

The judgment of the Court of Appeals of Maryland is reversed.

It is so ordered.

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

The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment. Whenever this Court has allowed a suspicionless search, it has insisted upon a justifying motive apart from the investigation of crime.

It is obvious that no such noninvestigative motive exists in this case. The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the State's custody, taxes the credulity of the credulous. And the Court's comparison of Maryland's DNA searches to other techniques, such as fingerprinting, can seem apt only to those who know no more than today's opinion has chosen to tell them about how those DNA searches actually work.

I

A

At the time of the founding, Americans despised the British use of so-called "general warrants"—warrants not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application. The first Virginia Constitution declared that "general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed," or to search a person "whose offence is not particularly described and supported by evidence," "are

grievous and oppressive, and ought not to be granted." Va. Declaration of Rights § 10 (1776), in 1 B. Schwartz, The Bill of Rights: A Documentary History 234, 235 (1971). The Maryland Declaration of Rights similarly provided that general warrants were "illegal." Md. Declaration of Rights § XXIII (1776), in *id.*, at 280, 282.

In the ratification debates, Antifederalists sarcastically predicted that the general, suspicionless warrant would be among the Constitution's "blessings." Blessings of the New Government, Philadelphia Independent Gazetteer, Oct. 6, 1787, in 13 Documentary History of the Ratification of the Constitution 345 (J. Kaminski & G. Saladino eds. 1981). "Brutus" of New York asked why the Federal Constitution contained no provision like Maryland's, Brutus II, N. Y. Journal, Nov. 1, 1787, in *id.*, at 524, and Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures "in the most arbitrary manner, without any evidence or reason." 3 Debates on the Federal Constitution 588 (J. Elliot 2d ed. 1854).

Madison's draft of what became the Fourth Amendment answered these charges by providing that the "rights of the people to be secured in their persons . . . from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause . . . or not particularly describing the places to be searched." 1 Annals of Cong. 434–435 (1789). As ratified, the Fourth Amendment's Warrant Clause forbids a warrant to "issue" except "upon probable cause," and requires that it be "particula[r]" (which is to say, *individualized*) to "the place to be searched, and the persons or things to be seized." And we have held that, even when a warrant is not constitutionally necessary, the Fourth Amendment's general prohibition of "unreasonable" searches imports the same requirement of individualized suspicion. See *Chandler* v. *Miller*, 520 U. S. 305, 308 (1997).

Although there is a "closely guarded category of constitutionally permissible suspicionless searches," *id.*, at 309, that

has never included searches designed to serve "the normal need for law enforcement," *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989) (internal quotation marks omitted). Even the common name for suspicionless searches—"special needs" searches—itself reflects that they must be justified, *always*, by concerns "other than crime detection." *Chandler*, *supra*, at 313–314. We have approved random drug tests of railroad employees, yes—but only because the Government's need to "regulat[e] the conduct of railroad employees to ensure safety" is distinct from "normal law enforcement." *Skinner*, *supra*, at 620. So too we have approved suspicionless searches in public schools—but only because there the government acts in furtherance of its "responsibilities . . . as guardian and tutor of children entrusted to its care." *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 665 (1995).

So while the Court is correct to note (*ante*, at 447) that there are instances in which we have permitted searches without individualized suspicion, "[i]n none of these cases . . . did we indicate approval of a [search] whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Indianapolis* v. *Edmond*, 531 U. S. 32, 38 (2000). That limitation is crucial. It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form "reasonableness" inquiry that the Court indulges at length today. To put it another way, both the legitimacy of the Court's method and the correctness of its outcome hinge entirely on the truth of a single proposition: that the primary purpose of these DNA searches is something other than simply discovering evidence of criminal wrongdoing. As I detail below, that proposition is wrong.

B

The Court alludes at several points (see *ante*, at 449, 463) to the fact that King was an arrestee, and arrestees may be validly searched incident to their arrest. But the Court does not really *rest* on this principle, and for good reason:

The objects of a search incident to arrest must be either (1) weapons or evidence that might easily be destroyed, or (2) evidence relevant to the crime of arrest. See *Arizona* v. *Gant*, 556 U. S. 332, 343–344 (2009); *Thornton* v. *United States*, 541 U. S. 615, 632 (2004) (SCALIA, J., concurring in judgment). Neither is the object of the search at issue here.

The Court hastens to clarify that it does not mean to approve invasive surgery on arrestees or warrantless searches of their homes. *Ante*, at 463. That the Court feels the need to disclaim these consequences is as damning a criticism of its suspicionless-search regime as any I can muster. And the Court's attempt to distinguish those hypothetical searches from this real one is unconvincing. We are told that the "privacy-related concerns" in the search of a home "are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." *Ibid.* But why are the "privacy-related concerns" not also "weighty" when an intrusion into the *body* is at stake? (The Fourth Amendment lists "persons" *first* among the entities protected against unreasonable searches and seizures.) And could the police engage, without any suspicion of wrongdoing, in a "brief and . . . minimal" intrusion into the home of an arrestee—perhaps just peeking around the curtilage a bit? See *ibid.* Obviously not.

At any rate, all this discussion is beside the point. No matter the degree of invasiveness, suspicionless searches are *never* allowed if their principal end is ordinary crime-solving. A search incident to arrest either serves other ends (such as officer safety, in a search for weapons) or is not suspicionless (as when there is reason to believe the arrestee possesses evidence relevant to the crime of arrest).

Sensing (correctly) that it needs more, the Court elaborates at length the ways that the search here served the special purpose of "identifying" King.[1] But that seems to

[1] The Court's insistence (*ante*, at 463) that our special-needs cases "do not have a direct bearing on the issues presented in this case" is perplexing. Why spill so much ink on the special need of identification if a special need

me quite wrong—unless what one means by "identifying" someone is "searching for evidence that he has committed crimes unrelated to the crime of his arrest." At points the Court does appear to use "identifying" in that peculiar sense—claiming, for example, that knowing "an arrestee's past conduct is essential to an assessment of the danger he poses." *Ante*, at 453. If identifying someone means finding out what unsolved crimes he has committed, then identification is indistinguishable from the ordinary law-enforcement aims that have never been thought to justify a suspicionless search. Searching every lawfully stopped car, for example, might turn up information about unsolved crimes the driver had committed, but no one would say that such a search was aimed at "identifying" him, and no court would hold such a search lawful. I will therefore assume that the Court means that the DNA search at issue here was useful to "identify" King in the normal sense of that word—in the sense that would identify the author of Introduction to the Principles of Morals and Legislation as Jeremy Bentham.

1

The portion of the Court's opinion that explains the identification rationale is strangely silent on the actual workings of the DNA search at issue here. To know those facts is to be instantly disabused of the notion that what happened had anything to do with identifying King.

King was arrested on April 10, 2009, on charges unrelated to the case before us. That same day, April 10, the police

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is not required? Why not just come out and say that any suspicionless search of an arrestee is allowed if it will be useful to solve crimes? The Court does not say that because most Members of the Court do not believe it. So whatever the Court's major premise—the opinion does not really contain what you would call a rule of decision—the *minor* premise is "this search was used to identify King." The incorrectness of that minor premise will therefore suffice to demonstrate the error in the Court's result.

searched him and seized the DNA evidence at issue here. What happened next? Reading the Court's opinion, particularly its insistence that the search was necessary to know "who [had] been arrested," *ante*, at 450, one might guess that King's DNA was swiftly processed and his identity thereby confirmed—perhaps against some master database of known DNA profiles, as is done for fingerprints. After all, was not the suspicionless search here crucial to avoid "inordinate risks for facility staff" or to "existing detainee population," *ante*, at 452? Surely, then—*surely*—the State of Maryland got cracking on those grave risks immediately, by rushing to identify King with his DNA as soon as possible.

Nothing could be further from the truth. Maryland officials did not even begin the process of testing King's DNA that day. Or, actually, the next day. Or the day after that. And that was for a simple reason: Maryland law forbids them to do so. A "DNA sample collected from an individual charged with a crime . . . *may not* be tested or placed in the statewide DNA data base system prior to the first scheduled arraignment date." Md. Pub. Saf. Code Ann. §2–504(d)(1) (Lexis 2011) (emphasis added). And King's first appearance in court was not until three days after his arrest. (I suspect, though, that they did not wait three days to ask his name or take his fingerprints.)

This places in a rather different light the Court's solemn declaration that the search here was necessary so that King could be identified at "every stage of the criminal process." *Ante*, at 456. I hope that the Maryland officials who read the Court's opinion do not take it seriously. Acting on the Court's misperception of Maryland law could lead to jail time. See Md. Pub. Saf. Code Ann. §2–512(c)–(e) (punishing by up to five years' imprisonment anyone who obtains or tests DNA information except as provided by statute). Does the Court really believe that Maryland did not know whom it was arraigning? The Court's response is to imagine that release on bail could take so long that the DNA results are

returned in time, or perhaps that bail could be revoked if the DNA test turned up incriminating information. *Ante*, at 454–455. That is no answer at all. If the purpose of this Act is to assess "whether [King] should be released on bail," *ante*, at 453, why would it *possibly* forbid the DNA testing process to *begin* until King was arraigned? Why would Maryland resign itself to simply hoping that the bail decision will drag out long enough that the "identification" can succeed before the arrestee is released? The truth, known to Maryland and increasingly to the reader: this search had nothing to do with establishing King's identity.

It gets worse. King's DNA sample was not received by the Maryland State Police's Forensic Sciences Division until April 23, 2009—two weeks after his arrest. It sat in that office, ripening in a storage area, until the custodians got around to mailing it to a lab for testing on June 25, 2009—two months after it was received, and nearly *three* since King's arrest. After it was mailed, the data from the lab tests were not available for several more weeks, until July 13, 2009, which is when the test results were entered into Maryland's DNA database, *together with information identifying the person from whom the sample was taken*. Meanwhile, bail had been set, King had engaged in discovery, and he had requested a speedy trial—presumably not a trial of John Doe. It was not until August 4, 2009—four months after King's arrest—that the forwarded sample transmitted (*without* identifying information) from the Maryland DNA database to the Federal Bureau of Investigation's national database was matched with a sample taken from the scene of an unrelated crime years earlier.

A more specific description of exactly what happened at this point illustrates why, by definition, King could not have been *identified* by this match. The FBI's DNA database (known as CODIS) consists of two distinct collections. FBI, CODIS and NDIS Fact Sheet, http://www.fbi.gov/about-us/lab/codis/codis-and-ndis-fact-sheet (all Internet materials as visited May 31, 2013, and available in Clerk of Court's case

file). One of them, the one to which King's DNA was submitted, consists of DNA samples taken from known convicts or arrestees. I will refer to this as the "Convict and Arrestee Collection." The other collection consists of samples taken from crime scenes; I will refer to this as the "Unsolved Crimes Collection." The Convict and Arrestee Collection stores "no names or other personal identifiers of the offenders, arrestees, or detainees." *Ibid.* Rather, it contains only the DNA profile itself, the name of the agency that submitted it, the laboratory personnel who analyzed it, and an identification number for the specimen. *Ibid.* This is because the submitting state laboratories are expected *already* to know the identities of the convicts and arrestees from whom samples are taken. (And, of course, they do.)

Moreover, the CODIS system works by checking to see whether any of the samples in the Unsolved Crimes Collection match any of the samples in the Convict and Arrestee Collection. *Ibid.* That is sensible, if what one wants to do is solve those cold cases, but note what it requires: that the identity of the people whose DNA has been entered in the Convict and Arrestee Collection *already be known*.[2] If one wanted to identify someone in custody using his DNA, the logical thing to do would be to compare that DNA against the Convict and Arrestee Collection: to search, in other words, the collection that could be used (by checking back with the submitting state agency) to identify people, rather than the collection of evidence from unsolved crimes, whose perpetrators are by definition unknown. But that is not what was done. And that is because this search had nothing to do with identification.

In fact, if anything was "identified" at the moment that the DNA database returned a match, it was not King—his

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[2] By the way, this procedure has nothing to do with exonerating the wrongfully convicted, as the Court soothingly promises. See *ante*, at 455. The FBI CODIS database includes DNA from *unsolved* crimes. I know of no indication (and the Court cites none) that it also includes DNA from all—or even any—crimes whose perpetrators have already been convicted.

identity was already known. (The docket for the original criminal charges lists his full name, his race, his sex, his height, his weight, his date of birth, and his address.) Rather, what the August 4 match "identified" was *the previously-taken sample from the earlier crime.* That sample was genuinely mysterious to Maryland; the State knew that it had probably been left by the victim's attacker, but nothing else. King was not identified by his association with the sample; rather, the sample was identified by its association with King. The Court effectively destroys its own "identification" theory when it acknowledges that the object of this search was "to see what [was] already known about [King]." *Ante*, at 451. King was who he was, and volumes of his biography could not make him any more or any less King. No minimally competent speaker of English would say, upon noticing a known arrestee's similarity "to a wanted poster of a previously unidentified suspect," *ibid.*, that the *arrestee* had thereby been identified. It was the previously unidentified suspect who had been identified—just as, here, it was the previously unidentified rapist.

2

That taking DNA samples from arrestees has nothing to do with identifying them is confirmed not just by actual practice (which the Court ignores) but by the enabling statute itself (which the Court also ignores). The Maryland Act at issue has a section helpfully entitled "Purpose of collecting and testing DNA samples." Md. Pub. Saf. Code Ann. §2–505. (One would expect such a section to play a somewhat larger role in the Court's analysis of the Act's purpose—which is to say, at least *some* role.) That provision lists five purposes for which DNA samples may be tested. By this point, it will not surprise the reader to learn that the Court's imagined purpose is not among them.

Instead, the law provides that DNA samples are collected and tested, as a matter of Maryland law, "as part of an official investigation into a crime." §2–505(a)(2). (Or, as

our suspicionless-search cases would put it: for ordinary law-enforcement purposes.) That is certainly how everyone has always understood the Maryland Act until today. The Governor of Maryland, in commenting on our decision to hear this case, said that he was glad, because "[a]llowing law enforcement to collect DNA samples . . . is absolutely critical to our efforts to continue driving down crime," and "bolsters our efforts to resolve open investigations and bring them to a resolution." Marbella, Supreme Court Will Review Md. DNA Law, Baltimore Sun, Nov. 10, 2012, pp. 1, 14. The attorney general of Maryland remarked that he "look[ed] forward to the opportunity to defend this important crime-fighting tool," and praised the DNA database for helping to "bring to justice violent perpetrators." *Ibid.* Even this Court's order staying the decision below states that the statute "provides a valuable tool for investigating unsolved crimes and thereby helping to remove violent offenders from the general population"—with, unsurprisingly, no mention of identity. 567 U. S. 1301, 1303 (2012) (ROBERTS, C. J., in chambers).

More devastating still for the Court's "identification" theory, the statute *does* enumerate two instances in which a DNA sample may be tested for the purpose of identification: "to help identify *human remains*," §2–505(a)(3) (emphasis added), and "to help identify *missing individuals*," §2–505(a)(4) (emphasis added). No mention of identifying arrestees. *Inclusio unius est exclusio alterius*. And note again that Maryland forbids using DNA records "for any purposes other than those specified"—it is actually a crime to do so. §2–505(b)(2).

The Maryland regulations implementing the Act confirm what is now monotonously obvious: These DNA searches have nothing to do with identification. For example, if someone is arrested and law enforcement determines that "a convicted offender Statewide DNA Data Base sample already exists" for that arrestee, "the agency is not required to obtain a new sample." Code of Md. Regs., tit. 29,

§ 05.01.04(B)(4) (2011). But how could the State know if an arrestee has already had his DNA sample collected, if the point of the sample is to identify who he is? Of course, if the DNA sample is instead taken in order to investigate crimes, this restriction makes perfect sense: Having previously placed an identified someone's DNA on file to check against available crime-scene evidence, there is no sense in going to the expense of taking a new sample. Maryland's regulations further require that the "individual collecting a sample . . . verify the identity of the individual from whom a sample is taken by name and, if applicable, State identification (SID) number." § 05.01.04(K). (But how?) And after the sample is taken, it continues to be identified *by* the individual's name, fingerprints, etc., see § 05.01.07(B)—rather than (as the Court believes) being used *to identify* individuals. See § 05.01.07(B)(2) ("Records and specimen information shall *be identified by* . . . [the] [n]ame of the donor" (emphasis added)).

So, to review: DNA testing does not even begin until after arraignment and bail decisions are already made. The samples sit in storage for months, and take weeks to test. When they are tested, they are checked against the Unsolved Crimes Collection—rather than the Convict and Arrestee Collection, which could be used to identify them. The Act forbids the Court's purpose (identification), but prescribes as its purpose what our suspicionless-search cases forbid ("official investigation into a crime"). Against all of that, it is safe to say that if the Court's identification theory is not wrong, there is no such thing as error.

II

The Court also attempts to bolster its identification theory with a series of inapposite analogies. See *ante*, at 456–461.

Is not taking DNA samples the same, asks the Court, as taking a person's photograph? No—because that is not a Fourth Amendment search at all. It does not involve a

physical intrusion onto the person, see *Florida* v. *Jardines*, *ante*, at 5, and we have never held that merely taking a person's photograph invades any recognized "expectation of privacy," see *Katz* v. *United States*, 389 U. S. 347 (1967). Thus, it is unsurprising that the cases the Court cites as authorizing photo-taking do not even mention the Fourth Amendment. See *State ex rel. Bruns* v. *Clausmeier*, 154 Ind. 599, 57 N. E. 541 (1900) (libel), *Shaffer* v. *United States*, 24 App. D. C. 417 (1904) (Fifth Amendment privilege against self-incrimination).

But is not the practice of DNA searches, the Court asks, the same as taking "Bertillon" measurements—noting an arrestee's height, shoe size, and so on, on the back of a photograph? No, because that system was not, in the ordinary case, used to solve unsolved crimes. It is possible, I suppose, to imagine situations in which such measurements might be useful to generate leads. (If witnesses described a very tall burglar, all the "tall man" cards could then be pulled.) But the obvious primary purpose of such measurements, as the Court's description of them makes clear, was to verify that, for example, the person arrested today is the same person that was arrested a year ago. Which is to say, Bertillon measurements were *actually* used as a system of identification, and drew their primary usefulness from that task.[3]

It is on the fingerprinting of arrestees, however, that the Court relies most heavily. *Ante*, at 458–461. The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question. Even assuming so, however, law enforcement's post-arrest use of finger-

[3] Puzzlingly, the Court's discussion of photography and Bertillon measurements repeatedly cites state cases (such as *Clausmeier*) that were decided before the Fourth Amendment was held to be applicable to the States. See *Wolf* v. *Colorado*, 338 U. S. 25 (1949); *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Why the Court believes them relevant to the meaning of that Amendment is therefore something of a mystery.

prints could not be more different from its post-arrest use of DNA. Fingerprints of arrestees are taken primarily to identify them (though that process sometimes solves crimes); the DNA of arrestees is taken to solve crimes (and nothing else). Contrast CODIS, the FBI's nationwide DNA database, with IAFIS, the FBI's Integrated Automated Fingerprint Identification System. See FBI, Integrated Automated Fingerprint Identification System, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis/iafis (hereinafter IAFIS).

Fingerprints	DNA Samples
The "average response time for an electronic criminal fingerprint submission is about 27 minutes." IAFIS.	DNA analysis can take months—far too long to be useful for identifying someone.
IAFIS includes detailed identification information, including "criminal histories; mug shots; scars and tattoo photos; physical characteristics like height, weight, and hair and eye color."	CODIS contains "[n]o names or other personal identifiers of the offenders, arrestees, or detainees." See CODIS and NDIS Fact Sheet.
"Latent prints" recovered from crime scenes are not systematically compared against the database of known fingerprints, since that requires further forensic work.[4]	The entire *point* of the DNA database is to check crime-scene evidence against the profiles of arrestees and convicts as they come in.

[4] See, *e. g.*, FBI, Privacy Impact Assessment: Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Repository for Individuals of Special Concern (RISC), http://

The Court asserts that the taking of fingerprints was "constitutional for generations prior to the introduction" of the FBI's rapid computer-matching system. *Ante*, at 460. This bold statement is bereft of citation to authority because there is none for it. The "great expansion in fingerprinting came before the modern era of Fourth Amendment jurisprudence," and so we were never asked to decide the legitimacy of the practice. *United States* v. *Kincade*, 379 F. 3d 813, 874 (CA9 2004) (Kozinski, J., dissenting). As fingerprint databases expanded from convicted criminals, to arrestees, to civil servants, to immigrants, to everyone with a driver's license, Americans simply "became accustomed to having our fingerprints on file in some government database." *Ibid.* But it is wrong to suggest that this was uncontroversial at the time, or that this Court blessed universal fingerprinting for "generations" before it was possible to use it effectively for identification.

The Court also assures us that "the delay in processing DNA from arrestees is being reduced to a substantial degree by rapid technical advances." *Ante*, at 460. The idea, presumably, is that the snail's pace in this case is atypical, so that DNA is now readily usable for identification. The Court's proof, however, is nothing but a pair of press releases—each of which turns out to undercut this argument. We learn in them that reductions in backlog have enabled Ohio and Louisiana crime labs to analyze a submitted DNA sample in twenty days.[5] But that is *still longer* than the *eighteen* days that Maryland needed to analyze King's sam-

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www.fbi.gov/foia/privacy-impact-assessments/iafis-ngi-risc (searches of the "Unsolved Latent File" may "take considerably more time").

[5] See Attorney General DeWine Announces Significant Drop in DNA Turnaround Time (Jan. 4, 2013), www.ohioattorneygeneral.gov/Media/News-Releases/January-2013/Attorney-General-DeWine-Announces-Significant-Drop; Gov. Jindal Announces Elimination of DNA Backlog, DNA Unit Now Operating in Real Time (Nov. 17, 2011), http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&articleID=3102.

ple, once it worked its way through the State's labyrinthine bureaucracy. What this illustrates is that these times do not take into account the many other sources of delay. So if the Court means to suggest that Maryland is unusual, that may be right—it may qualify in this context as a paragon of efficiency. (Indeed, the Governor of Maryland was hailing the elimination of that State's backlog more than five years ago. See Wheeler, O'Malley Wants to Expand DNA Testing, Baltimore Sun, Jan. 11, 2008, p. 5B.) Meanwhile, the Court's holding will result in the dumping of a large number of arrestee samples—many from minor offenders—onto an already overburdened system: Nearly one-third of Americans will be arrested for some offense by age 23. See Brame, Turner, Paternoster, & Bushway, Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample, 129 Pediatrics 21 (2012).

The Court also accepts uncritically the Government's representation at oral argument that it is developing devices that will be able to test DNA in mere minutes. At most, this demonstrates that it may one day be possible to design a program that uses DNA for a purpose other than crime-solving—not that Maryland has in fact designed such a program today. And that is the main point, which the Court's discussion of the brave new world of instant DNA analysis should not obscure. The issue before us is not whether DNA can *some day* be used for identification; nor even whether it can *today* be used for identification; but whether it *was used for identification here.*

Today, it can fairly be said that fingerprints really are used to identify people—so well, in fact, that there would be no need for the expense of a separate, wholly redundant DNA confirmation of the same information. What DNA adds—what makes it a valuable weapon in the law-enforcement arsenal—is the ability to solve unsolved crimes, by matching old crime-scene evidence against the profiles of people whose identities are already known. That is what was going on when King's

DNA was taken, and we should not disguise the fact. Solving unsolved crimes is a noble objective, but it occupies a lower place in the American pantheon of noble objectives than the protection of our people from suspicionless law-enforcement searches. The Fourth Amendment must prevail.

* * *

The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for "serious offense[s]." *Ante*, at 465; see also *ante*, at 440, 448, 453, 455, 460, 461 (repeatedly limiting the analysis to "serious offenses"). I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. If one believes that DNA will "identify" someone arrested for assault, he must believe that it will "identify" someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, *logic will out.* When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, "We can find no significant difference between this case and *King*." Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.

The most regrettable aspect of the suspicionless search that occurred here is that it proved to be quite unnecessary. All parties concede that it would have been entirely permissible, as far as the Fourth Amendment is concerned, for Maryland to take a sample of King's DNA as a consequence of his conviction for second-degree assault. So the ironic result of the Court's error is this: The only arrestees to whom the outcome here will ever make a difference are those

who *have been acquitted* of the crime of arrest (so that their DNA could not have been taken upon conviction). In other words, this Act manages to burden uniquely the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations.

Today's judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the "identity" of the flying public), applies for a driver's license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.

I therefore dissent, and hope that today's incursion upon the Fourth Amendment, like an earlier one,[6] will some day be repudiated.

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[6] Compare *New York* v. *Belton*, 453 U. S. 454 (1981) (suspicionless search of a car permitted upon arrest of the driver), with *Arizona* v. *Gant*, 556 U. S. 332 (2009) (on second thought, no).

Syllabus

HILLMAN *v.* MARETTA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 11–1221. Argued April 22, 2013—Decided June 3, 2013

The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA) establishes an insurance program for federal employees. FEGLIA permits an employee to name a beneficiary of life insurance proceeds, and specifies an "order of precedence" providing that an employee's death benefits accrue first to that beneficiary ahead of other potential recipients. 5 U. S. C. § 8705(a). A Virginia statute revokes a beneficiary designation in any contract that provides a death benefit to a former spouse where there has been a change in the decedent's marital status. Va. Code Ann. § 20–111.1(A) (Section A). In the event that this provision is pre-empted by federal law, a separate provision of Virginia law, Section D, provides a cause of action rendering the former spouse liable for the principal amount of the proceeds to the party who would have received them were Section A not pre-empted. § 20–111.1(D).

Warren Hillman named then-spouse, respondent Judy Maretta, as the beneficiary of his Federal Employees' Group Life Insurance (FEGLI) policy. After their divorce, he married petitioner Jacqueline Hillman but never changed his named FEGLI beneficiary. After Warren's death, Maretta, still the named beneficiary, filed a claim for the FEGLI proceeds and collected them. Hillman sued in Virginia court, seeking recovery of the proceeds under Section D. Maretta argued in response that Section D is pre-empted by federal law. The parties agreed that Section A is pre-empted. The Virginia Circuit Court found Maretta liable to Hillman under Section D for the FEGLI policy proceeds. The State Supreme Court reversed, concluding that Section D is pre-empted by FEGLIA because it conflicts with the purposes and objectives of Congress.

Held: Section D of the Virginia statute is pre-empted by FEGLIA. Pp. 490–499.

(a) State law is pre-empted "to the extent of any conflict with a federal statute." *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372. This case raises the question whether Virginia law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U. S. 52, 67. Pp. 490–497.

(1) To determine whether a state law conflicts with Congress' purposes and objectives, the nature of the federal interest must first be

ascertained. *Crosby*, 530 U. S., at 372–373. Two previous cases govern the analysis of the relationship between Section D and FEGLIA here. In *Wissner* v. *Wissner*, 338 U. S. 655, a California court granted a decedent's widow, who was not the named beneficiary of a policy under the federal National Service Life Insurance Act of 1940 (NSLIA), an interest in the insurance proceeds as community property under state law. This Court reversed. Because NSLIA provided that the insured had a right to designate a beneficiary and could change that designation at any time, the Court reasoned that Congress had "spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Id.*, at 658. The Court addressed a similar question regarding the federal Servicemen's Group Life Insurance Act of 1965 (SGLIA) in *Ridgway* v. *Ridgway*, 454 U. S. 46. There, a Maine court imposed a constructive trust on insurance proceeds paid to a servicemember's widow, the named beneficiary, and ordered that they be paid to the decedent's first wife as required by a divorce decree. Holding the constructive trust pre-empted, the *Ridgway* Court explained that *Wissner* controlled and that SGLIA made clear that "the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office." *Id.*, at 56. Pp. 491–493.

(2) The reasoning in *Wissner* and *Ridgway* applies with equal force here. NSLIA and SGLIA are strikingly similar to FEGLIA, which creates a scheme that gives highest priority to an insured's designated beneficiary, § 8705(a), and which underscores that the employee's "right" of designation "cannot be waived or restricted," 5 CFR § 843.205(e). Section D interferes with this scheme, because it directs that the proceeds actually belong to someone other than the named beneficiary by creating a cause of action for their recovery by a third party. FEGLIA establishes a clear and predictable procedure for an employee to indicate who the intended beneficiary shall be and evinces Congress' decision to accord federal employees an unfettered freedom of choice in selecting a beneficiary and to ensure the proceeds actually belong to that beneficiary. This conclusion is confirmed by another provision of FEGLIA, § 8705(e), which creates a limited exception to the order of precedence by allowing proceeds to be paid to someone other than the named beneficiary, if, and only if, the requisite documentation is filed with the Government before the employee's death, so that any departure from the beneficiary designation is managed within, not outside, the federal system. If States could make alternative distributions outside the clear procedure Congress established, § 8705(e)'s narrow exception would be transformed into a general license for state law to override FEGLIA. Pp. 493–497.

(b) Hillman's additional arguments in support of a different result are unpersuasive. Pp. 497–499.

283 Va. 34, 722 S. E. 2d 32, affirmed.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined, and in which SCALIA, J., joined as to all but footnote 4. THOMAS, J., *post*, p. 499, and ALITO, J., *post*, p. 502, filed opinions concurring in the judgment.

Daniel H. Ruttenberg argued the cause for petitioner. With him on the briefs were *Jason D. Smolen*, *Alan B. Plevy*, and *Kyung N. Dickerson*.

Steffen N. Johnson argued the cause for respondent. With him on the brief were *George O. Peterson*, *Gene C. Schaerr*, *Elizabeth P. Papez*, *Linda T. Coberly*, and *William P. Ferranti*.

Elaine J. Goldenberg argued the cause for the United States as *amicus curiae* in support of respondent. With her on the brief were *Solicitor General Verrilli*, *Acting Assistant Attorney General Delery*, *Deputy Solicitor General Srinivasan*, *Leonard Schaitman*, *Robert D. Kamenshine*, *Elaine Kaplan*, and *James Muetzel*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court.†

The Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U. S. C. § 8701 *et seq.*, establishes a life insurance program for federal employees. FEGLIA provides that an employee may designate a beneficiary to receive the proceeds of his life insurance at the time of his death. § 8705(a). Separately, a Virginia statute addresses the situation in which an employee's marital status has changed, but he did not update his beneficiary designation before his death. Section 20–111.1(D) of the Virginia Code renders a former spouse liable for insurance proceeds to whoever

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**Anthony F. Shelley* and *David M. Ermer* filed a brief for the Association of Federal Health Organizations as *amicus curiae* urging affirmance.

†JUSTICE SCALIA joins all but footnote 4 of this opinion.

would have received them under applicable law, usually a widow or widower, but for the beneficiary designation. Va. Code Ann. §20–111.1(D) (Lexis Supp. 2012). This case presents the question whether the remedy created by §20–111.1(D) is pre-empted by FEGLIA and its implementing regulations. We hold that it is.

I

A

In 1954, Congress enacted FEGLIA to "provide low-cost group life insurance to Federal employees." H. R. Rep. No. 2579, 83d Cong., 2d Sess., 1 (1954). The program is administered by the federal Office of Personnel Management (OPM). 5 U. S. C. §8716. Pursuant to the authority granted to it by FEGLIA, OPM entered into a life insurance contract with the Metropolitan Life Insurance Company. See §8709; 5 CFR §870.102 (2013). Individual employees enrolled in the Federal Employees' Group Life Insurance (FEGLI) Program receive coverage through this contract. The program is of substantial size. In 2010, the total amount of FEGLI insurance coverage in force was $824 billion. GAO, Federal Employees' Group Life Insurance: Retirement Benefit and Retained Asset Account Disclosures Could Be Improved 1 (GAO–12–94, 2011).

FEGLIA provides that, upon an employee's death, life insurance benefits are paid in accordance with a specified "order of precedence." 5 U. S. C. §8705(a). The proceeds accrue "[f]irst, to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death." *Ibid.* "[I]f there is no designated beneficiary," the benefits are paid "to the widow or widower of the employee." *Ibid.* Absent a widow or widower, the benefits accrue to "the child or children of the employee and descendants of [the] deceased children"; "the parents of the employee" or their survivors; the "executor or administrator

of the estate of the employee"; and last, to "other next of kin." *Ibid.*

To be effective, the beneficiary designation and any accompanying revisions to it must be in writing and duly filed with the Government. See *ibid.* ("[A] designation, change, or cancellation of beneficiary in a will or other document not so executed and filed has no force or effect"). An OPM regulation provides that an employee may "change [a] beneficiary at any time without the knowledge or consent of the previous beneficiary," and makes clear that "[t]his right cannot be waived or restricted." 5 CFR § 870.802(f). Employees are informed of these requirements through materials that OPM disseminates in connection with the program. See, *e. g.*, OPM, FEGLI Program Booklet 21–22 (rev. Aug. 2004) (setting forth the order of precedence and stating that OPM "will pay benefits" "*[f]irst*, to the beneficiary [the employee] designate[s]"). The order of precedence is also described on the form that employees use to designate a beneficiary. See Designation of Beneficiary, FEGLI Program, SF 2823 (rev. Mar. 2011) (Back of Part 2). And the enrollment form advises employees to update their designations if their "[i]ntentions [c]hange" as a result of, for example, "marriage [or] divorce." *Ibid.*

In 1998, Congress amended FEGLIA to create a limited exception to an employee's right of designation. The statute now provides that "[a]ny amount which would otherwise be paid to a person determined under the order of precedence . . . shall be paid (in whole or in part) by [OPM] to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation" or related settlement, but only in the event the "decree, order, or agreement" is received by OPM or the employing agency before the employee's death. 5 U. S. C. §§ 8705(e)(1)–(2).

FEGLIA also includes an express pre-emption provision. That provision states in relevant part that "[t]he provisions

of any contract under [FEGLIA] which relate to the nature or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any law of any State . . . , which relates to group life insurance to the extent that the law or regulation is inconsistent with the contractual provisions." § 8709(d)(1).

This case turns on the interaction between these provisions of FEGLIA and a Virginia statute. Section 20–111.1(A) (Section A) of the Virginia Code provides that a divorce or annulment "revoke[s]" a "beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party." A "death benefit" includes "payments under a life insurance contract." § 20–111.1(B).

In the event that Section A is pre-empted by federal law, § 20–111.1(D) (Section D) of the Virginia Code applies. Section D provides as follows:

> "If [Va. Code Ann. § 20–111.1] is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of any death benefit that the former spouse is not entitled to under [§ 20–111.1] is personally liable for the amount of the payment to the person who would have been entitled to it were [§ 20–111.1] not preempted."

In other words, where Section A is pre-empted, Section D creates a cause of action rendering a former spouse liable for the principal amount of the insurance proceeds to the person who would have received them had Section A continued in effect.

B

Warren Hillman (Warren) and respondent Judy Maretta were married. In 1996, Warren named Maretta as the beneficiary of his FEGLI policy. Warren and Maretta divorced in 1998 and, four years later, he married petitioner Jacqueline Hillman. Warren died unexpectedly in 2008. Because

Warren had never changed the named beneficiary under his FEGLI policy, it continued to identify Maretta as the beneficiary at the time of his death despite his divorce and subsequent remarriage to Hillman.

Hillman filed a claim for the proceeds of Warren's life insurance, but the FEGLI administrator informed her that the proceeds would accrue to Maretta, because she had been named as the beneficiary. Maretta filed a claim for the benefits with OPM and collected the FEGLI proceeds in the amount of $124,558.03. App. to Pet. for Cert. 37a.

Hillman then filed a lawsuit in Virginia Circuit Court, arguing that Maretta was liable to her under Section D for the proceeds of her deceased husband's FEGLI policy. The parties agreed that Section A, which directly reallocates the benefits, is pre-empted by FEGLIA. *Id.*, at 36a. Maretta contended that Section D is also pre-empted by federal law and that she should keep the insurance proceeds. The Circuit Court rejected Maretta's argument and granted summary judgment to Hillman, finding Maretta liable to Hillman under Section D for the proceeds of Warren's policy. *Id.*, at 58a.

The Virginia Supreme Court reversed and entered judgment for Maretta. 283 Va. 34, 46, 722 S. E. 2d 32, 38 (2012). The court found that FEGLIA clearly instructed that the insurance proceeds should be paid to a named beneficiary. *Id.*, at 44–46, 722 S. E. 2d, at 36–38. The court reasoned that "Congress did not intend merely for the named beneficiary in a FEGLI policy to receive the proceeds, only then to have them subject to recovery by a third party under state law." *Id.*, at 44, 722 S. E. 2d, at 37. It therefore concluded that Section D is pre-empted by FEGLIA, because it "stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*, at 45, 722 S. E. 2d, at 37 (internal quotation marks omitted).

We granted certiorari, 568 U. S. 1118 (2013), to resolve a conflict among the state and federal courts over whether

FEGLIA pre-empts a rule of state law that automatically assigns an interest in the proceeds of a FEGLI policy to a person other than the named beneficiary or grants that person a right to recover such proceeds.[1] We now affirm.

II

Under the Supremacy Clause, Congress has the power to pre-empt state law expressly. See *Brown* v. *Hotel Employees*, 468 U. S. 491, 500–501 (1984). Although FEGLIA contains an express pre-emption provision, see § 8709(d)(1), the court below considered only whether Section D is pre-empted under conflict pre-emption principles. We limit our analysis here to that holding. State law is pre-empted "to the extent of any conflict with a federal statute." *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372 (2000) (citing *Hines* v. *Davidowitz*, 312 U. S. 52, 66–67 (1941)). Such a conflict occurs when compliance with both federal and state regulations is impossible, *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U. S., at 67. This case raises a question of purposes and objectives pre-emption.

The regulation of domestic relations is traditionally the domain of state law. See *In re Burrus*, 136 U. S. 586, 593–594 (1890). There is therefore a "presumption against pre-emption" of state laws governing domestic relations, *Egelhoff* v. *Egelhoff*, 532 U. S. 141, 151 (2001), and "family and

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[1] Compare, *e. g.*, *Metropolitan Life Ins. Co.* v. *Zaldivar*, 413 F. 3d 119 (CA1 2005) (FEGLIA pre-empted state-law rule); *Metropolitan Life Ins. Co.* v. *Sullivan*, 96 F. 3d 18 (CA2 1996) (*per curiam*) (same); *Metropolitan Life Ins. Co.* v. *McMorris*, 786 F. 2d 379 (CA10 1986) (same); *O'Neal* v. *Gonzalez*, 839 F. 2d 1437 (CA11 1988), with *Hardy* v. *Hardy*, 963 N. E. 2d 470 (Ind. 2012) (not pre-empted); *McCord* v. *Spradling*, 830 So. 2d 1188 (Miss. 2002) (same); *Kidd* v. *Pritzel*, 821 S. W. 2d 566 (Mo. App. 1991) (same).

family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden," *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 581 (1979). But family law is not entirely insulated from conflict pre-emption principles, and so we have recognized that state laws "governing the economic aspects of domestic relations . . . must give way to clearly conflicting federal enactments." *Ridgway* v. *Ridgway*, 454 U. S. 46, 55 (1981).

A

To determine whether a state law conflicts with Congress' purposes and objectives, we must first ascertain the nature of the federal interest. *Crosby*, 530 U. S., at 372–373.

Hillman contends that Congress' purpose in enacting FEGLIA was to advance administrative convenience by establishing a clear rule to dictate where the Government should direct insurance proceeds. See Brief for Petitioner 25. There is some force to Hillman's argument that a significant legislative interest in a large federal program like FEGLIA is to enable its efficient administration. If Hillman is correct that administrative convenience was Congress' only purpose, then there might be no conflict between Section D and FEGLIA: Section D's cause of action takes effect only after benefits have been paid, and so would not necessarily impact the Government's distribution of insurance proceeds. Cf. *Hardy* v. *Hardy*, 963 N. E. 2d 470, 477–478 (Ind. 2012).

For her part, Maretta insists that Congress had a more substantial purpose in enacting FEGLIA: to ensure that a duly named beneficiary will receive the insurance proceeds and be able to make use of them. Brief for Respondent 21–22. If Maretta is correct, then Section D would directly conflict with that objective, because its cause of action would take the insurance proceeds away from the named beneficiary and reallocate them to someone else. We must there-

fore determine which understanding of FEGLIA's purpose is correct.

We do not write on a clean slate. In two previous cases, we considered federal insurance statutes requiring that insurance proceeds be paid to a named beneficiary and held they pre-empted state laws that mandated a different distribution of benefits. The statutes we addressed in these cases are similar to FEGLIA. And the impediments to the federal interests in these prior cases are analogous to the one created by Section D of the Virginia statute. These precedents accordingly govern our analysis of the relationship between Section D and FEGLIA in this case.

In *Wissner* v. *Wissner*, 338 U. S. 655 (1950), we considered whether the National Service Life Insurance Act of 1940 (NSLIA), 54 Stat. 1008, pre-empted a rule of state marital property law. Congress had enacted NSLIA to "affor[d] a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States." *Wissner*, 338 U. S., at 658. A California court granted the decedent's widow, who was not the named beneficiary, an interest in the insurance proceeds as community property under state law. *Id.*, at 657.

We reversed, holding that NSLIA pre-empted the widow's state-law action to recover the proceeds. *Id.*, at 658. In pertinent part, NSLIA provided that the insured "'shall have the right to designate the beneficiary or beneficiaries of the insurance [within a designated class], . . . and shall . . . at all times have the right to change the beneficiary or beneficiaries.'" *Ibid.* (quoting 38 U. S. C. § 802(g) (1946 ed.)). We reasoned that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." 338 U. S., at 658. The California court's decision could not stand, we found, because it "substitute[d] the widow for the mother, who was the beneficiary Congress directed shall receive the insurance money." *Id.*, at 659.

In *Ridgway*, we considered a similar question regarding the federal Servicemen's Group Life Insurance Act of 1965 (SGLIA), Pub. L. 89–214, 79 Stat. 880, another insurance scheme for members of the armed services. 454 U. S., at 50–53. A Maine court imposed a constructive trust on insurance proceeds paid to a servicemember's widow, who was the named beneficiary, and ordered they be paid to the decedent's first wife as required by the terms of a divorce decree. *Id.*, at 49–50.

In holding the constructive trust pre-empted, we explained that the issue was "controlled by *Wissner*." *Id.*, at 55. As in *Wissner*, the applicable provisions of SGLIA made clear that "the insured service member possesses the right freely to designate the beneficiary and to alter that choice at any time by communicating the decision in writing to the proper office." 454 U. S., at 56 (citing *Wissner*, 338 U. S., at 658). We also noted that SGLIA established an "'order of precedence,'" which provided that the benefits would be first paid to "such 'beneficiary or beneficiaries as the member . . . may have designated by [an appropriately filed] writing received prior to death.'" 454 U. S., at 52 (quoting 38 U. S. C. § 770(a) (1976 ed.)). Notwithstanding "some small differences" between SGLIA and NSLIA, we concluded that SGLIA's "unqualified directive to pay the proceeds to the properly designated beneficiary clearly suggest[ed] that no different result was intended by Congress." 454 U. S., at 57.

B

Our reasoning in *Wissner* and *Ridgway* applies with equal force here. The statutes we considered in these earlier cases are strikingly similar to FEGLIA. Like NSLIA and SGLIA, FEGLIA creates a scheme that gives highest priority to an insured's designated beneficiary. 5 U. S. C. § 8705(a). Indeed, FEGLIA includes an "order of precedence" that is nearly identical to the one in SGLIA: Both require that the insurance proceeds be paid first to the

named beneficiary ahead of any other potential recipient. Compare *ibid.* with 38 U. S. C. § 770(a) (1976 ed.) (now § 1970(a) (2006 ed.)). FEGLIA's implementing regulations further underscore that the employee's "right" of designation "cannot be waived or restricted." 5 CFR § 843.205(e). In FEGLIA, as in these other statutes, Congress "'spok[e] with force and clarity in directing that the proceeds *belong* to the named beneficiary and no other.'" *Ridgway*, 454 U. S., at 55 (quoting *Wissner*, 338 U. S., at 658; emphasis added).[2]

Section D interferes with Congress' scheme, because it directs that the proceeds actually "belong" to someone other than the named beneficiary by creating a cause of action for their recovery by a third party. *Ridgway*, 454 U. S., at 55; see Va. Code Ann. § 20–111.1(D). It makes no difference whether state law requires the transfer of the proceeds, as Section A does, or creates a cause of action, like Section D, that enables another person to receive the proceeds upon filing an action in state court. In either case, state law displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead. As in *Wissner*, applicable state law "substitutes the widow" for the "beneficiary Congress directed shall receive the insurance money," 338 U. S., at 659, and thereby "frustrates the deliberate purpose of Congress" to ensure that a federal employee's named beneficiary receives the proceeds. *Ibid.*

One can imagine plausible reasons to favor a different policy. Many employees perhaps neglect to update their beneficiary designations after a change in marital status.

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[2] Hillman points to some textual differences among NSLIA, SGLIA, and FEGLIA. She suggests, for example, that the provision of NSLIA enabling the appointment of a beneficiary does not use precisely the "'same language'" as FEGLIA's order of precedence. Reply Brief 21. Even if there are "some small differences" in the statutory language, however, they do not diminish the critical similarity shared by the three statutes: Each reflects Congress' "unqualified directive" that the proceeds accrue to a named beneficiary. *Ridgway*, 454 U. S., at 57.

As a result, a legislature could have thought that a default rule providing that insurance proceeds accrue to a widow or widower, and not a named beneficiary, would be more likely to align with most people's intentions. Or, similarly, a legislature might have reasonably believed that an employee's will is more reliable evidence of his intent than a beneficiary designation form executed years earlier.

But that is not the judgment Congress made.[3] Rather than draw an inference about an employee's probable intent from a range of sources, Congress established a clear and predictable procedure for an employee to indicate who the intended beneficiary of his life insurance shall be. Like the statutes at issue in *Ridgway* and *Wissner*, FEGLIA evinces Congress' decision to accord federal employees an unfettered "freedom of choice" in selecting the beneficiary of the insurance proceeds and to ensure the proceeds would actually "belong" to that beneficiary. *Ridgway*, 454 U. S., at 56. An employee's ability to name a beneficiary acts as a "guarantee of the complete and full performance of the contract to the exclusion of conflicting claims." *Wissner*, 338 U. S., at 660. With that promise comes the expectation that the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them.

There is further confirmation that Congress intended the insurance proceeds be paid in accordance with FEGLIA's procedures. Section 8705(e)(1) of FEGLIA provides that "[a]ny amount which would otherwise be paid . . . under the

[3] In his concurrence, JUSTICE ALITO argues that one of FEGLIA's purposes is to "effectuat[e] . . . the insured's *expressed* intent" and that evidence beyond an employee's named beneficiary could therefore be relevant in some circumstances to determining that intent. *Post*, at 503 (opinion concurring in judgment) (emphasis in original). For the reasons explained, however, that statement of Congress' purpose is incomplete. See *supra*, at 493–494 and this page. Congress sought to ensure that an employee's intent would be given effect only through the designation of a beneficiary or through the narrow exceptions specifically provided in the statute, see *infra*, at 496–497.

order of precedence" shall be paid to another person "if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation." This exception, however, only applies if the "decree, order, or agreement . . . is received, before the date of the covered employee's death, by the employing agency." § 8705(e)(2). This provision allows the proceeds to be paid to someone other than the named beneficiary, but if and only if the requisite documentation is filed with the Government, so that any departure from the beneficiary designation is managed within, not outside, the federal system.[4]

We have explained that "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U. S. 608, 616–617 (1980). Section 8705(e) creates a limited exception to the order of precedence. If States could make alternative distributions outside the clear procedure Congress established, that would transform this narrow exception into a general license for state law to override FEGLIA. See *TRW Inc.* v. *Andrews*, 534 U. S. 19, 28–29 (2001).[5]

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[4] Congress enacted 5 U. S. C. § 8705(e) following federal-court decisions that found FEGLIA to pre-empt state-court constructive trust actions predicated upon divorce decrees. See, *e. g.*, *Gonzalez*, 839 F. 2d, at 1439–1440. Reflecting this backdrop, the House Report noted: "Under current law, . . . divorce decrees . . . do not affect the payment of life insurance proceeds. Instead, when the policyholder dies, the proceeds are paid to the beneficiary designated by the policyholder, if any, or to other individuals as specified by statute." H. R. Rep. No. 105–134, p. 2 (1997). To address the issue raised by these lower court cases, Congress could have amended FEGLIA to allow state law to take precedence over the named beneficiary when there is any conflict with a divorce decree or annulment. But Congress did not do so, and instead described the precise conditions under which a divorce decree could displace an employee's named beneficiary.

[5] Hillman contends that § 8705(e) of FEGLIA indicates that Congress contemplated that the proceeds could be paid to someone other than the named beneficiary and that Section D is consistent with that broad princi-

In short, where a beneficiary has been duly named, the insurance proceeds she is owed under FEGLIA cannot be allocated to another person by operation of state law. Section D does exactly that. We therefore agree with the Virginia Supreme Court that it is pre-empted.

III

We are not persuaded by Hillman's additional arguments in support of a different result.

Hillman contends that *Ridgway* and *Wissner* can be distinguished because, unlike the statutes we considered in those cases, FEGLIA does not include an "anti-attachment provision." Brief for Petitioner 38–41. The anti-attachment provisions in NSLIA and SGLIA were identical, and each broadly prohibited the "attachment, levy, or seizure" of insurance proceeds by any legal process. 38 U. S. C. § 454a (1946 ed.) (incorporated by reference in § 816); § 770(g) (1976 ed.). In *Wissner* and *Ridgway*, we found that the relevant state laws violated these provisions and that this further conflict supported our conclusion that the state laws were pre-empted.

These discussions of the anti-attachment provisions, however, were alternative grounds to support the judgment in each case, and not necessary components of the holdings. See *Ridgway*, 454 U. S., at 60–61 (describing separately the anti-attachment provision and noting that the state law "also" conflicted with it); *id.*, at 60 (noting that in *Wissner* we found an "anti-attachment provision . . . as an *independent ground* for the result reached in that case" (emphasis added)); see also *Rose* v. *Rose*, 481 U. S. 619, 631 (1987) (describing *Wissner*'s treatment of the anti-attachment provision as "clearly an alternative holding"). The absence of an

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ple. Brief for Petitioner 43. As noted, however, § 8705(e) has the opposite implication, because it is framed as a specific exception to the rule that the proceeds accrue in all cases to the named beneficiary. It is not, as Hillman suggests, a general rule authorizing state law to supersede FEGLIA.

anti-attachment provision in FEGLIA does not render *Ridgway*'s and *Wissner*'s primary holdings any less applicable here.

Next, Hillman suggests that *Wissner* and *Ridgway* can be set aside because FEGLIA contains an express pre-emption provision and that conflict pre-emption principles ordinarily do not apply when that is so. Brief for Petitioner 45–47. As noted, the court below did not pass on the parties' express pre-emption arguments, and thus we similarly address only conflict pre-emption. See *supra*, at 490. And we need not consider whether Section D is expressly pre-empted, because Hillman is incorrect to suggest that FEGLIA's express pre-emption provision renders conflict pre-emption inapplicable. Rather, we have made clear that the existence of a separate pre-emption provision "'does *not* bar the ordinary working of conflict pre-emption principles.'" *Sprietsma* v. *Mercury Marine*, 537 U. S. 51, 65 (2002); see *Arizona* v. *United States*, 567 U. S. 387, 410 (2012).

Hillman further argues that *Ridgway* is not controlling because a provision of FEGLIA specifically authorizes an employee to assign a FEGLI policy, whereas SGLIA's implementing regulations prohibit such an assignment. See 5 U. S. C. § 8706(f)(1) (2006 ed., Supp. V); 38 CFR § 9.6 (2012). The premise of Hillman's argument is that FEGLIA's assignment provision suggests that an employee has a less substantial interest in who ultimately receives the proceeds. But an employee's ability to assign a FEGLI policy in fact highlights Congress' intent to allow an employee wide latitude to determine how the proceeds should be paid, whether that is to a named beneficiary that he selects, or indirectly through the assignment of the policy itself to someone else.

Finally, Hillman attempts to distinguish *Ridgway* and *Wissner* because Congress enacted the statutes at issue in those cases with the goal of improving military morale. Brief for Petitioner 47–51. Congress' aim of increasing the morale of the armed services, however, was not the basis of

our pre-emption analysis in either case. See *Wissner*, 338 U. S., at 658–659; *Ridgway*, 454 U. S., at 53–56.

* * *

Section D is in direct conflict with FEGLIA because it interferes with Congress' objective that insurance proceeds belong to the named beneficiary. Accordingly, we hold that Section D is pre-empted by federal law. The judgment of the Virginia Supreme Court is affirmed.

It is so ordered.

JUSTICE THOMAS, concurring in the judgment.

The Court correctly concludes that § 20–111.1(D) of the Virginia Code (Section D) is pre-empted by the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA), 5 U. S. C. § 8701 *et seq.* But I cannot join the "purposes and objectives" framework that the majority uses to reach this conclusion. *Ante*, at 490. That framework is an illegitimate basis for finding the pre-emption of state law, see *Wyeth* v. *Levine*, 555 U. S. 555, 583 (2009) (THOMAS, J., concurring in judgment), and is entirely unnecessary to the result in this case, because the ordinary meanings of FEGLIA and Section D directly conflict. Accordingly, I concur only in the judgment.

The Supremacy Clause establishes that federal law "shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. "Where state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc.* v. *Mensing*, 564 U. S. 604, 617 (2011) (quoting *Wyeth*, 555 U. S., at 583 (opinion of THOMAS, J.)). As I have noted before, courts assessing whether state and federal law conflict should not engage in a freewheeling inquiry into whether state law undermines supposed federal purposes and objectives. *Id.*, at 588. Such an approach looks beyond the text of enacted federal law and thereby permits the Federal Government to displace

state law without satisfying an essential precondition to pre-emption, namely, the Bicameral and Presentment Clause. *Id.*, at 586–587. Pre-emption analysis should, therefore, instead hew closely to the text and structure of the provisions at issue, and a court should find pre-emption only when the "'ordinary meaning'" of duly enacted federal law "effectively repeal[s] contrary state law." *PLIVA*, *supra*, at 621, 623.

Applying these principles, it is clear that the ordinary meaning of FEGLIA directly conflicts with Section D. FEGLIA provides that life insurance benefits are paid according to a particular "order of precedence." 5 U. S. C. § 8705(a); see also 5 CFR § 870.801(a) (2013). The benefits are distributed first to "the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death." 5 U. S. C. § 8705(a). If the insured fails to designate a beneficiary, FEGLIA provides a specific order in which benefits must be distributed: next to "the widow or widower of the employee"; absent a widow or widower, to "the child or children of the employee and descendants of [the] deceased children"; and so on. *Ibid.*; *ante*, at 486–487. The insured has the right to change his beneficiary designation "at any time without the knowledge or consent of the previous beneficiary," and "[t]his right cannot be waived or restricted." 5 CFR § 870.802(f).

Section D directly conflicts with this statutory scheme, because it nullifies the insured's statutory right to designate a beneficiary. The right to designate a beneficiary encompasses a corresponding right in the named beneficiary not only to receive the proceeds, but also to retain them. Indeed, the "right" to designate a beneficiary—as well as the term "beneficiary" itself—would be meaningless if the only effect of a designation were to saddle the nominal beneficiary with liability under state law for the full value of the proceeds. But Section D accomplishes exactly that: It transforms the designated beneficiary into a defendant in state

court, a defendant who is now liable to the individual the State has designated as the true beneficiary. While Hillman does not insist that the insurer should have mailed the check to her (as opposed to Maretta, the designated beneficiary), Section D requires, in effect, this very result. See *ante*, at 494 ("[Section D] displaces the beneficiary selected by the insured in accordance with FEGLIA and places someone else in her stead"). If the right to designate a beneficiary means anything, we must conclude that Section D directly conflicts with FEGLIA's order of precedence.

The direct conflict between Section D and FEGLIA is also evident in the fact that Section D's only function is to accomplish what Section A would have achieved, had Section A not been pre-empted. Section A provides:

> "[U]pon the entry of a decree of annulment or divorce from the bond of matrimony . . . , any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent." Va. Code Ann. §20–111.1(A) (Lexis Supp. 2012).

Both parties agree that FEGLIA pre-empts this provision. Brief for Petitioner 4–5; Brief for Respondent 2; see also 283 Va. 34, 41–42, 722 S. E. 2d 32, 35 (2012). And for good reason: If an insured has designated his former spouse as the beneficiary of his life insurance policy, Section A purports to "revok[e]" that designation in the event of divorce or annulment. By purporting to so alter FEGLIA's statutory order of precedence, Section A is clearly pre-empted by federal law. Tellingly, it is precisely in this context—and only in this context—that Section D operates. See §20–111.1(D). Of course, Section D does not preclude the direct payment of benefits to the designated beneficiary; however, it accom-

plishes the same prohibited result by transforming the designated party into little more than a passthrough for the true beneficiary. This cannot be squared with FEGLIA. Consequently, Section D must yield.

* * *

For these reasons, I agree with the Court's conclusion that Section D is pre-empted and, therefore, concur in the judgment.

JUSTICE ALITO, concurring in the judgment.

I concur in the judgment. Because one of the purposes of the Federal Employees' Group Life Insurance Act of 1954 (FEGLIA) is to implement the expressed wishes of the insured, I would hold that a state law is pre-empted if it effectively overrides an insured's actual, articulated choice of beneficiary. The challenged provision of Virginia law has that effect.

By way of background, Va. Code Ann. §20–111.1(A) (Lexis Supp. 2012) provides that the entry of a divorce decree automatically revokes an insured's prior designation of his or her former spouse as the beneficiary of the policy. And where, as in this case, the insured remarries after the divorce and dies before making a new FEGLIA designation, the proceeds, under 5 U. S. C. §8705(a), are automatically paid to the insured's former spouse. Under the provision of Virginia law at issue here, the surviving spouse is entitled to recover those proceeds from the former spouse. See Va. Code Ann. §20–111.1(D). Section 20–111.1(D) apparently requires this result even if the insured manifests a clear contrary intent, such as by providing specifically in a recent will that the proceeds are to go to another party—for example, the insured's children by the former marriage. Because §20–111.1(D) overrides the insured's express intent (whether that intent is expressed via a beneficiary designation or through

other reliable means), I agree that it is pre-empted by FEGLIA.

Interpreted in light of our prior decisions in *Wissner* v. *Wissner*, 338 U. S. 655 (1950), and *Ridgway* v. *Ridgway*, 454 U. S. 46 (1981), FEGLIA seems to me to have two primary purposes or objectives.

The first is administrative convenience. It is easier for an insurance administrator to pay insurance proceeds to the person whom the insured has designated on a specified form without having to consider claims made by others based on some other ground. But § 20–111.1(D) does not affect the initial payment of proceeds. It operates *after* the funds are received by the designated beneficiary, and it thus causes no inconvenience for those who administer the payment of FEGLIA proceeds.

The second purpose or objective is the effectuation of the insured's *expressed* intent above all other considerations. That was the basis for the decisions in *Wissner* and *Ridgway*, as I understand them. In both cases, there was a conflict between a person whom the insured had designated as his beneficiary and another person whose claim to the proceeds was not based on the insured's expressed intent, and in both cases, the Court held in favor of the designated beneficiary.

The present case bears a similarity to *Wissner* and *Ridgway* in that petitioner's claim depends upon a state statute that automatically alters the ultimate recipient of a divorced employee's insurance proceeds. To be sure, Virginia's provision may well reflect the *unexpressed* preferences of the majority of insureds whose situations are similar to that of the insured in this case—that is, individuals who, after divorce and remarriage, fail to change a prior designation of a former spouse as the beneficiary of the policy. But FEGLIA prioritizes the insured's *expressed* intent. And it is telling that, on petitioner's theory, she would still be entitled to the insurance proceeds even if, for example, the insured had died

shortly after executing a new will leaving those proceeds to someone else. This shows that her claim is based on something other than a manifestation of the insured's intent. Because § 20–111.1(D) operates as a blunt tool to override the insured's express declaration of his or her intent, it conflicts with FEGLIA's purpose of prioritizing an insured's articulated wishes above all other considerations.

In affirming the decision below, the Court goes well beyond what is necessary and opines that the party designated as the beneficiary under a FEGLIA policy must be allowed to keep the insurance proceeds even if the insured's contrary and expressed intent is indisputable—for example, when the insured writes a postdivorce will specifically leaving the proceeds to someone else. See *ante*, at 495. The Court's explanation is as follows: "Congress sought to ensure that an employee's intent would be given effect only through the designation of a beneficiary or through the narrow exceptions specifically provided in the statute." *Ibid.*, n. 3. In other words, Congress wanted the designated beneficiary—rather than the person named in a later will—to keep the proceeds because Congress wanted the named beneficiary to keep the proceeds. Needless to say, this circular reasoning does not explain *why* Congress might have wanted the designated beneficiary to keep the proceeds even when that is indisputably contrary to the insured's expressed wishes at the time of death. I am doubtful that any purpose or objective of FEGLIA would be honored by such a holding, but it is not necessary to resolve that question in this case.

For these reasons, I concur in the judgment.

Syllabus

NEVADA *v.* JACKSON

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

No. 12–694. Decided June 3, 2013

At respondent's trial for rape and other serious crimes, the trial court did not permit him to introduce evidence of the victim's prior assault allegations because Nevada law generally precludes the admission of extrinsic evidence of "[s]pecific instances of the conduct of a witness" to attack or support that witness' credibility, Nev. Rev. Stat. § 50.085(3). Respondent was convicted. On appeal, the State Supreme Court rejected his argument that the trial court's refusal to admit the evidence violated the Federal Constitution. A District Court subsequently denied respondent's request for federal habeas relief, but the Ninth Circuit reversed, reasoning that the Nevada Supreme Court's decision to exclude evidence critical to respondent's defense was an unreasonable application of this Court's precedents.

Held: Under 28 U. S. C. § 2254(d)(1)'s deferential standard of review, the Nevada Supreme Court's decision represented a reasonable application of this Court's clearly established precedents, which recognize both the constitutional guarantee of "'a meaningful opportunity to present a complete defense,'" *Crane* v. *Kentucky*, 476 U. S. 683, 690, and the "'broad latitude'" the Constitution gives state and federal lawmakers "'to establish rules excluding evidence from criminal trials,'" *Holmes* v. *South Carolina*, 547 U. S. 319, 324. Nevada's evidentiary rule has a reasonable purpose akin to the widely accepted Federal Rule of Evidence 608(b). The Nevada rule provides an exception that permits cross-examination of a witness based on previous fabricated sexual assault accusations and permits the admission of extrinsic evidence in some circumstances, but only when a defendant files prior written notice. Respondent did not do so here, and the Nevada Supreme Court upheld the exclusion on that basis. None of this Court's decisions clearly establishes that Nevada's notice requirement is unconstitutional or that the enforcement of such a requirement necessitates a case-by-case balancing of interests. *Michigan* v. *Lucas*, 500 U. S. 145, distinguished. Nor do they establish that respondent's constitutional rights were violated by the exclusion of evidence of alleged false accusations not involving sexual assault on the grounds that such evidence might confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. While this Court has held that cer-

tain restrictions on a defendant's ability to cross-examine witnesses violate the Confrontation Clause, see, *e. g.*, *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678–679, the Court has never held that the Confrontation Clause entitles a criminal defendant to introduce extrinsic evidence for impeachment purposes, see *Delaware* v. *Fensterer*, 474 U. S. 15, 22.

Certiorari granted; 688 F. 3d 1091, reversed and remanded.

PER CURIAM.

In this case, the Court of Appeals held that respondent, who was convicted of rape and other serious crimes, is entitled to relief under the federal habeas statute because the Supreme Court of Nevada unreasonably applied clearly established Supreme Court precedent regarding a criminal defendant's constitutional right to present a defense. At his trial, respondent unsuccessfully sought to introduce evidence for the purpose of showing that the rape victim previously reported that he had assaulted her but that the police had been unable to substantiate those allegations. The State Supreme Court held that this evidence was properly excluded, and no prior decision of this Court clearly establishes that the exclusion of this evidence violated respondent's federal constitutional rights. The decision of the Court of Appeals is therefore reversed.

I

Respondent Calvin Jackson had a tumultuous decade-long romantic relationship with Annette Heathmon. In 1998, after several previous attempts to end the relationship, Heathmon relocated to a new apartment in North Las Vegas without telling respondent where she was moving. Respondent learned of Heathmon's whereabouts, and on the night of October 21, 1998, he visited her apartment. What happened next was the focus of respondent's trial.

Heathmon told police and later testified that respondent forced his way into her apartment and threatened to kill her with a screwdriver if she did not have sex with him. After raping Heathmon, respondent hit her, stole a ring from her bedroom, and dragged her out of the apartment and toward

his car by the neck and hair. A witness confronted the couple, and respondent fled. Police observed injuries to Heathmon's neck and scalp that were consistent with her account of events, and respondent was eventually arrested.

Although respondent did not testify at trial, he discussed Heathmon's allegations with police shortly after his arrest, and his statements were admitted into evidence at trial. Respondent acknowledged that Heathmon might have agreed to have sex because the two were alone and "she was scared that [he] might do something," Tr. 305, but he claimed that the sex was consensual. Respondent also admitted striking Heathmon inside the apartment but denied pulling her outside by the neck and hair.

Shortly before trial, Heathmon sent the judge a letter recanting her prior accusations and stating that she would not testify. She went into hiding, but police eventually found her and took her into custody as a material witness. Once in custody, Heathmon disavowed the letter and agreed to testify. When asked about the letter at trial, she stated that three of respondent's associates had forced her to write it and had threatened to hurt her if she appeared in court.

At trial, the theory of the defense was that Heathmon had fabricated the sexual assault and had reported it to police in an effort to control respondent. To support that theory, the defense sought to introduce testimony and police reports showing that Heathmon had called the police on several prior occasions claiming that respondent had raped or otherwise assaulted her. Police were unable to corroborate many of these prior allegations, and in several cases they were skeptical of her claims. Although the trial court gave the defense wide latitude to cross-examine Heathmon about those prior incidents, it refused to admit the police reports or to allow the defense to call as witnesses the officers involved. The jury found respondent guilty, and he was sentenced to life imprisonment.

Respondent appealed his conviction to the Nevada Supreme Court, arguing, among other things, that the trial court's refusal to admit extrinsic evidence relating to the prior incidents violated his federal constitutional right to present a complete defense, but the Nevada Supreme Court rejected that argument.

After exhausting his remedies in state court, respondent filed a federal habeas petition, again arguing that the trial court's ruling had violated his right to present a defense. Applying the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) deferential standard of review, the District Court denied relief, but a divided panel of the Ninth Circuit reversed. 688 F. 3d 1091 (2012). The majority held that extrinsic evidence of Heathmon's prior allegations was critical to respondent's defense, that the exclusion of that evidence violated respondent's constitutional right to present a defense, and that the Nevada Supreme Court's decision to the contrary was an unreasonable application of this Court's precedents. *Id.*, at 1097–1101. Although it acknowledged that the state court had ruled that the evidence was inadmissible as a matter of state law, the Ninth Circuit concluded that the impact of the State's rules of evidence on the defense "was disproportionate to the state's interest in . . . exclusion." *Id.*, at 1101–1104. Finding that the trial court's erroneous evidentiary ruling was not harmless, *id.*, at 1104–1106, the Ninth Circuit ordered the State either to retry or to release respondent.

II

AEDPA authorizes a federal habeas court to grant relief to a prisoner whose state-court conviction "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). It is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that "there is no possibility fairminded jurists could disagree that the state court's deci-

sion conflicts with this Court's precedents." *Harrington* v. *Richter*, 562 U. S. 86, 102 (2011). Applying that deferential standard, we conclude that the Nevada Supreme Court's decision was reasonable.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense,'" *Crane* v. *Kentucky*, 476 U. S. 683, 690 (1986) (quoting *California* v. *Trombetta*, 467 U. S. 479, 485 (1984)), but we have also recognized that "'state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials,'" *Holmes* v. *South Carolina*, 547 U. S. 319, 324 (2006) (quoting *United States* v. *Scheffer*, 523 U. S. 303, 308 (1998)). Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence. See *Holmes*, *supra*, at 331 (rule did not rationally serve any discernible purpose); *Rock* v. *Arkansas*, 483 U. S. 44, 61 (1987) (rule arbitrary); *Chambers* v. *Mississippi*, 410 U. S. 284, 302–303 (1973) (State did not even attempt to explain the reason for its rule); *Washington* v. *Texas*, 388 U. S. 14, 22 (1967) (rule could not be rationally defended).

As the Ninth Circuit conceded, "[t]he Nevada Supreme Court recognized and applied the correct legal principle." 688 F. 3d, at 1097. But contrary to the Ninth Circuit's conclusion, the State Supreme Court's application of our clearly established precedents was reasonable. The starting point in the state court's analysis was a state statute that generally precludes the admission of extrinsic evidence of "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime." App. to Pet. for Cert. 66; see Nev. Rev. Stat. § 50.085(3) (2011). The purpose of that rule, the Nevada Supreme Court has explained, "is to focus the fact-finder on the most important facts and conserve 'judicial resources by avoiding mini-trials on collateral issues.'" *Abbott* v. *State*, 122 Nev. 715, 736, 138 P. 3d 462, 476 (2006)

(quoting *State* v. *Long*, 140 S. W. 3d 27, 30 (Mo. 2004)). These are "good reason[s]" for limiting the use of extrinsic evidence, *Clark* v. *Arizona*, 548 U. S. 735, 770 (2006), and the Nevada statute is akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness' conduct to prove the witness' character for untruthfulness. See Fed. Rule Evid. 608(b); C. Mueller & L. Kirkpatrick, Evidence § 6.27, pp. 497–499 (4th ed. 2009). The constitutional propriety of this rule cannot be seriously disputed.

As an exception to the prohibition contained in Nev. Rev. Stat. § 50.085(3), the Nevada Supreme Court held in *Miller* v. *State*, 105 Nev. 497, 499–500, 779 P. 2d 87, 88–89 (1989), that "in a sexual assault case defense counsel may cross-examine a complaining witness about previous fabricated sexual assault accusations and, if the witness denies making the allegations, may introduce extrinsic evidence to prove that fabricated charges were made by that witness in the past." App. to Pet. for Cert. 66. But in order to introduce evidence showing that the witness previously made false allegations, the defendant must file written notice, and the trial court must hold a hearing. *Miller*, *supra*, at 501, 779 P. 2d, at 90. Respondent did not file the requisite notice, and the State Supreme Court upheld the exclusion of evidence of prior sexual assault complaints on this basis.

No decision of this Court clearly establishes that this notice requirement is unconstitutional. Nor, contrary to the reasoning of the Ninth Circuit majority, see 688 F. 3d, at 1103–1104, do our cases clearly establish that the Constitution requires a case-by-case balancing of interests before such a rule can be enforced. The decision on which the Ninth Circuit relied, *Michigan* v. *Lucas*, 500 U. S. 145 (1991), is very far afield. In that case, we reversed a decision holding that the Sixth Amendment categorically prohibits the enforcement of a rule that required a rape defendant to provide pretrial notice if he wished to introduce evidence of his

prior sexual relationship with the complaining witness. The Court did not even suggest, much less hold, that it is unconstitutional to enforce such a rule unless a case-by-case balancing of interests weighs in favor of enforcement. Instead, the Court "express[ed] no opinion as to whether or not preclusion was justified in th[at] case" and left it for the state courts to address that question in the first instance. *Id.*, at 153. No fairminded jurist could think that *Lucas* clearly establishes that the enforcement of the Nevada rule in this case is inconsistent with the Constitution.

Some of the evidence that respondent sought to introduce concerned prior incidents in which the victim reported that respondent beat her up but did not sexually assault her, and the State Supreme Court did not view its *Miller* decision as applying in such circumstances. But the state court did not simply invoke the rule set out in Nev. Rev. Stat. § 50.085(3). Rather, the court reasoned that the proffered evidence had little impeachment value because at most it showed simply that the victim's reports could not be corroborated. The admission of extrinsic evidence of specific instances of a witness' conduct to impeach the witness' credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution.

In holding that respondent is entitled to habeas relief, the Ninth Circuit pointed to two of its own AEDPA decisions in which it granted habeas relief to state prisoners who were not allowed to conduct a full cross-examination of the witnesses against them. 688 F. 3d, at 1098–1101 (discussing *Fowler* v. *Sacramento Cty. Sheriff's Dept.*, 421 F. 3d 1027, 1035–1038 (2005), and *Holley* v. *Yarborough*, 568 F. 3d 1091, 1098–1101 (2009)). Those cases in turn relied on Supreme Court decisions holding that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause of the Sixth Amendment. See, *e. g.*, *Olden* v.

Kentucky, 488 U. S. 227, 231 (1988) (*per curiam*); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 678–679 (1986); *Davis* v. *Alaska*, 415 U. S. 308, 315–316 (1974). But this Court has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes. See *Delaware* v. *Fensterer*, 474 U. S. 15, 22 (1985) (*per curiam*) (observing that "the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to . . . expose [testimonial] infirmities through cross-examination"). See also *Jordan* v. *Warden*, 675 F. 3d 586, 596 (CA6 2012); *Brown* v. *Ruane*, 630 F. 3d 62, 70 (CA1 2011).

The Ninth Circuit elided the distinction between cross-examination and extrinsic evidence by characterizing the cases as recognizing a broad right to present "evidence bearing on [a witness'] credibility." 688 F. 3d, at 1099. By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into "clearly established Federal law, as determined by the Supreme Court." 28 U. S. C. § 2254(d)(1). In thus collapsing the distinction between "an *unreasonable* application of federal law" and what a lower court believes to be "an *incorrect* or *erroneous* application of federal law," *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000), the Ninth Circuit's approach would defeat the substantial deference that AEDPA requires.

The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

HORNE ET AL. *v.* DEPARTMENT OF AGRICULTURE

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

No. 12–123. Argued March 20, 2013—Decided June 10, 2013

The Agricultural Marketing Agreement Act of 1937 (AMAA), which was enacted to stabilize prices for agricultural commodities, regulates only "handlers," *i. e.*, "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities, 7 U. S. C. § 608c(1). Any handler that violates the Secretary of Agriculture's marketing orders may be subject to civil and criminal penalties. §§ 608a(5), 608a(6), and 608c(14). One such order, the California Raisin Marketing Order (Marketing Order or Order), established a Raisin Administrative Committee (RAC), which recommends setting up annual reserve pools of raisins that are not to be sold on the open domestic market, and which recommends what portion of a particular year's production should be included in the pool. The Order also requires handlers to pay assessments to help cover the RAC's administrative costs.

Petitioners, California raisin growers, started a business that processed more than 3 million pounds of raisins from their farm and 60 other farms during the two crop years. When they refused to surrender the requisite portions of raisins to the reserve, the United States Department of Agriculture (USDA) began administrative proceedings, alleging that petitioners were handlers who were required to retain raisins in reserve and pay assessments. Petitioners countered that as producers, they were not subject to the Order. They also raised an affirmative defense that the Order violated the Fifth Amendment's prohibition against taking property without just compensation. An Administrative Law Judge found that petitioners were handlers, found that they had violated the AMAA and the Marketing Order, and rejected their takings defense. On appeal, a judicial officer agreed that petitioners were handlers who had violated the Marketing Order, imposed fines and civil penalties, and declined to address the takings claim. Petitioners sought review in the Federal District Court. Granting summary judgment to the USDA, it found that substantial evidence supported the agency's determination that petitioners were handlers rather than producers, and it rejected petitioners' takings claim. The Ninth Circuit affirmed. It agreed that petitioners were handlers subject to the Marketing Order, but concluded that it lacked jurisdiction to resolve the takings claim, which they should have raised in the Court of Federal

Claims. It recognized that when a handler raises a takings defense, Court of Federal Claims Tucker Act jurisdiction gives way to the AMAA's comprehensive remedial scheme, see 7 U. S. C. § 608c(15), but found that petitioners had brought the takings claim in their capacity as producers.

Held: The Ninth Circuit has jurisdiction to decide petitioners' takings claim. Pp. 523–529.

(a) That court incorrectly determined that petitioners brought their takings claim as producers rather than handlers. Petitioners argued that they were producers—and thus not subject to the AMAA or the Marketing Order—but both the USDA and the District Court concluded that they were handlers. And the fines and civil penalties for failure to reserve raisins were levied on them in that capacity. Because the Marketing Order imposes duties on petitioners only in their capacity as handlers, their takings claim raised as a defense against those duties is necessarily raised in that same capacity. In finding otherwise, the Ninth Circuit confused petitioners' statutory argument that they were producers with their constitutional argument that, assuming they were handlers, their fine violated the Fifth Amendment. The relevant question is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order. Pp. 523–524.

(b) The Government's claim that petitioners' takings-based defense was rightly dismissed on ripeness grounds is unpersuasive, and its reliance on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, is misplaced. There, a plaintiff's claim that a zoning decision effected a taking without just compensation was not ripe. But the claim failed because the plaintiff could not show that it had been injured by the Government's action when there had been no final decision. Here, petitioners were subject to a final agency order imposing concrete fines and penalties. The takings claim in *Williamson County* was also not yet ripe because the plaintiff had not sought "compensation through the procedures [provided by] the State." *Id.*, at 194. The Government argues that petitioners' takings claim is premature because the Tucker Act affords a remedy, but, in fact, the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative remedy. Pp. 524–528.

(c) A takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14). The provision's text does not bar handlers from raising constitutional defenses to the USDA's enforcement action. Allowing handlers to do

so would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A), for a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if the constitutional challenge fails. It would also make little sense to force a party to pay an assessed fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding. See *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 520. Pp. 528–529.

673 F. 3d 1071, reversed and remanded.

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

Michael W. McConnell argued the cause for petitioners. With him on the briefs were *Aditya Bamzai*, *Joseph Cascio*, *Aaron L. Nielson*, and *Brian C. Leighton*.

Joseph R. Palmore argued the cause for respondent. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Michael S. Raab*, and *Carrie F. Ricci*.*

JUSTICE THOMAS delivered the opinion of the Court.

Under the Agricultural Marketing Agreement Act of 1937 (AMAA) and the California Raisin Marketing Order (Marketing Order or Order) promulgated by the Secretary of

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas by *Greg Abbott*, Attorney General, *Andrew S. Oldham*, Deputy Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, *Jonathan F. Mitchell*, Solicitor General, and *Richard B. Farrer*, *Matthew H. Frederick*, and *Douglas D. Geyser*, Assistant Solicitors General; for the Cato Institute et al. by *Steffen N. Johnson*, *William P. Ferranti*, *Ilya Shapiro*, *Karen R. Harned*, *Elizabeth Milito*, *John C. Eastman*, and *Manuel S. Klausner*; for the Chamber of Commerce of the United States of America by *John P. Elwood*, *Robin S. Conrad*, *Rachel L. Brand*, and *Sheldon Gilbert*; and for Constitutional Law Scholars by *Scott A. Keller* and *J. Campbell Barker*.

Briefs of *amici curiae* urging affirmance were filed for the International Municipal Lawyers Association by *John D. Echeverria*; and for Sun-Maid Growers of California by *Edward M. Ruckert* and *M. Miller Baker*.

Agriculture, raisin growers are frequently required to turn over a percentage of their crop to the Federal Government. The AMAA and the Marketing Order were adopted to stabilize prices by limiting the supply of raisins on the market. Petitioners are California raisin growers who believe that this regulatory scheme violates the Fifth Amendment. After petitioners refused to surrender the requisite portion of their raisins, the United States Department of Agriculture (USDA) began administrative proceedings against petitioners that led to the imposition of more than $650,000 in fines and civil penalties. Petitioners sought judicial review, claiming that the monetary sanctions were an unconstitutional taking of private property without just compensation. The Ninth Circuit held that petitioners were required to bring their takings claim in the Court of Federal Claims and that it therefore lacked jurisdiction to review petitioners' claim. We disagree. Petitioners' takings claim, raised as an affirmative defense to the agency's enforcement action, was properly before the court because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over takings claims brought by raisin handlers. Accordingly, we reverse and remand to the Ninth Circuit.

I

A

Congress enacted the AMAA during the Great Depression in an effort to insulate farmers from competitive market forces that it believed caused "unreasonable fluctuations in supplies and prices." Ch. 296, 50 Stat. 246, as amended, 7 U. S. C. § 602(4). To achieve this goal, Congress declared a national policy of stabilizing prices for agricultural commodities. *Ibid.* The AMAA authorizes the Secretary of Agriculture to promulgate marketing orders that regulate the sale and delivery of agricultural goods. § 608c(1); see also *Block* v. *Community Nutrition Institute*, 467 U. S. 340, 346 (1984) ("The Act contemplates a cooperative venture among

the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them"). The Secretary may delegate to industry committees the authority to administer marketing orders. § 608c(7)(C).

The AMAA does not directly regulate the "producer[s]" who grow agricultural commodities, § 608c(13)(B); it only regulates "handlers," which the AMAA defines as "processors, associations of producers, and others engaged in the handling" of covered agricultural commodities. § 608c(1). Handlers who violate the Secretary's marketing orders may be subject to civil and criminal penalties. §§ 608a(5), 608a(6), and 608c(14).

The Secretary promulgated a marketing order for California raisins in 1949.[1] See 14 Fed. Reg. 5136 (codified, as amended, at 7 CFR pt. 989 (2013)). In particular, "[t]he Raisin Marketing Order, like other fruit and vegetable orders adopted under the AMAA, [sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc.* v. *United States*, 416 F. 3d 1356, 1359 (CA Fed. 2005). The Marketing Order defines a raisin "handler" as "(a) [a]ny processor or packer; (b) [a]ny person who places . . . raisins in the current of commerce from within [California] to any point outside thereof; (c) [a]ny person who delivers off-grade raisins . . . into any eligible non-normal outlet; or (d) [a]ny person who blends raisins [subject to certain exceptions]." 7 CFR § 989.15.

The Marketing Order also established the Raisin Administrative Committee (RAC), which consists of 47 members, with 35 representing producers, 10 representing handlers,

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[1] The AMAA also applies to a vast array of other agricultural products, including "[m]ilk, fruits (including filberts, almonds, pecans and walnuts . . . , pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, . . .), tobacco, vegetables . . . , hops, [and] honeybees." § 608c(2).

1 representing the cooperative bargaining associations, and 1 member of the public. See § 989.26. The Marketing Order authorizes the RAC to recommend setting up annual reserve pools of raisins that are not to be sold on the open domestic market. See 7 U. S. C. § 608c(6)(E); 7 CFR §§ 989.54(d) and 989.65. Each year, the RAC reviews crop yield, inventories, and shipments and makes recommendations to the Secretary whether or not there should be a reserve pool. § 989.54. If the RAC recommends a reserve pool, it also recommends what portion of that year's production should be included in the pool ("reserve-tonnage"). The rest of that year's production remains available for sale on the open market ("free-tonnage"). §§ 989.54(d), (a). The Secretary approves the recommendation if he determines that the recommendation would "effectuate the declared policy of the Act." § 989.55. The reserve-tonnage, calculated as a percentage of a producer's crop, varies from year to year.[2]

Under the Marketing Order's reserve requirements, a producer is only paid for the free-tonnage raisins. § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC. § 989.66(f). The RAC may then sell the reserve-tonnage raisins to handlers for resale in overseas markets, or may alternatively direct that they be sold or given at no cost to secondary, noncompetitive domestic markets, such as school lunch programs. § 989.67(b). The reserve pool sales proceeds are used to finance the RAC's administrative costs. § 989.53(a). In the event that there are any remaining funds, the producers receive a pro rata share. 7 U. S. C. § 608c(6)(E); 7 CFR § 989.66(h). As a result, even though producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited

[2] In 2002–2003 and 2003–2004, the crop years at issue here, the reserve percentages were set at 47% and 30% of a producer's crop, respectively. See RAC, Marketing Policy & Industry Statistics 2012, p. 28 (Table 12).

interest in the net proceeds of the RAC's disposition of the reserve pool.

Handlers have other duties beyond managing the RAC's reserve pool. The Marketing Order requires them to file certain reports with the RAC, such as reports concerning the quantity of raisins that they hold or acquire. § 989.73. They are also required to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports, § 989.77, to obtain inspections of raisins acquired, § 989.58(d), and to pay certain assessments, § 989.80, which help cover the RAC's administrative costs. A handler who violates any provision of the Order or its implementing regulations is subject to a civil penalty of up to $1,100 per day. 7 U. S. C. § 608c(14)(B); 7 CFR § 3.91(b)(1)(vii). A handler who does not comply with the reserve requirement must "compensate the [RAC] for the amount of the loss resulting from his failure to . . . deliver" the requisite raisins. § 989.166(c).

B

Petitioners Marvin and Laura Horne have been producing raisins in two California counties (Fresno and Madera) since 1969. The Hornes do business as Raisin Valley Farms, a general partnership. For more than 30 years, the Hornes operated only as raisin producers. But, after becoming disillusioned with the AMAA regulatory scheme,[3] they began looking for ways to avoid the mandatory reserve program. Since the AMAA applies only to handlers, the Hornes de-

[3] The Hornes wrote to the Secretary and the RAC in 2002 setting out their grievances: "[W]e are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." App. to Pet. for Cert. 60a.

vised a plan to bring their raisins to market without going through a traditional handler. To this end, the Hornes entered into a partnership with Mrs. Horne's parents called Lassen Vineyards. In addition to its grape-growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package the raisins from Raisin Valley Farms and Lassen Vineyards. It also contracted with more than 60 other raisin growers to clean, stem, sort, and, in some cases, box and stack their raisins for a fee. The Hornes' facilities processed more than 3 million pounds of raisins *in toto* during the 2002–2003 and 2003–2004 crop years. During these two crop years, the Hornes produced 27.4% and 12.3% of the raisins they processed, respectively.

Although the USDA informed the Hornes in 2001 that their proposed operations made them "handlers" under the AMAA, the Hornes paid no assessments to the RAC during the 2002–2003 and 2003–2004 crop years. Nor did they set aside reserve-tonnage raisins from those produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for packing services. They also declined to arrange for RAC inspection of the raisins they received for processing, denied the RAC access to their records, and held none of their own raisins in reserve.

On April 1, 2004, the Administrator of the Agriculture Marketing Service initiated an enforcement action against the Hornes, Raisin Valley Farms, and Lassen Vineyards (petitioners). The complaint alleged that petitioners were "handlers" of California raisins during the 2002–2003 and 2003–2004 crop years. It also alleged that petitioners violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC and failing to hold inspections of incoming raisins, retain raisins in reserve, pay assessments, and allow access to their records. Petitioners denied the allegations, countering that they were not "handlers" and asserting that they did not acquire physical possession of the other producers' raisins within the meaning of the reg-

ulations. Petitioners also raised several affirmative defenses, including a claim that the Marketing Order violated the Fifth Amendment's prohibition against taking property without just compensation.

An Administrative Law Judge (ALJ) concluded in 2006 that petitioners were handlers of raisins and thus subject to the Marketing Order. The ALJ also concluded that petitioners violated the AMAA and the Marketing Order and rejected petitioners' takings defense based on its view that "handlers no longer have a property right that permits them to market their crop free of regulatory control." App. 39 (citing *Cal-Almond, Inc.* v. *United States*, 30 Fed. Cl. 244, 246–247 (1994)).

Petitioners appealed to a judicial officer who, like the ALJ, also found that petitioners were handlers and that they had violated the Marketing Order. The judicial officer imposed $202,600 in civil penalties under 7 U. S. C. § 608c(14)(B); $8,783.39 in assessments for the two crop years under 7 CFR § 989.80(a); and $483,843.53 for the value of the California raisins that petitioners failed to hold in reserve for the two crop years under § 989.166(c). The judicial officer believed that he lacked "authority to judge the constitutionality of the various statutes administered by the [USDA]," App. 73, and declined to adjudicate petitioners' takings claim.

Petitioners filed a complaint in Federal District Court seeking judicial review of the USDA's decision. See 7 U. S. C. § 608c(14)(B). The District Court granted summary judgment to the USDA. The court held that substantial evidence supported the agency's determination that petitioners were "handlers" subject to the Marketing Order, and rejected petitioners' argument that they were exempt from the Marketing Order due to their status as "producers" under § 608c(13)(B). No. CV–F–08–1549 LJO SMS, 2009 WL 4895362, *15 (ED Cal., Dec. 11, 2009). Petitioners renewed their Fifth Amendment argument, asserting that the reserve-tonnage requirement constituted a physical taking.

Though the District Court found that the RAC takes title to a significant portion of a California raisin producer's crop through the reserve requirement, the court held that the transfer of title to the RAC did not constitute a physical taking. See *id.*, at *26 ("'[I]n essence, [petitioners] are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket'" (quoting *Evans* v. *United States*, 74 Fed. Cl. 554, 563–564 (2006))).

The Ninth Circuit affirmed. The court agreed that petitioners were "handlers" subject to the Marketing Order's provisions, and rejected petitioners' argument that they were producers and, thus, exempt from regulation. 673 F. 3d 1071, 1078 (2012). The court did not resolve petitioners' takings claim, however, because it concluded that it lacked jurisdiction to do so. The court explained that "a takings claim against the federal government must be brought [in the Court of Federal Claims] in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Id.*, at 1079 (quoting *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 520 (1998) (plurality opinion)). The court recognized that 7 U. S. C. § 608c(15) provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA, and it agreed that "when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section [60]8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements." 673 F. 3d, at 1079. But, the Ninth Circuit determined, petitioners brought the takings claim in their capacity as producers, not handlers. *Id.*, at 1080. Consequently, the

court was of the view that "[n]othing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation." *Ibid.* This availability of a Federal Claims Court action thus rendered petitioners' takings claim unripe for adjudication. *Ibid.*

We granted certiorari to determine whether the Ninth Circuit has jurisdiction to review petitioners' takings claim. 568 U. S. 1021 (2012).

II

A

The Ninth Circuit's jurisdictional ruling flowed from its determination that petitioners brought their takings claim as producers rather than handlers. This determination is not correct. Although petitioners argued that they were producers—and thus not subject to the AMAA or Marketing Order at all—both the USDA and the District Court concluded that petitioners were "handlers." Accordingly, the civil penalty, assessment, and reimbursement for failure to reserve raisins were all levied on petitioners in their capacity as "handlers." If petitioners' argument that they were producers had prevailed, they would not have been subject to *any* of the monetary sanctions imposed on them. See 7 U. S. C. § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer").

It is undisputed that the Marketing Order imposes duties on petitioners only in their capacity as handlers. As a result, any defense raised against those duties is necessarily raised in that same capacity. Petitioners argue that it would be unconstitutional for the Government to come on their land and confiscate raisins, or to confiscate the proceeds of raisin sales, without paying just compensation; and that it is therefore unconstitutional to fine petitioners for not complying

with the unconstitutional requirement.[4] See Brief for Petitioners 54. Given that fines can only be levied on handlers, petitioners' takings claim makes sense only as a defense to penalties imposed upon them in their capacity *as handlers*. The Ninth Circuit confused petitioners' statutory argument (*i. e.*, "we are producers, not handlers") with their constitutional argument (*i. e.*, "assuming we are handlers, fining us for refusing to turn over reserve-tonnage raisins violates the Fifth Amendment").[5]

The relevant question, then, is whether a federal court has jurisdiction to adjudicate a takings defense raised by a handler seeking review of a final agency order.

B

The Government argues that petitioners' takings-based defense was rightly dismissed on ripeness grounds. Brief for Respondent 21–22. According to the Government, because a takings claim can be pursued later in the Court of

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[4] The Ninth Circuit construed the takings argument quite differently, stating that petitioners believe the regulatory scheme "takes reserve-tonnage raisins belonging to producers." 673 F. 3d 1071, 1080 (2012). When the agency brought its enforcement action against petitioners, however, it did not seek to recover reserve-tonnage raisins from the 2002–2003 and 2003–2004 crop years. Rather, it sought monetary penalties and reimbursement. Petitioners could not argue in the face of such agency action that the Secretary was attempting to take raisins that had already been harvested and sold. Instead, petitioners argued that they could not be compelled to pay fines for refusing to accede to an unconstitutional taking.

[5] The Government notes that petitioners did not own most of the raisins that they failed to reserve and argues that petitioners would have no takings claim based on those raisins. See Brief for Respondent 19. We take no position on the merits of petitioners' takings claim. We simply recognize that insofar as petitioners challenged the imposition of monetary sanctions under the Marketing Order, they raised their takings-based defense in their capacity as handlers. On remand, the Ninth Circuit can decide in the first instance whether petitioners may raise the takings defense with respect to raisins they never owned.

Federal Claims, the Ninth Circuit correctly refused to adjudicate petitioners' takings defense. In support of its position, the Government relies largely on *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172 (1985). Brief for Respondent 21–22 ("Just compensation need not 'be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking'" (quoting *Williamson County*, 473 U. S., at 194)). In that case, the plaintiff filed suit against the regional planning commission, claiming that a zoning decision by the commission effected a taking of property without just compensation. *Id.*, at 182. We found that the plaintiff's claim was not "ripe" for two reasons, neither of which supports the Government's position.

First, we explained that the plaintiff's takings claim in *Williamson County* failed because the plaintiff could not show that it had been injured by the Government's action. Specifically, the plaintiff "ha[d] not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property." *Id.*, at 186. Here, by contrast, petitioners were subject to a final agency order imposing concrete fines and penalties at the time they sought judicial review under § 608c(14)(B). This was clearly sufficient "injury" for federal jurisdiction.

Second, the *Williamson County* plaintiff's takings claim was not yet ripe because the plaintiff had not sought "compensation through the procedures the State ha[d] provided for doing so." *Id.*, at 194. We explained that "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." *Id.*, at 194–195 (internal quotation marks and alteration omitted). Stated differently, a Fifth Amendment claim is premature until it is clear that

the Government has both taken property *and* denied just compensation. Although we often refer to this consideration as "prudential 'ripeness,'" *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1013 (1992), we have recognized that it is not, strictly speaking, jurisdictional.[6] See *Stop the Beach Renourishment, Inc.* v. *Florida Dept. of Environmental Protection*, 560 U. S. 702, 729, and n. 10 (2010).

Here, the Government argues that petitioners' takings claim is premature because the Tucker Act affords "the requisite reasonable, certain, and adequate provision for obtaining just compensation that a property owner must pursue." Brief for Respondent 22. In the Government's view, "[p]etitioners should have complied with the order's requirements, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, . . . sought compensation as producers in the Court of Federal Claims for the alleged taking." *Id.*, at 24–25. We disagree with the Government's argument, however, because the AMAA provides a comprehensive remedial scheme that withdraws Tucker Act jurisdiction over a handler's takings claim. As a result, there is no alternative "reasonable, certain, and adequate" remedial scheme through which petitioners (as handlers) must proceed before obtaining review of their claim under the AMAA.[7]

The Court of Federal Claims has jurisdiction over Tucker Act claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department."

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[6] A "Case" or "Controversy" exists once the government has taken private property without paying for it. Accordingly, whether an alternative remedy exists does not affect the jurisdiction of the federal court.

[7] That is not to say that a producer who turns over her reserve-tonnage raisins could not bring suit for just compensation in the Court of Claims. Whether a producer could bring such a claim, and what impact the availability of such a claim would have on petitioners' takings-based defense, are questions going to the merits of petitioners' defense, not to a court's jurisdiction to entertain it. We therefore do not address those issues here.

28 U. S. C. § 1491(a)(1). "[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises*, 524 U. S., at 520 (plurality opinion); see also *United States* v. *Bormes*, 568 U. S. 6, 11 (2012) (where "a statute contains its own self-executing remedial scheme," a court "look[s] only to that statute"). To determine whether a statutory scheme displaces Tucker Act jurisdiction, a court must "examin[e] the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States* v. *Fausto*, 484 U. S. 439, 444 (1988).

Under the AMAA's comprehensive remedial scheme, handlers may challenge the content, applicability, and enforcement of marketing orders. Pursuant to §§ 608c(15)(A)–(B), a handler may file with the Secretary a direct challenge to a marketing order and its applicability to him. We have held that "any handler" subject to a marketing order must raise any challenges to the order, including constitutional challenges, in administrative proceedings. See *United States* v. *Ruzicka*, 329 U. S. 287, 294 (1946). Once the Secretary issues a ruling, the federal district court where the "handler is an inhabitant, or has his principal place of business," is "vested with jurisdiction . . . to review [the] ruling."[8] § 608c(15)(B). These statutory provisions afford handlers a ready avenue to bring takings claims against the USDA. We thus conclude that the AMAA withdraws Tucker Act ju-

[8] Petitioners filed an administrative petition before the Secretary in March 2007 pursuant to § 608c(15)(A) challenging the Marketing Order and its application to them. The USDA argued that they had no standing to file the petition because they had not admitted that they were handlers. The judicial officer granted the USDA's motion to dismiss the petition for lack of jurisdiction. Petitioners filed a complaint in District Court, but the court dismissed it as untimely. The Ninth Circuit affirmed. See *Horne* v. *Department of Agriculture*, 395 Fed. Appx. 486 (2010).

risdiction over petitioners' takings claim. Petitioners (as handlers) have no alternative remedy, and their takings claim was not "premature" when presented to the Ninth Circuit.

C

Although petitioners' claim was not "premature" for Tucker Act purposes, the question remains whether a takings-based defense may be raised by a handler in the context of an enforcement proceeding initiated by the USDA under § 608c(14). We hold that it may. The AMAA provides that the handler may not be subjected to an adverse order until he has been given "notice and an opportunity for an agency hearing on the record." § 608c(14)(B). The text of § 608c(14)(B) does not bar handlers from raising constitutional defenses to the USDA's enforcement action. Allowing handlers to raise constitutional challenges in the course of enforcement proceedings would not diminish the incentive to file direct challenges to marketing orders under § 608c(15)(A) because a handler who refuses to comply with a marketing order and waits for an enforcement action will be liable for significant monetary penalties if his constitutional challenge fails.

In the case of an administrative enforcement proceeding, when a party raises a constitutional defense to an assessed fine, it would make little sense to require the party to pay the fine in one proceeding and then turn around and sue for recovery of that same money in another proceeding. See *Eastern Enterprises*, *supra*, at 520. We see no indication that Congress intended this result for handlers subject to enforcement proceedings under the AMAA. Petitioners were therefore free to raise their takings-based defense before the USDA. And, because § 608c(14)(B) allows a handler to seek judicial review of an adverse order, the district court and Ninth Circuit were not precluded from reviewing petitioners' constitutional challenge. The grant of jurisdiction necessarily includes the power to review any constitutional

challenges properly presented to and rejected by the agency. We are therefore satisfied that petitioners raised a cognizable takings defense and that the Ninth Circuit erred in declining to adjudicate it.

III

The Ninth Circuit has jurisdiction to decide whether the USDA's imposition of fines and civil penalties on petitioners, in their capacity as handlers, violated the Fifth Amendment. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

PEUGH *v.* UNITED STATES

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

No. 12–62. Argued February 26, 2013—Decided June 10, 2013

Petitioner Peugh was convicted of five counts of bank fraud for conduct that occurred in 1999 and 2000. At sentencing, he argued that the *Ex Post Facto* Clause required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his offenses rather than under the 2009 version in effect at the time of sentencing. Under the 1998 Guidelines, Peugh's sentencing range was 37 to 46 months, but the 2009 Guidelines assigned more severe consequences to his acts, yielding a range of 70 to 87 months. The District Court rejected Peugh's *ex post facto* claim and sentenced him to 70 months' imprisonment. The Seventh Circuit affirmed.

Held: The judgment is reversed, and the case is remanded.

675 F. 3d 736, reversed and remanded.

JUSTICE SOTOMAYOR delivered the opinion of the Court, except as to Part III–C, concluding that the *Ex Post Facto* Clause is violated when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher sentencing range than the version in place at the time of the offense. Pp. 535–544, 546–551.

(a) Though no longer mandatory, see *United States* v. *Booker*, 543 U. S. 220, the Guidelines still play an important role in sentencing procedures. A district court must begin "by correctly calculating the applicable Guidelines range," *Gall* v. *United States*, 552 U. S. 38, 49, and then consider the parties' arguments and factors specified in 18 U. S. C. § 3553(a). 552 U. S., at 49–50. The court "may not presume that the Guidelines range is reasonable," *id.*, at 50, and must explain the basis for its sentence on the record, *ibid.* On appeal, a sentence is reviewed for reasonableness under an abuse-of-discretion standard. *Id.*, at 51. A district court is to apply the Guidelines "in effect on the date the defendant is sentenced," § 3553(a)(4)(A)(ii), but, per the Guidelines, is to use the Guidelines in effect on the date the offense was committed should the Guidelines in effect on the sentencing date be found to violate the *Ex Post Facto* Clause. Pp. 535–538.

(b) The Constitution forbids the passage of *ex post facto* laws, a category including, as relevant here, "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the

crime, when committed." *Calder* v. *Bull*, 3 Dall. 386, 390. The "scope of this Latin phrase" is given "substance by an accretion of case law." *Dobbert* v. *Florida*, 432 U. S. 282, 292. The touchstone of the inquiry is whether a given change in law presents a "'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Garner* v. *Jones*, 529 U. S. 244, 250. Pp. 538–539.

(c) The most relevant prior decision is *Miller* v. *Florida*, 482 U. S. 423. There, the Court found an *ex post facto* violation when the petitioner was sentenced under Florida's new sentencing guidelines, which yielded a higher sentencing range than the guidelines in place at the time of his crime. The pre-existing guidelines would have required the sentencing judge to provide clear and convincing reasons in writing for any departure, and the sentence would have been reviewable on appeal. But under the new guidelines, a sentence within the guidelines range required no explanation and was unreviewable. Variation in the sentence, though possible, was burdensome; so in the ordinary case, a defendant would receive a within-guidelines sentence. Thus, increasing the applicable guidelines range created a significant risk of a higher sentence.

The same principles apply to the post-*Booker* federal sentencing scheme, which aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines. Normally, a "judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Freeman* v. *United States*, 564 U. S. 522, 529. That the court may impose a sentence outside that range does not deprive the Guidelines of force as the framework for sentencing. Uniformity is also promoted by appellate review for reasonableness with the Guidelines as a benchmark. Appellate courts may presume a within-Guidelines sentence is reasonable, see *Rita* v. *United States*, 551 U. S. 338, 347, and may "consider the extent of the deviation" from the Guidelines as part of their reasonableness review, *Gall*, 552 U. S., at 51. The sentencing regime also puts in place procedural hurdles that, in practice, make imposition of a non-Guidelines sentence less likely. Florida's scheme and the federal regime differ, but those differences are not dispositive. Common sense indicates that the federal system generally will steer district courts to more within-Guidelines sentences, and considerable empirical evidence suggests that the Guidelines have that effect. A retrospective increase in an applicable Guidelines range thus creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation. Pp. 540–544.

(d) The Government's contrary arguments are unpersuasive. Its principal claim is that the Sentencing Guidelines lack sufficient legal effect to attain the status of a "law" within the meaning of the *Ex Post Facto* Clause. Changes in law need not bind a sentencing authority for

there to be an *ex post facto* violation, and "[t]he presence of discretion does not displace the protections of [that] Clause." *Garner*, 529 U. S., at 253. As for contrasts between the Federal Guidelines and the Florida system in *Miller*, the difference between the two systems is one in degree, not in kind. The attributes of post-*Booker* sentencing fail to show that the Guidelines are but one among many persuasive sources a sentencing court may consult in making a decision. Recognizing an *ex post facto* violation here is consistent with post-*Booker* Sixth Amendment cases. The Court's Sixth Amendment cases, which focus on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty, are distinct from its *ex post facto* cases, which focus on whether a change in law creates a "significant risk" of a higher sentence. The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: promoting sentencing uniformity while avoiding a Sixth Amendment violation. Nothing in this case undoes the holdings of such cases as *Booker*, *Rita*, and *Gall*. Pp. 546–550.

SOTOMAYOR, J., delivered the opinion of the Court, except as to Part III–C. GINSBURG, BREYER, and KAGAN, JJ., joined that opinion in full, and KENNEDY, J., joined except as to Part III–C. THOMAS, J., filed a dissenting opinion, in which ROBERTS, C. J., and SCALIA and ALITO, JJ., joined as to Parts I and II–C, *post*, p. 551. ALITO, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 563.

Stephen B. Kinnaird argued the cause for petitioner. With him on the briefs were *Stephanos Bibas*, *Allan A. Ackerman*, and *Katherine F. Murray*.

Eric J. Feigin 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 *Nina Goodman*.*

JUSTICE SOTOMAYOR delivered the opinion of the Court, except as to Part III–C.†

The Constitution forbids the passage of *ex post facto* laws, a category that includes "[e]very law that changes the pun-

Adam K. Mortara and *Steven A. Greenberg* filed a brief for the Illinois Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

†JUSTICE KENNEDY joins this opinion except as to Part III–C.

ishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (emphasis deleted). The U. S. Sentencing Guidelines set forth an advisory sentencing range for each defendant convicted in federal court. We consider here whether there is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense. We hold that there is.

I

Petitioner Marvin Peugh and his cousin, Steven Hollewell, ran two farming-related businesses in Illinois. Grainery, Inc., bought, stored, and sold grain; Agri-Tech, Inc., provided farming services to landowners and tenants. When the Grainery began experiencing cashflow problems, Peugh and Hollewell engaged in two fraudulent schemes. First, they obtained a series of bank loans by representing falsely the existence of contracts for future grain deliveries from Agri-Tech to the Grainery. When they failed to pay back the principal on these loans, the bank suffered losses of over $2 million. Second, they artificially inflated the balances of accounts under their control by "check kiting," or writing bad checks between their accounts. This scheme allowed them to overdraw an account by $471,000. They engaged in their illicit conduct in 1999 and 2000.

When their acts were uncovered, Peugh and Hollewell were charged with nine counts of bank fraud, in violation of 18 U. S. C. § 1344. While Hollewell pleaded guilty to one count of check kiting, Peugh pleaded not guilty and went to trial, where he testified that he had not intended to defraud the banks. The jury found him guilty of five counts of bank fraud and acquitted him of the remaining counts.

At sentencing, Peugh argued that the *Ex Post Facto* Clause required that he be sentenced under the 1998 version

of the Federal Sentencing Guidelines in effect at the time of his offenses, rather than under the 2009 version in effect at the time of sentencing. The two versions yielded significantly different results for Peugh's applicable Guidelines sentencing range. Under the 1998 Guidelines, Peugh's base offense level was 6. United States Sentencing Commission, Guidelines Manual §2F1.1 (Nov. 1998) (USSG). Thirteen levels were added for a loss amount of over $2.5 million, *ibid.*, and two levels for obstruction of justice because of Peugh's perjury at trial, see USSG §3C1.1. The total offense level under the 1998 Guidelines was therefore 21. As a first-time offender, Peugh was in Criminal History Category I, and so his sentencing range under the 1998 Guidelines was 37 to 46 months. USSG, ch. 5, pt. A.

The 2009 Guidelines in effect when Peugh was sentenced in May 2010 assigned more severe consequences to his acts. First, the base offense level was raised from 6 to 7 for crimes, like Peugh's, that have a statutory maximum term of imprisonment of 20 years or more. See §2B1.1 (Nov. 2009); 18 U. S. C. §1344. Second, the enhancement for a loss exceeding $2.5 million was 18, a 5-level increase from the 1998 Guidelines. USSG §2B1.1 (Nov. 2009). After adding the 2-level enhancement for obstruction of justice, Peugh's total offense level under the 2009 Guidelines was 27. With a Criminal History Category of I, Peugh's sentencing range rose under the 2009 Guidelines to 70 to 87 months. USSG, ch. 5, pt. A. The low end of the 2009 Guidelines range was 24 months higher than the high end of the 1998 Guidelines range.

At the sentencing hearing, the District Court rejected Peugh's argument that applying the 2009 Guidelines violated the *Ex Post Facto* Clause, noting that it was foreclosed by Seventh Circuit precedent. App. 30 (discussing *United States* v. *Demaree*, 459 F. 3d 791 (2006)). The District Court declined to give Peugh a downward variance, concluding that "a sentence within the [G]uideline[s] range is the most appro-

priate sentence in this case," App. 100. It sentenced Peugh to 70 months' imprisonment, *ibid.*, the bottom of the 2009 Guidelines range.

The Seventh Circuit, in keeping with its decision in *Demaree*, rejected Peugh's *ex post facto* claim and affirmed his conviction and sentence. 675 F. 3d 736 (2012). We granted certiorari to resolve a conflict among the Courts of Appeals over whether the *Ex Post Facto* Clause may be violated when a defendant is sentenced under the version of the Sentencing Guidelines in effect at the time of sentencing rather than the version in effect at the time the crime was committed, and the newer Guidelines yield a higher applicable sentencing range.[1] 568 U. S. 1006 (2012). We now reverse.

II

Prior to 1984, the broad discretion of sentencing courts and parole officers had led to significant sentencing disparities among similarly situated offenders. To address this problem, Congress created the United States Sentencing Commission. *Mistretta* v. *United States*, 488 U. S. 361, 362, 366–367 (1989). The Sentencing Reform Act of 1984, 98 Stat. 1987, eliminated parole in the federal system and directed the Sentencing Commission to promulgate uniform guidelines that would be binding on federal courts at sentencing. *Mistretta*, 488 U. S., at 367. The Commission produced the now familiar Sentencing Guidelines: a system under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yielded a predetermined output (a range of months within which the defendant could be sentenced).

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[1] Compare *United States* v. *Demaree*, 459 F. 3d 791, 795 (CA7 2006), with *United States* v. *Wetherald*, 636 F. 3d 1315, 1321–1322 (CA11 2011); *United States* v. *Ortiz*, 621 F. 3d 82, 87 (CA2 2010); *United States* v. *Lewis*, 606 F. 3d 193, 199–203 (CA4 2010); *United States* v. *Lanham*, 617 F. 3d 873, 889–890 (CA6 2010); *United States* v. *Turner*, 548 F. 3d 1094, 1099–1100 (CADC 2008).

In *United States* v. *Booker*, 543 U. S. 220, 244 (2005), however, this Court held that mandatory Guidelines ran afoul of the Sixth Amendment by allowing judges to find facts that increased the penalty for a crime beyond "the maximum authorized by the facts established by a plea of guilty or a jury verdict." See also *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000). The appropriate remedy for this violation, the Court determined, was to strike those portions of the Sentencing Reform Act that rendered the Guidelines mandatory. *Booker*, 543 U. S., at 245–258. Under the resulting scheme, a district court is still required to consult the Guidelines. See *id.*, at 259–260, 264; 18 U. S. C. § 3553(a)(4)(A). But the Guidelines are no longer binding, and the district court must consider all of the factors set forth in § 3553(a) to guide its discretion at sentencing, see *Booker*, 543 U. S., at 259–260, 264. The *Booker* remedy, "while not the system Congress enacted," was designed to "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.*, at 264–265.

Our subsequent decisions have clarified the role that the Guidelines play in sentencing procedures, both at the district court level and when sentences are reviewed on appeal. First, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall* v. *United States*, 552 U. S. 38, 49 (2007) (citation omitted). The district court must then consider the arguments of the parties and the factors set forth in § 3553(a). *Id.*, at 49–50. The district court "may not presume that the Guidelines range is reasonable," *id.*, at 50; and it "may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the [Sentencing] Commission's views," *Pepper* v. *United States*, 562 U. S. 476, 501

(2011) (citing *Kimbrough* v. *United States*, 552 U. S. 85, 109–110 (2007)). The district court must explain the basis for its chosen sentence on the record. *Gall*, 552 U. S., at 50. "[A] major departure [from the Guidelines] should be supported by a more significant justification than a minor one." *Ibid.*

On appeal, the district court's sentence is reviewed for reasonableness under an abuse-of-discretion standard. See *id.*, at 51; *Booker*, 543 U. S., at 261–264. Failure to calculate the correct Guidelines range constitutes procedural error, as does treating the Guidelines as mandatory. *Gall*, 552 U. S., at 51. The court of appeals may, but is not required to, presume that a within-Guidelines sentence is reasonable. *Rita* v. *United States*, 551 U. S. 338, 347 (2007). The reviewing court may not apply a heightened standard of review or a presumption of unreasonableness to sentences outside the Guidelines range, although it "will, of course, take into account the totality of the circumstances, including the extent of any variance from the Guidelines range." *Gall*, 552 U. S., at 49–51. We have indicated that "a district court's decision to vary from the advisory Guidelines may attract greatest respect when" it is based on the particular facts of a case. *Kimbrough*, 552 U. S., at 109.[2] Overall, this system "requires a court to give respectful consideration to the Guidelines," but it "permits the court to tailor the sentence in light of other statutory concerns as well." *Id.*, at 101 (internal quotation marks omitted).

Under 18 U. S. C. § 3553(a)(4)(A)(ii), district courts are instructed to apply the Sentencing Guidelines issued by the United States Sentencing Commission that are "in effect

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[2] We have left open the question whether "closer [appellate] review [of a non-Guidelines sentence] may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." *Kimbrough*, 552 U. S., at 109 (quoting *Rita*, 551 U. S., at 351). Resolution of this case does not require us to assess the merits of this issue.

on the date the defendant is sentenced." The Sentencing Guidelines reiterate that statutory directive, with the proviso that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *[E]x [P]ost [F]acto* [C]lause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." USSG §§ 1B1.11(a), (b)(1) (Nov. 2012). Whether the *Ex Post Facto* Clause was violated by the use of the more onerous Guidelines in effect on the date of Peugh's sentencing is the question presented here.

III

A

The Constitution prohibits both Federal and State Governments from enacting any "ex post facto Law." Art. I, § 9, cl. 3; Art. I, § 10. The phrase "'ex post facto law' was a term of art with an established meaning at the time of the framing." *Collins* v. *Youngblood*, 497 U. S. 37, 41 (1990). In *Calder* v. *Bull*, Justice Chase reviewed the definition that the term had acquired in English common law:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." 3 Dall., at 390 (emphasis deleted).

See also *Carmell* v. *Texas*, 529 U. S. 513, 521–525 (2000) (discussing *Calder* v. *Bull* and the common-law understanding of the term). Building on Justice Chase's formulation of what constitutes an "*ex post facto* Law," our cases "have not at-

tempted to precisely delimit the scope of this Latin phrase, but have instead given it substance by an accretion of case law." *Dobbert* v. *Florida*, 432 U. S. 282, 292 (1977).

At issue here is *Calder*'s third category of *ex post facto* laws, those that "chang[e] the punishment, and inflic[t] a greater punishment, than the law annexed to the crime, when committed." 3 Dall., at 390. Peugh's claim is that the Clause was violated because the 2009 Guidelines call for a greater punishment than attached to bank fraud in 2000, when his crimes were completed. The Government counters that because the more punitive Guidelines applied at Peugh's sentencing were only advisory, there was no *ex post facto* problem.

Each of the parties can point to prior decisions of this Court that lend support to its view. On the one hand, we have never accepted the proposition that a law must increase the maximum sentence for which a defendant is eligible in order to violate the *Ex Post Facto* Clause. See, *e. g.*, *Lindsey* v. *Washington*, 301 U. S. 397 (1937). Moreover, the fact that the sentencing authority exercises some measure of discretion will also not defeat an *ex post facto* claim. See *Garner* v. *Jones*, 529 U. S. 244, 253 (2000). On the other hand, we have made it clear that mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause. See *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 509 (1995). The touchstone of this Court's inquiry is whether a given change in law presents a "'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Garner*, 529 U. S., at 250 (quoting *Morales*, 514 U. S., at 509). The question when a change in law creates such a risk is "a matter of degree"; the test cannot be reduced to a "single formula." *Id.*, at 509 (internal quotation marks omitted).[3]

[3] JUSTICE THOMAS, raising the issue on his own initiative, would reject our established *Ex Post Facto* Clause framework. *Post*, at 558–563 (dissenting opinion). We decline to revisit settled precedent, and we reject

B

The most relevant of our prior decisions for assessing whether the requisite degree of risk is present here is *Miller* v. *Florida*, 482 U. S. 423 (1987), in which this Court considered an *ex post facto* challenge to a sentencing guidelines scheme implemented by the State of Florida. Under Florida's system, a calculation under the guidelines yielded a presumptive sentencing range. *Id.*, at 426. This range was assumed to be appropriate, and the sentencing judge had discretion to fix a sentence within that range "'without the requirement of a written explanation.'" *Ibid.* (quoting Fla. Rule Crim. Proc. 3.701(d)(8) (1983)). If the court wished to depart from the guidelines range, however, it was required to give "clear and convincing reasons in writing for doing so." 482 U. S., at 426. A within-guidelines sentence was unreviewable; a nonguidelines sentence was subject to appellate review. *Ibid.*

The petitioner in *Miller* had been sentenced under new guidelines that yielded a higher sentencing range than the guidelines that had been in place at the time of his crime, and he had received a sentence at the top of the new range. *Ibid.* This Court found an *ex post facto* violation. We emphasized that in order to impose the petitioner's sentence under the pre-existing guidelines, the sentencing judge would have been required to provide clear and convincing reasons in writing for the departure, and the sentence would then have been reviewable on appeal. *Id.*, at 432. In contrast, because the sentence imposed was within the new guidelines range, it required no explanation and was unreviewable. *Id.*, at 432–433. The fact that Florida's guidelines "create[d] a high hurdle that must be cleared before discretion can be exercised" was sufficient to render the changed guidelines an *ex post facto* law. *Id.*, at 435.

JUSTICE THOMAS' assertion that our case law has become "unworkab[le]," *post*, at 558, simply because it requires case-by-case judgments.

Miller thus establishes that applying amended sentencing guidelines that increase a defendant's recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range. The sentencing scheme in *Miller* was designed to channel sentences for similarly situated offenders into a specified range. Its reason-giving requirements and standards of appellate review meant that while variation was possible, it was burdensome; and so in the ordinary case, a defendant would receive a within-guidelines sentence. Under the Florida system, therefore, an increase in the guidelines range applicable to an offender created a significant risk that he would receive a higher sentence.[4] The same principles apply here.

The post-*Booker* federal sentencing scheme aims to achieve uniformity by ensuring that sentencing decisions are anchored by the Guidelines and that they remain a meaningful benchmark through the process of appellate review. See *Kimbrough*, 552 U. S., at 107. As we have described, "district courts *must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U. S., at 50, n. 6 (emphasis added). Failing to calculate the correct Guidelines range constitutes procedural error. *Id.*, at 51. A district court contemplating a non-Guidelines sentence "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Id.*, at 50. See also *Pepper*, 562 U. S., at 508 (BREYER, J., concurring in part and concurring in judgment) ("[T]he law permits the

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[4] *Miller* employed a "substantial disadvantage" test that this Court has since abandoned. See *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 506–507, n. 3 (1995). The relevant question is whether the change in law creates a "'sufficient'" or "significant" risk of increasing the punishment for a given crime. *Garner* v. *Jones*, 529 U. S. 244, 250, 251 (2000). As we have made clear, however, the result in *Miller* remains sound. See *Morales*, 514 U. S., at 506–507, n. 3.

court to disregard the Guidelines only where it is 'reasonable' for a court to do so" (citing *Booker*, 543 U. S., at 261–262)).

These requirements mean that "[i]n the usual sentencing, . . . the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range." *Freeman* v. *United States*, 564 U. S. 522, 529 (2011) (plurality opinion). Even if the sentencing judge sees a reason to vary from the Guidelines, "if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense a basis for the sentence.*" *Ibid.* (emphasis added). See also *id.*, at 535 (SOTOMAYOR, J., concurring in judgment) (stating that outside the context of a Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreement, "in the normal course the district judge's calculation of the Guidelines range applicable to the charged offenses will serve as the basis for the term of imprisonment imposed"). That a district court may ultimately sentence a given defendant outside the Guidelines range does not deprive the Guidelines of force as the framework for sentencing. Indeed, the rule that an incorrect Guidelines calculation is procedural error ensures that they remain the starting point for every sentencing calculation in the federal system.

Similarly, appellate review for reasonableness using the Guidelines as a benchmark helps promote uniformity by "tend[ing] to iron out sentencing differences." *Booker*, 543 U. S., at 263. Courts of appeals may presume a within-Guidelines sentence is reasonable, see *Rita*, 551 U. S., at 347, and they may further "consider the extent of the deviation" from the Guidelines as part of their reasonableness review, *Gall*, 552 U. S., at 51. As in *Miller*, then, the post-*Booker* sentencing regime puts in place procedural "hurdle[s]" that, in practice, make the imposition of a non-Guidelines sentence less likely. See 482 U. S., at 435.

This is a more difficult case than *Miller*, because there are relevant differences between Florida's sentencing scheme and the current federal sentencing regime. The Florida Legislature had made a within-guidelines sentence unreviewable; whereas in the federal system, the courts of appeals may—but are not required to—presume that a within-Guidelines sentence is reasonable. And under Florida's scheme, a sentencing court departing from the guideline range was required to provide "clear and convincing" reasons for the departure; whereas this Court has not, post-*Booker*, applied such an exacting across-the-board standard of review to variances. Rather, we have held that a district court varying from the Federal Guidelines should provide an explanation adequate to the extent of the departure. See *Gall*, 552 U. S., at 51.

But contrary to the arguments advanced by the Government and JUSTICE THOMAS' dissent (hereinafter dissent), see Brief for United States 23–24; *post*, at 554–555, these differences are not dispositive. Although the federal system's procedural rules establish gentler checks on the sentencing court's discretion than Florida's did, they nevertheless impose a series of requirements on sentencing courts that cabin the exercise of that discretion. Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences.

Peugh points to considerable empirical evidence indicating that the Sentencing Guidelines have the intended effect of influencing the sentences imposed by judges. Even after *Booker* rendered the Sentencing Guidelines advisory, district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion. See United States Sentencing Commission (USSC), 2011 Sourcebook of Federal Sentencing Statistics 63 (16th ed.) (Figure G). In less than one-fifth of cases since 2007 have dis-

trict courts imposed above- or below-Guidelines sentences absent a Government motion. See *ibid.* See also Baron-Evans & Stith, *Booker* Rules, 160 U. Pa. L. Rev. 1631, 1677 (2012). Moreover, the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it. See USSC, Final Quarterly Data Report, FY 2012, p. 32 (Figure C); USSC, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing, pt. A, pp. 60–68 (2012).[5]

The federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing. A retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation.

C

Our holding today is consistent with basic principles of fairness that animate the *Ex Post Facto* Clause. The Framers considered *ex post facto* laws to be "contrary to the first principles of the social compact and to every principle of sound legislation." The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison). The Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action. See *Weaver* v. *Graham*, 450 U. S. 24, 28–29 (1981); see also *post*, at 560–562. Even where these concerns are not directly implicated, however, the Clause also safeguards "a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell*, 529 U. S., at 533.

[5] The Government does not dispute these statistics. It argues instead that by relying on aggregated data, Peugh glosses over the fact that non-Guidelines sentences are more common for certain crimes and that some individual judges are less likely to follow the Guidelines than others. Brief for United States 49–50. But these arguments do not refute the basic point that the applicable Guidelines channel sentences toward the specified range, even if they do not fix them within it.

The Sentencing Guidelines represent the Federal Government's authoritative view of the appropriate sentences for specific crimes. When Peugh committed his crime, the recommended sentence was 37 to 46 months. When he was sentenced, it was 70 to 87 months. "[T]he purpose and effect of the change in [the Guidelines calculation] was to increase the rates and length of incarceration for [fraud]." *Miller*, 482 U. S., at 431 (quoting *Florida Bar: Amendment to Rules of Criminal Procedure (3.701, 3.988—Sentencing Guidelines)*, 451 So. 2d 824, n. (1984) (*per curiam*); internal quotation marks omitted; brackets added and deleted). Such a retrospective increase in the measure of punishment raises clear *ex post facto* concerns. We have previously recognized, for instance, that a defendant charged with an increased punishment for his crime is likely to feel enhanced pressure to plead guilty. See *Carmell*, 529 U. S., at 534, n. 24; *Weaver*, 450 U. S., at 32. This pressure does not disappear simply because the Guidelines range is advisory; the defendant will be aware that the range is intended to, and usually does, exert controlling influence on the sentence that the court will impose.

We are therefore not persuaded by the argument advanced by the Government and also suggested by the dissent that the animating principles of the *Ex Post Facto* Clause are not implicated by this case. While the Government argues that the Sentencing Commission is insulated from legislative interference, see Brief for United States 42–44, our precedents make clear that the coverage of the *Ex Post Facto* Clause is not limited to legislative acts, see *Garner*, 529 U. S., at 247, 257 (recognizing that a change in a parole board's rules could, given an adequate showing, run afoul of the *Ex Post Facto* Clause). It is true that we held, in *Irizarry* v. *United States*, 553 U. S. 708, 713–714 (2008), that a defendant does not have an "expectation subject to due process protection" that he will be sentenced within the Guidelines range. But, contrary to the dissent's view, see *post*, at 560–563, the *Ex Post Facto* Clause does not merely protect reliance interests.

It also reflects principles of "fundamental justice." *Carmell*, 529 U. S., at 531.[6]

IV

The Government's principal argument that there is no constitutional violation in this case is that the Sentencing Guidelines lack sufficient legal effect to attain the status of a "law" within the meaning of the *Ex Post Facto* Clause. Whereas the pre-*Booker* Guidelines "ha[d] the force and effect of laws," *Booker*, 543 U. S., at 234, the post-*Booker* Guidelines, the Government contends, have lost that status due to their advisory nature. The dissent echoes this argument. *Post*, at 551–553, 556–558.

The distinction that the Government draws is necessarily a fine one, because our precedents firmly establish that changes in law need not bind a sentencing authority in order to violate the *Ex Post Facto* Clause. So, for example, a law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime. In *Lindsey* v. *Washington*, 301 U. S. 397, this Court considered an *ex post facto* challenge to a Washington law altering the statutory penalty for grand larceny from a range of 0 to 15 years' imprisonment to a mandatory term of 15 years' imprisonment. Although the upper boundary of the sentencing court's power to punish remained unchanged, it was enough that the petitioners were "deprived of all *opportunity* to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term." *Id.*, at 402 (emphasis added).

In addition, our cases make clear that "[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause." *Garner*, 529 U. S., at 253. In a series of cases, for example, this Court has considered the validity

[6] Of course, "while the principle of unfairness helps explain and shape the Clause's scope, it is not a doctrine unto itself, invalidating laws under the *Ex Post Facto* Clause by its own force." *Carmell*, 529 U. S., at 533, n. 23.

under the *Ex Post Facto* Clause of state laws altering the terms on which discretionary parole or early release was available to prisoners. See *Garner*, 529 U. S. 244; *Morales*, 514 U. S. 499; *Weaver*, 450 U. S. 24. Although these cases reached differing conclusions with respect to whether there was an *ex post facto* violation, in none of them did we indicate that the mere fact that the prisoner was not guaranteed parole but rather received it at the will of the parole board was fatal to his claim. See *Garner*, 529 U. S., at 253; *Morales*, 514 U. S., at 508–510, and n. 6; *Weaver*, 450 U. S., at 30–31.

The Government does not challenge these holdings but rather argues, in essence, that the Guidelines are too much like guideposts and not enough like fences to give rise to an *ex post facto* violation. It contrasts the Sentencing Guidelines with the Florida system at issue in *Miller*, which, the Government indicates, really did place "a substantial legislative constraint on the judge's exercise of sentencing discretion." Brief for United States 21. But as we have explained at length, the difference between the federal system and the scheme the Court considered in *Miller* is one in degree, not in kind. The Florida system did not achieve its "binding legal effect," Brief for United States 22, by mandating a within-guidelines sentence in every case. Rather, it achieved its "binding legal effect" through a set of procedural rules and standards for appellate review that, in combination, encouraged district courts to sentence within the guidelines. See *Miller*, 482 U. S., at 432–433. We have detailed all of the ways in which the federal sentencing regime after *Booker* does the same.[7]

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[7] The Government likens the Sentencing Guidelines system to the United States Parole Commission's Parole Release Guidelines, which established an advisory framework for parole decisions, see *United States Parole Comm'n* v. *Geraghty*, 445 U. S. 388, 391 (1980), and argues that *Miller* indicated that retrospectively applying more stringent parole guidelines would not have constituted an *ex post facto* violation. The

The Government elaborates its argument that the Sentencing Guidelines do not have adequate legal force to constitute an *ex post facto* violation by reviewing the various features of the post-*Booker* sentencing regime that, in its view, tend to render the Guidelines purely advisory. As we have noted, district courts may not presume that a within-Guidelines sentence is reasonable; they may "in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views," *Pepper*, 562 U. S., at 501; and all sentences are reviewed under a deferential abuse-of-discretion standard. See *supra*, at 537.

While the Government accurately describes several attributes of federal sentencing after *Booker*, the conclusion it draws by isolating these features of the system is ultimately not supportable. On the Government's account, the Guidelines are just one among many persuasive sources a sentencing court can consult, no different from a "policy paper." Brief for United States 28. The Government's argument fails to acknowledge, however, that district courts are not required to consult any policy paper in order to avoid reversible procedural error; nor must they "consider the extent of [their] deviation" from a given policy paper and "ensure that the justification is sufficiently compelling to support the degree of the variance," *Gall*, 552 U. S., at 50. Courts of appeals, in turn, are not permitted to presume that a sentence that comports with a particular policy paper is reasonable; nor do courts of appeals, in considering whether the district court's sentence was reasonable, weigh the extent of any departure from a given policy paper in determining whether the district court abused its discretion, see *id.*, at 51. It is

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issue of the constitutional validity of the retrospective application of the parole guidelines, however, was not before the Court in *Miller*. While the *Miller* Court did state that lower court cases discussing the federal parole guidelines were "inapposite" to its discussion of the Florida guidelines, 482 U. S., at 434–435, it had no occasion to address whether changes to the parole guidelines generated an *ex post facto* problem.

simply not the case that the Sentencing Guidelines are merely a volume that the district court reads with academic interest in the course of sentencing.

Of course, as the Government and the dissent point out, notwithstanding a rule that retrospective application of a higher Guidelines range violates the *Ex Post Facto* Clause, sentencing courts will be free to give careful consideration to the current version of the Guidelines as representing the most recent views of the agency charged by Congress with developing sentencing policy. See *post*, at 558 (citing *Demaree*, 459 F. 3d, at 795). But this does not render our holding "purely semantic." *Id.*, at 795. District courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process in all of the ways we have described. The newer Guidelines, meanwhile, will have the status of one of many reasons a district court might give for *deviating* from the older Guidelines, a status that is simply not equivalent for *ex post facto* purposes.

Finally, the Government contends that a rule that the *Ex Post Facto* Clause is violated by the application of an increased Guidelines range would be in tension with this Court's post-*Booker* cases and, indeed, would "largely undo . . . the *Booker* remedy" for the Sixth Amendment violation found there. Brief for United States 35. If the Guidelines are binding enough to trigger an *ex post facto* violation, the argument goes, then they must be binding enough to trigger a Sixth Amendment violation as well. The Government's argument assumes that the Sixth Amendment and the *Ex Post Facto* Clause share a common boundary; that only where judge-found facts are the basis of a higher sentence in a manner that raises Sixth Amendment concerns can a set of sentencing rules be sufficiently determinate to run afoul of the *Ex Post Facto* Clause. But the Sixth Amendment

and *Ex Post Facto* Clause inquiries are analytically distinct. Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our *ex post facto* cases, in contrast, have focused on whether a change in law creates a "significant risk" of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely. The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: It is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation. In light of the statistics invoked by petitioner, see *supra*, at 543–544, and n. 5, it appears so far to be achieving this balance. Nothing that we say today "undo[es]" the holdings of *Booker*, *Rita*, *Gall*, *Kimbrough*, or our other recent sentencing cases.

* * *

The arguments put forward by the Government and the dissent cannot unseat the conclusion that Peugh's case falls within *Calder*'s third category of *ex post facto* violations. "[T]he *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive 'formula' used to calculate the applicable sentencing range." *Morales*, 514 U. S., at 505. That is precisely what the amended Guidelines did here. Doing so created a "significant risk" of a higher sentence for Peugh, *Garner*, 529 U. S., at 251, and offended "one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice," *Carmell*, 529 U. S., at 531.[8] For these reasons, we

[8] There may be cases in which the record makes clear that the district court would have imposed the same sentence under the older, more lenient Guidelines that it imposed under the newer, more punitive ones. In such a case, the *ex post facto* error may be harmless. See *Chapman* v. *California*, 386 U. S. 18 (1967). Here, however, the Government does not argue that any *ex post facto* violation was harmless. And indeed, any such argument would fail in light of the fact that the District Court rejected Peugh's *ex post facto* claim in keeping with Circuit precedent, applied the new

reverse the judgment of the Seventh Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, with whom the CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE ALITO join as to Parts I and II–C, dissenting.

The Constitution prohibits Congress from passing *ex post facto* laws. Art. I, § 9, cl. 3. The retroactive application of the 2009 Guidelines did not alter the punishment affixed to petitioner's crime and does not violate this proscription. I would affirm the Seventh Circuit's decision denying petitioner's *ex post facto* claim. Therefore, I respectfully dissent.

I

It is well established that an *ex post facto* law includes "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 Dall. 386, 390 (1798) (opinion of Chase, J.) (emphasis deleted). Under our precedents, the relevant inquiry for determining whether a law "inflicts a greater punishment" is whether the "retroactive application of the change in [the] law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.' " *Garner* v. *Jones*, 529 U. S. 244, 250 (2000) (quoting *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 509 (1995)). The retroactive application of subsequently amended Guidelines does not create a "sufficient risk" of increasing a defendant's punishment for two reasons. First, the Guidelines do not constrain the discretion of district courts and, thus, have no legal effect on a defendant's sentence. Second, to the extent that the amended Guide-

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Guidelines, and indicated at sentencing that "a sentence within the [G]uideline range is the most appropriate sentence in this case." App. 30, 100.

lines create a *risk* that a defendant might receive a harsher punishment, that risk results from the Guidelines' persuasive force, not any legal effect. The Guidelines help district judges to impose sentences that comply with 18 U. S. C. § 3553(a). The risk of an increased sentence is, in essence, the risk of a more *accurate* sentence—*i. e.*, a sentence more in line with the statutory scheme's penological goals. Guideline changes that help district courts achieve such preexisting statutory sentencing goals do not create a risk of an increased sentence cognizable under the *Ex Post Facto* Clause. We have never held that government action violates the *Ex Post Facto* Clause when it merely influences the exercise of the sentencing judge's discretion.

A

The Federal Sentencing Guidelines do not constrain the discretion of district courts. As we have said repeatedly, the Guidelines are "advisory." *United States* v. *Booker*, 543 U. S. 220, 245 (2005) (remedial opinion for the Court by BREYER, J.). For this reason, district courts may not "presume" that a within-Guidelines sentence is appropriate. *Gall* v. *United States*, 552 U. S. 38, 50 (2007); see also *Nelson* v. *United States*, 555 U. S. 350, 352 (2009) (*per curiam*) (the Guidelines range is "not to be *presumed* reasonable"); *Rita* v. *United States*, 551 U. S. 338, 351 (2007) ("[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply"). Rather, district courts must "make an individualized assessment" of the appropriate sentence "based on the facts presented." *Gall*, *supra*, at 50. Moreover, a district court may freely depart from the range recommended by the Guidelines based not only on "an individualized determination that [the Guidelines] yield an excessive sentence in a particular case" but also based on "*policy* disagreement" with the Guidelines themselves. *Spears* v. *United States*, 555 U. S. 261, 264 (2009) (*per curiam*); see *Pepper* v. *United States*, 562 U. S.

476, 501 (2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views").

It is true that a district judge who "decides that an outside-Guidelines sentence is warranted" must "ensure that the justification is sufficiently compelling to support the degree of the variance" and that "a major departure should be supported by a more significant justification than a minor one." *Gall*, 552 U. S., at 50. This does not demonstrate that the Guidelines constrain the judge's discretion, but rather comports with the notion that an explanation is essential for "meaningful appellate review." *Ibid.* And, when a district court departs from the recommended range, the court of appeals may not presume that such a sentence is unreasonable. *Id.*, at 47; *id.*, at 41 ("[C]ourts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard"). While "[t]he applicable guideline [may] nudg[e] [the sentencing judge] toward the sentencing range," "his freedom to impose a reasonable sentence outside the range is unfettered." *United States* v. *Demaree*, 459 F. 3d 791, 795 (CA7 2006).

None of petitioner's arguments to the contrary is persuasive. Petitioner first contends that the Guidelines constrain district courts' discretion because improperly calculating the applicable guidelines is reversible error. Brief for Petitioner 20–21, and n. 7; 18 U. S. C. § 3742(f); cf. *Gall*, 552 U. S., at 51. This argument is a non sequitur. The Guidelines can only serve their advisory purpose if district courts consider the "range established" by the Guidelines, § 3553(a)(4). For this reason, district courts must "begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Id.*, at 49. But the fact that courts must give due consideration to the recommendation expressed in the *correct* Guidelines does not mean that the Guidelines constrain

the district court's discretion to impose an appropriate sentence; it simply means that district courts must consider the correct variables before exercising their discretion.

Petitioner next argues that the Guidelines limit district court discretion because sentences falling outside the Guidelines are more likely to be reversed for substantive unreasonableness. Brief for Petitioner 25. I doubt, however, that reversal is a likely outcome when a district judge can justify his sentence based on agreement with either of two Guidelines—the old or the new. If a district court calculated the sentencing range under the new Guidelines but sentenced the defendant to a below-Guidelines sentence that fell within the range provided by the old Guidelines, it would be difficult to label such a sentence "substantively unreasonable." To do so would cast doubt on every within-Guidelines sentence issued under the old Guidelines. Similarly, it is hard to imagine that a court of appeals would reverse a sentence for substantive unreasonableness if it was above the range of the Guidelines in effect at the time of the offense but fell within the range of the most up-to-date Guidelines. This case provides an apt example. After considering all of the § 3553(a)(2) factors, the District Court concluded that a sentence within the amended Guidelines range was "the most appropriate sentence in this case." App. 100. The same sentence would undoubtedly be upheld on appeal if the District Court, on remand, once again determined that a sentence within the amended Guidelines was appropriate in light of all the facts. The essential point is that once new Guidelines have been promulgated, reasonableness review does not meaningfully constrain the discretion of district courts to sentence offenders within either of the two ranges.

The majority argues that our opinion in *Miller* v. *Florida*, 482 U. S. 423 (1987), supports its conclusion that retroactive application of advisory Guidelines violates the *Ex Post Facto* Clause. See *ante,* at 541. But *Miller* leads to the opposite

conclusion. There, Florida superimposed narrowed presumptive sentencing ranges on the statutory sentencing ranges for particular crimes. 482 U. S., at 425–426. If a judge imposed a sentence within that narrower presumptive range, he did not need to give a written explanation of his reasons for selecting that sentence, and the sentence was not subject to appellate review. *Ibid.* If the judge imposed a sentence outside the presumptive range, however, he was required to provide "'clear and convincing reasons,'" *id.*, at 426 (quoting Fla. Rule Crim. Proc. 3.701(d)(11) (1983)), based "on facts proved beyond a reasonable doubt," that justified the departure, 482 U. S., at 432. In concluding that retroactive application of this scheme violated the *Ex Post Facto* Clause, we reasoned that the Florida guidelines did not "simply provide flexible 'guideposts' for use in the exercise of discretion: instead, they create[d] a high hurdle that must be cleared before discretion c[ould] be exercised." *Id.*, at 435.

The Court cites *Miller* for the proposition "that applying amended sentencing guidelines that increase a defendant's recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range." *Ante*, at 541. But that claim is not supported by *Miller*. The guidelines in *Miller* violated the *Ex Post Facto* Clause precisely *because* they constrained the sentencing judge's discretion.

The Federal Guidelines, by contrast, do no such thing. Indeed, our post-*Booker* opinions have made abundantly clear that the Guidelines do not create a "high hurdle"—or any hurdle at all—"that must be cleared before discretion can be exercised." *Miller*, 482 U. S., at 435. Rather, the Guidelines are "flexible 'guideposts'" which inform the district courts' discretion. *Ibid.* Accordingly, their retroactive application cannot constitute a violation of the *Ex Post Facto* Clause.

B

Notwithstanding the discretion district courts have to impose appropriate sentences anywhere within the statutory range, Guidelines do "influenc[e] the sentences imposed by judges." *Ante*, at 543. But, the Guidelines do this by helping district courts impose sentences that are consistent with § 3553(a). It is difficult to see how an advisory Guideline, designed to lead courts to impose sentences more in line with fixed statutory objectives, could ever constitute an *ex post facto* violation. But that is exactly what the Court concludes.

District courts are charged with imposing sentences that are "'sufficient, but not greater than necessary,' to comply with the sentencing purposes set forth in" § 3553(a). *Pepper*, 562 U. S., at 491 (quoting § 3553(a)). The district court's task is to impose sentences that reflect the punitive goals of justice, deterrence, protection of the public, and rehabilitation. 18 U. S. C. § 3553(a)(2). While easily stated, this goal is difficult to achieve. Enter the Sentencing Guidelines.

The Sentencing Reform Act of 1984 instructs the Sentencing Commission to promulgate Guidelines that reflect the "same basic § 3553(a) objectives" that district courts must consider. *Rita*, 551 U. S., at 348; see also 28 U. S. C. § 991(b)(1)(A). In crafting the Guidelines, the Commission began with "an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." *Rita*, *supra*, at 349 (citing United States Sentencing Commission, Guidelines Manual § 1A1.1, comment., n. 3 (Nov. 2006) (USSG)). The Commission then "modif[ied] and adjust[ed] past practice in the interests of greater rationality, avoiding inconsistency, complying with congressional instructions, and the like." *Rita*, *supra*, at 349. While an individual judge has limited experience upon which to draw, the Commission "has the capacity . . . to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough* v.

United States, 552 U. S. 85, 109 (2007) (internal quotation marks omitted). And the Commission updates the Guidelines regularly as new information becomes available. It consults with "prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology, and others," to ensure that the Guidelines continue to further § 3553(a)'s goals. *Rita*, *supra*, at 350; see also *Booker*, 543 U. S., at 263 (noting that the Commission would "modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices").

In light of this extensive study, amendments to the Guidelines should produce sentencing ranges that better comport with the § 3553(a) factors. If the Commission has fulfilled its mission of recommending sentences that are generally consistent with § 3553(a)(2), then sentences *should* fall within the Guidelines range most of the time. This, in part, explains why within-Guidelines sentences are presumed, on appeal, to reflect a "discretionary decision" by the district court that "accords with the Commission's view." *Rita*, *supra*, at 351.

Again, this case furnishes a ready example. Prior to petitioner's sentencing, Congress directed the Commission "to consider" whether fraud guidelines were " 'sufficient to deter and punish' " particular offenses, in light of increases to statutory maximum penalties for certain fraud crimes other than bank fraud. USSG App. C, Amdt. 653 (Reason for Amendment) (effective Nov. 1, 2003) (quoting White-Collar Crime Penalty Enhancement Act of 2002, § 905(b)(2), 116 Stat. 805). This produced amended Guidelines, which were based on the Commission's further assessment of "economic crime issues over a number of years." USSG App. C, Amdt. 617 (Reason for Amendment) (effective Nov. 1, 2001). With an amended Guidelines sentencing range, the District Court concluded that a within-Guidelines sentence was "the most appropriate sentence." App. 100. Neither the statutory sentencing range nor § 3553(a) changed between the time of petitioner's

offense and sentencing. Thus, it is quite incorrect to say that reliance on information reflected in the amended Guidelines violated the *Ex Post Facto* Clause.

This is underscored by the fact that even the Court's holding—which requires district courts to calculate the Guidelines range in effect at the time of the offense—will not eliminate the "risk" of a higher sentence. The district judge remains free to consider the range produced by the amended Guidelines. See *Demaree*, 459 F. 3d, at 795 ("A judge is certainly entitled to take advice from the Sentencing Commission"). Thus, the mere fact that new Guidelines have been promulgated creates *some* risk of an increased sentence, even if district courts are required to calculate the Guidelines in effect at the time of the offense. Petitioner has presented no evidence indicating what portion of the risk of an increased sentence flows from the retroactive *application* of the amended Guidelines and what portion flows from their very *existence*. In the absence of such evidence, even if I agreed that advisory Guidelines could be *ex post facto* laws, which I do not, I would not find the "risk" of an increased sentence created by the retroactive application of the Guidelines to be "sufficient" for *ex post facto* purposes.

II

Today's opinion also demonstrates the unworkability of our *ex post facto* jurisprudence. Under our current precedent, whenever a change in the law creates a "risk" of an increased sentence, we must determine whether the risk is "sufficient," see *Morales*, 514 U. S., at 509, or sufficiently "'significant,'" see *ante*, at 550, to violate the *Ex Post Facto* Clause. Our analysis under that test has devolved into little more than an exercise in judicial intuition. I would return to the original meaning of the Clause as stated in Justice Chase's classic *Calder* formulation, under which laws of this sort are *ex post facto* only when they retroactively increase the punishment "annexed to the crime." 3 Dall., at 390.

A

This Court addressed the *Ex Post Facto* Clause a mere decade after the Constitution was ratified. In *Calder*, Justice Chase described four types of *ex post facto* laws. *Ibid.* As relevant, Justice Chase's third category indicated that "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" violates the *Ex Post Facto* Clause. *Ibid.* (emphasis deleted). Justice Chase's emphasis on increases in the punishment "annexed to the crime" was grounded in the English common law and accurately reflected the original understanding of the *Ex Post Facto* Clause. See Part II–B, *infra*. Unfortunately, the Court rapidly deviated from this formulation. In *Kring* v. *Missouri*, 107 U. S. 221 (1883), the Court declared that "any law passed after the commission of an offence which . . . 'in relation to that offence, or its consequences, *alters the situation of a party to his disadvantage*,' is an *ex post facto* law." *Id.*, at 235 (quoting Justice Washington's jury charge in *United States* v. *Hall*, 26 F. Cas. 84, 86 (No. 15,285) (CC Pa. 1809); emphasis added). It took nearly a century for the Court to decide that *Kring*'s "departure from *Calder*'s explanation of the original understanding of the *Ex Post Facto* Clause was . . . unjustified." *Collins* v. *Youngblood*, 497 U. S. 37, 49 (1990) (overruling *Kring*).

Following *Collins*' disavowal of *Kring*, the Court held that a law is *ex post facto* if it "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, *supra*, at 509. While *Morales* avoided the overbreadth of *Kring*'s "disadvantage the defendant" test, it failed to reconnect our *ex post facto* jurisprudence to the original understanding of the term.* The "sufficient risk" test also depends upon empirical analysis that can-

*As the author of *Morales*, failure to apply the original meaning was an error to which I succumbed.

not yield determinative answers and which courts are ill equipped to handle. See, *e. g.*, *Garner*, 529 U. S., at 255 ("When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule"). More fundamentally, the "sufficient risk" test, like the "disadvantage the defendant" test, wrongly focuses on the particular sentence that the defendant *might* receive, rather than on the punishment "annexed to the crime."

The practical difficulties with the test are apparent even from our application in *Morales*, where we considered an amendment to California's parole procedures that allowed, under certain circumstances, the board of prison terms to decrease the frequency of parole suitability hearings. Under the sufficient risk test, we were compelled to speculate about the possible effects of the new law on various individuals' prison terms. Ultimately, we held that the amendment did not violate the *Ex Post Facto* Clause because the "narrow class of prisoners covered by the amendment [could not] reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings." *Morales*, *supra*, at 512. But nothing in the text or history of the *Ex Post Facto* Clause suggests that it should hinge on the expectations that prisoners and defendants have about how many days they will spend in prison.

B

"Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,'" *Collins*, 497 U. S., at 41, the Court has long recognized that the phrase "was a term of art with an established meaning" at the time of the founding, *ibid.* Blackstone offers the first key to understanding this "established meaning." He explicitly opposed

laws that rendered innocent conduct criminal after the fact. See 1 W. Blackstone, Commentaries *44. Such laws deprive citizens of notice and fair warning and are, therefore, an affront to man's "reason and freewill." *Id.*, at *39; see *id.*, at *46. Blackstone, thus, considered them illegitimate. *Id.*, at *44; see also The Federalist No. 44, p. 301 (J. Cooke ed. 1961) (J. Madison) ("[E]x post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation"). For this reason, *ex post facto* laws have rightly been described as "formidable instruments of tyranny," *id.*, No. 84, at 577 (A. Hamilton), and their prohibition a "bulwark in favour of the personal security of the subject," *Calder*, 3 Dall., at 390 (opinion of Chase, J.).

Although Blackstone confined his discussion of *ex post facto* laws to those laws retroactively declaring innocent acts to be criminal, other authorities confirm that laws retroactively increasing the punishment were also understood to be *ex post facto* at the time of the founding. See, *e. g.*, 2 R. Wooddeson, A Systematical View of the Laws of England; as treated of in a Course of Vinerian Lectures 638 (1792) (discussing "acts of parliament, which principally affect *the punishment*, making therein some innovation, or creating some forfeiture or disability, not incurred in the ordinary course of law"); J. Story, Commentaries on the Constitution of the United States § 679, p. 486 (Abr. ed. 1833) (The "prohibition" against *ex post facto* laws "reaches every law . . . whereby the act, if a crime, is aggravated in enormity, or punishment"). Justice Chase's formulation reflects this understanding. *Calder*, *supra*, at 390 ("Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" is *ex post facto* (emphasis deleted)). Under this view, courts must compare the punishment affixed to the crime at the time of the offense with the punishment affixed at the time of sentencing. If the latter is harsher than the former, the court must apply the punishment in effect at the time of the offense.

At common law, it was quite easy to identify when a law retroactively increased the punishment, because the criminal law generally "prescribed a particular sentence for each offense." Langbein, The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700–1900, pp. 13, 36 (A. Schioppa ed. 1987). In a world of determinate sentencing, a retroactive increase in the punishment affixed to a crime renders an act "punishable in a manner in which it was not punishable when it was committed," *Fletcher* v. *Peck*, 6 Cranch 87, 138 (1810), which is sufficient for an *ex post facto* violation. The key point is that "the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Lindsey* v. *Washington*, 301 U. S. 397, 401 (1937).

Focusing on the punishment affixed by law, rather than on the specific sentence imposed, furthers the goals of notice and fair warning recognized by Blackstone as the rationales for the prohibition against *ex post facto* laws. See *Ross' Case*, 19 Mass. 165, 170 (1824) ("A party ought to know, at the time of committing the offence, the whole extent of the punishment; for it may sometimes be a matter of calculation, whether he will commit the offence, considering the severity of the punishment"). Because increasing the punishment affixed to the crime deprives people of the opportunity to plan their conduct in light of the law, "[t]he enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime or penalty; and therefore they may be classed together." *Calder*, *supra,* at 397 (opinion of Paterson, J.).

Retroactive laws that merely create a *risk* that a defendant will receive a higher sentence, however, do not implicate traditional *ex post facto* concerns. An individual contemplating the commission of a given offense knows he may be sentenced anywhere within the legally prescribed range. He may *hope* to receive a lenient sentence, and he may even

have good reasons for expecting leniency. But he does not have any guarantees. See *Garner*, 529 U. S., at 258 (SCALIA, J., concurring in judgment in part) ("Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes"). The law provides the defendant with only one assurance: He will be sentenced within the range affixed to his offense by statute. Legal changes that alter the *likelihood* of a particular sentence within the legally prescribed range do not deprive people of notice and fair warning, or implicate the concerns about tyranny that animated the adoption of the *Ex Post Facto* Clause.

C

The statutory range in effect at the time of petitioner's offense remained in effect at his sentencing. The Guidelines sentencing range is not the punishment affixed to the offense. See Part I–A, *supra*. Accordingly, sentencing petitioner under the amended Guidelines did not violate the *Ex Post Facto* Clause. Because the Court concludes otherwise, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE SCALIA joins, dissenting.

I agree with JUSTICE THOMAS that retroactive application of amended advisory Guidelines does not violate the *Ex Post Facto* Clause under our "sufficient risk" test. See *California Dept. of Corrections* v. *Morales*, 514 U. S. 499, 509 (1995). I do not have occasion in this case to reconsider that test's merits or its relation to the original understanding of the Clause.

Syllabus

OXFORD HEALTH PLANS LLC *v.* SUTTER

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

No. 12–135. Argued March 25, 2013—Decided June 10, 2013

Respondent Sutter, a pediatrician, provided medical services to petitioner Oxford Health Plans' insureds under a fee-for-services contract that required binding arbitration of contractual disputes. He nonetheless filed a proposed class action in New Jersey Superior Court, alleging that Oxford failed to fully and promptly pay him and other physicians with similar Oxford contracts. On Oxford's motion, the court compelled arbitration. The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he concluded that it did. Oxford filed a motion in federal court to vacate the arbitrator's decision, claiming that he had "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act, 9 U. S. C. § 1 *et seq.* The District Court denied the motion, and the Third Circuit affirmed.

After this Court decided *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662—holding that an arbitrator may employ class procedures only if the parties have authorized them—the arbitrator reaffirmed his conclusion that the contract approves class arbitration. Oxford renewed its motion to vacate that decision under § 10(a)(4). The District Court denied the motion, and the Third Circuit affirmed.

Held: The arbitrator's decision survives the limited judicial review allowed by § 10(a)(4). Pp. 568–573.

(a) A party seeking relief under § 10(a)(4) bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen*, 559 U. S., at 671. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62. Thus, the sole question on judicial review is whether the arbitrator interpreted the parties' contract, not whether he construed it correctly. Here, the arbitrator twice did what the parties asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that he did not exceed his powers under § 10(a)(4). Pp. 568–570.

(b) *Stolt-Nielsen* does not support Oxford's contrary view. There, the parties stipulated that they had not reached an agreement on class

arbitration, so the arbitrators did not construe the contract, and did not identify any agreement authorizing class proceedings. This Court thus found not that they had misinterpreted the contract but that they had abandoned their interpretive role. Here, in stark contrast, the arbitrator did construe the contract, and did find an agreement to permit class arbitration. So to overturn his decision, this Court would have to find that he misapprehended the parties' intent. But § 10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. Oxford's remaining arguments go to the merits of the arbitrator's contract interpretation and are thus irrelevant under § 10(a)(4). Pp. 570–573.

675 F. 3d 215, affirmed.

KAGAN, J., delivered the opinion for a unanimous Court. ALITO, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 573.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Edward C. DuMont*, *Paul R. Q. Wolfson*, *Joshua M. Salzman*, *Matthew M. Shors*, and *Adam N. Saravay*.

Eric D. Katz argued the cause for respondent. With him on the brief was *Eric Schnapper*.*

JUSTICE KAGAN delivered the opinion of the Court.

Class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. See *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*,

*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States of America by *Carter G. Phillips*, *Paul J. Zidlicky*, *Eric D. McArthur*, *Robin S. Conrad*, *Sheldon Gilbert*, and *Kathryn Comerford Todd*; for DRI–The Voice of the Defense Bar by *Mary Massaron Ross*, *Jerrold J. Ganzfried*, and *John F. Stanton*; for the Equal Employment Advisory Council by *Rae T. Vann*; for the New England Legal Foundation by *Benjamin G. Robbins* and *Martin J. Newhouse*; and for the Pacific Legal Foundation by *Deborah J. La Fetra* and *Timothy Sandefur*.

Joe R. Whatley, Jr., *Edith M. Kallas*, *Ilze C. Thielmann*, and *Robert Axelrod* filed a brief for the American Medical Association et al. as *amici curiae* urging affirmance.

559 U. S. 662, 684 (2010). In this case, an arbitrator found that the parties' contract provided for class arbitration. The question presented is whether in doing so he "exceeded [his] powers" under § 10(a)(4) of the Federal Arbitration Act (FAA or Act), 9 U. S. C. § 1 *et seq.* We conclude that the arbitrator's decision survives the limited judicial review § 10(a)(4) allows.

I

Respondent John Sutter, a pediatrician, entered into a contract with petitioner Oxford Health Plans, a health insurance company. Sutter agreed to provide medical care to members of Oxford's network, and Oxford agreed to pay for those services at prescribed rates. Several years later, Sutter filed suit against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford. The complaint alleged that Oxford had failed to make full and prompt payment to the doctors, in violation of their agreements and various state laws.

Oxford moved to compel arbitration of Sutter's claims, relying on the following clause in their contract:

> "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." App. 15–16.

The state court granted Oxford's motion, thus referring the suit to arbitration.

The parties agreed that the arbitrator should decide whether their contract authorized class arbitration, and he determined that it did. Noting that the question turned on "construction of the parties' agreement," the arbitrator focused on the text of the arbitration clause quoted above. *Id.*, at 30. He reasoned that the clause sent to arbitration

"the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court: The "intent of the clause" was "to vest in the arbitration process everything that is prohibited from the court process." *Id.*, at 31. And a class action, the arbitrator continued, "is plainly one of the possible forms of civil action that could be brought in a court" absent the agreement. *Ibid.* Accordingly, he concluded that "on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained." *Id.*, at 32.

Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under § 10(a)(4) of the FAA. The District Court denied the motion, and the Court of Appeals for the Third Circuit affirmed. See 05–CV–2198, 2005 WL 6795061 (D NJ, Oct. 31, 2005), aff'd, 227 Fed. Appx. 135 (2007).

While the arbitration proceeded, this Court held in *Stolt-Nielsen* that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." 559 U. S., at 684. The parties in *Stolt-Nielsen* had stipulated that they had never reached an agreement on class arbitration. Relying on § 10(a)(4), we vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had "simply . . . imposed [their] own view of sound policy." *Id.*, at 672.

Oxford immediately asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator issued a new opinion holding that *Stolt-Nielsen* had no effect on the case because this agreement authorized class arbitration. Unlike in *Stolt-Nielsen*, the arbitrator explained, the parties here disputed the meaning of their contract; he had therefore been required "to construe the arbitration clause in the ordinary way to glean the parties' intent." App. 72. And in performing that task, the arbitrator continued, he had "found that the arbitration clause

unambiguously evinced an intention to allow class arbitration." *Id.*, at 70. The arbitrator concluded by reconfirming his reasons for so construing the clause.

Oxford then returned to federal court, renewing its effort to vacate the arbitrator's decision under § 10(a)(4). Once again, the District Court denied the motion, and the Third Circuit affirmed. The Court of Appeals first underscored the limited scope of judicial review that § 10(a)(4) allows: So long as an arbitrator "makes a good faith attempt" to interpret a contract, "even serious errors of law or fact will not subject his award to vacatur." 675 F. 3d 215, 220 (2012). Oxford could not prevail under that standard, the court held, because the arbitrator had "endeavored to give effect to the parties' intent" and "articulate[d] a contractual basis for his decision." *Id.*, at 223–224. Oxford's objections to the ruling were "simply dressed-up arguments that the arbitrator interpreted its agreement erroneously." *Id.*, at 224.

We granted certiorari, 568 U. S. 1065 (2012), to address a circuit split on whether § 10(a)(4) allows a court to vacate an arbitral award in similar circumstances.[1] Holding that it does not, we affirm the Court of Appeals.

II

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 942 (1995). That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L. L. C.* v. *Mattel, Inc.*, 552 U. S. 576, 588 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude

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[1] Compare 675 F. 3d 215 (CA3 2012) (case below) (vacatur not proper), and *Jock* v. *Sterling Jewelers Inc.*, 646 F. 3d 113 (CA2 2011) (same), with *Reed* v. *Florida Metropolitan Univ., Inc.*, 681 F. 3d 630 (CA5 2012) (vacatur proper).

to a more cumbersome and time-consuming judicial review process." *Ibid.*

Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator[ ] exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough . . . to show that the [arbitrator] committed an error—or even a serious error." *Stolt-Nielsen*, 559 U. S., at 671. Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits. *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000) (quoting *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 599 (1960), and *Paperworkers* v. *Misco, Inc.*, 484 U. S. 29, 38 (1987); internal quotation marks omitted). Only if "the arbitrator act[s] outside the scope of his contractually delegated authority"—issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract"—may a court overturn his determination. *Eastern Associated Coal*, 531 U. S., at 62 (internal quotation marks omitted). So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.[2]

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[2] We would face a different issue if Oxford had argued below that the availability of class arbitration is a so-called "question of arbitrability." Those questions—which "include certain gateway matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy"—are presumptively for courts to decide. *Green Tree Financial Corp.* v. *Bazzle*, 539 U. S. 444, 452 (2003) (plurality opinion). A court may therefore review an arbitrator's determination of such a matter *de novo* absent "clear[] and unmistakabl[e]" evidence that the parties wanted an arbitrator to resolve the dispute. *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649 (1986). *Stolt-Nielsen* made clear that this Court has not yet decided whether the availability of class arbitration

And we have already all but answered that question just by summarizing the arbitrator's decisions, see *supra*, at 566–568; they are, through and through, interpretations of the parties' agreement. The arbitrator's first ruling recited the "question of construction" the parties had submitted to him: "whether [their] Agreement allows for class action arbitration." App. 29–30. To resolve that matter, the arbitrator focused on the arbitration clause's text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration. The arbitrator concluded, based on that textual exegesis, that the clause "on its face . . . expresses the parties' intent that class action arbitration can be maintained." *Id.*, at 32. When Oxford requested reconsideration in light of *Stolt-Nielsen*, the arbitrator explained that his prior decision was "concerned solely with the parties' intent as evidenced by the words of the arbitration clause itself." App. 69. He then ran through his textual analysis again, and reiterated his conclusion: "[T]he text of the clause itself authorizes" class arbitration. *Id.*, at 73. Twice, then, the arbitrator did what the parties had asked: He considered their contract and decided whether it reflected an agreement to permit class proceedings. That suffices to show that the arbitrator did not "exceed[ ] [his] powers." § 10(a)(4).

Oxford's contrary view relies principally on *Stolt-Nielsen*. As noted earlier, we found there that an arbitration panel exceeded its powers under § 10(a)(4) when it ordered a party to submit to class arbitration. See *supra*, at 567. Oxford takes that decision to mean that "even the 'high hurdle' of Section 10(a)(4) review is overcome when an arbitrator im-

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is a question of arbitrability. See 559 U. S., at 680. But this case gives us no opportunity to do so because Oxford agreed that the arbitrator should determine whether its contract with Sutter authorized class procedures. See Brief for Petitioner 38, n. 9 (conceding this point). Indeed, Oxford submitted that issue to the arbitrator not once, but twice—and the second time after *Stolt-Nielsen* flagged that it might be a question of arbitrability.

poses class arbitration without a sufficient contractual basis." Reply Brief 5 (quoting *Stolt-Nielsen*, 559 U. S., at 671). Under *Stolt-Nielsen*, Oxford asserts, a court may thus vacate "as *ultra vires*" an arbitral decision like this one for misconstruing a contract to approve class proceedings. Reply Brief 7.

But Oxford misreads *Stolt-Nielsen*: We overturned the arbitral decision there because it lacked *any* contractual basis for ordering class procedures, not because it lacked, in Oxford's terminology, a "sufficient" one. The parties in *Stolt-Nielsen* had entered into an unusual stipulation that they had never reached an agreement on class arbitration. See 559 U. S., at 668–669, 673. In that circumstance, we noted, the panel's decision was not—indeed, could not have been—"based on a determination regarding the parties' intent." *Id.*, at 673, n. 4; see *id.*, at 676 ("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement. *Id.*, at 673. Instead, "the panel simply imposed its own conception of sound policy" when it ordered class proceedings. *Id.*, at 675. But "the task of an arbitrator," we stated, "is to interpret and enforce a contract, not to make public policy." *Id.*, at 672. In "impos[ing] its own policy choice," the panel "thus exceeded its powers." *Id.*, at 677.

The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But § 10(a)(4)

bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly. *Stolt-Nielsen* and this case thus fall on opposite sides of the line that § 10(a)(4) draws to delimit judicial review of arbitral decisions.

The remainder of Oxford's argument addresses merely the merits: The arbitrator, Oxford contends at length, badly misunderstood the contract's arbitration clause. See Brief for Petitioner 21–28. The key text, again, goes as follows: "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration." App. 15–16. The arbitrator thought that clause sent to arbitration all "civil action[s]" barred from court, and viewed class actions as falling within that category. See *supra*, at 566–567. But Oxford points out that the provision submits to arbitration not any "civil action[s]," but instead any "dispute arising under" the agreement. And in any event, Oxford claims, a class action is not a form of "civil action," as the arbitrator thought, but merely a procedural device that may be available in a court. At bottom, Oxford maintains, this is a garden-variety arbitration clause, lacking any of the terms or features that would indicate an agreement to use class procedures.

We reject this argument because, and only because, it is not properly addressed to a court. Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was "arguably construing" the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). *Eastern Associated Coal*, 531 U. S., at 62 (internal quotation marks omitted). The potential for those mistakes is the price of agreeing to

arbitration. As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel*, 363 U. S., at 599. The arbitrator's construction holds, however good, bad, or ugly.

In sum, Oxford chose arbitration, and it must now live with that choice. Oxford agreed with Sutter that an arbitrator should determine what their contract meant, including whether its terms approved class arbitration. The arbitrator did what the parties requested: He provided an interpretation of the contract resolving that disputed issue. His interpretation went against Oxford, maybe mistakenly so. But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he construed it at all. Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants. We accordingly affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, concurring.

As the Court explains, "[c]lass arbitration is a matter of consent," *ante*, at 565, and petitioner consented to the arbitrator's authority by conceding that he should decide in the first instance whether the contract authorizes class arbitration. The Court accordingly refuses to set aside the arbitrator's ruling because he was " 'arguably construing' the contract" when he allowed respondent to proceed on a classwide basis. *Ante*, at 572 (quoting *Eastern Associated Coal Corp.* v. *Mine Workers*, 531 U. S. 57, 62 (2000)). Today's result follows directly from petitioner's concession and the narrow ju-

dicial review that federal law allows in arbitration cases. See 9 U. S. C. § 10(a).

But unlike petitioner, absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct class arbitration. It doesn't. If we were reviewing the arbitrator's interpretation of the contract *de novo*, we would have little trouble concluding that he improperly inferred "[a]n implicit agreement to authorize class-action arbitration . . . from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen S. A.* v. *Animal-Feeds Int'l Corp.*, 559 U. S. 662, 685 (2010).

With no reason to think that the absent class members ever agreed to class arbitration, it is far from clear that they will be bound by the arbitrator's ultimate resolution of this dispute. Arbitration "is a matter of consent, not coercion," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989), and the absent members of the plaintiff class have not submitted themselves to this arbitrator's authority in any way. It is true that they signed contracts with arbitration clauses materially identical to those signed by the plaintiff who brought this suit. But an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration cannot bind someone who has not authorized the arbitrator to make that determination. As the Court explains, "[a]n arbitrator may employ class procedures only if the parties have authorized them." *Ante*, at 565.

The distribution of opt-out notices does not cure this fundamental flaw in the class arbitration proceeding in this case. "[A]rbitration is simply a matter of contract between the parties," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943 (1995), and an offeree's silence does not normally modify the terms of a contract, Restatement (Second) of Contracts § 69(1) (1979). Accordingly, at least where absent class members have not been required to opt *in*, it is difficult to see how an arbitrator's decision to conduct class proceedings

could bind absent class members who have not authorized the arbitrator to decide on a classwide basis which arbitration procedures are to be used.

Class arbitrations that are vulnerable to collateral attack allow absent class members to unfairly claim the "benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one," *American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 546–547 (1974). In the absence of concessions like Oxford's, this possibility should give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide. But because that argument was not available to petitioner in light of its concession below, I join the opinion of the Court.

Syllabus

ASSOCIATION FOR MOLECULAR PATHOLOGY ET AL. *v.* MYRIAD GENETICS, INC., ET AL.

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

No. 12–398. Argued April 15, 2013—Decided June 13, 2013

Each human gene is encoded as deoxyribonucleic acid (DNA), which takes the shape of a "double helix." Each "cross-bar" in that helix consists of two chemically joined nucleotides. Sequences of DNA nucleotides contain the information necessary to create strings of amino acids used to build proteins in the body. The nucleotides that code for amino acids are "exons," and those that do not are "introns." Scientists can extract DNA from cells to isolate specific segments for study. They can also synthetically create exons-only strands of nucleotides known as complementary DNA (cDNA). cDNA contains only the exons that occur in DNA, omitting the intervening introns.

Respondent Myriad Genetics, Inc. (Myriad), obtained several patents after discovering the precise location and sequence of the BRCA1 and BRCA2 genes, mutations of which can dramatically increase the risk of breast and ovarian cancer. This knowledge allowed Myriad to determine the genes' typical nucleotide sequence, which, in turn, enabled it to develop medical tests useful for detecting mutations in these genes in a particular patient to assess the patient's cancer risk. If valid, Myriad's patents would give it the exclusive right to isolate an individual's BRCA1 and BRCA2 genes, and would give Myriad the exclusive right to synthetically create BRCA cDNA. Petitioners filed suit, seeking a declaration that Myriad's patents are invalid under 35 U. S. C. § 101. As relevant here, the District Court granted summary judgment to petitioners, concluding that Myriad's claims were invalid because they covered products of nature. The Federal Circuit initially reversed, but on remand in light of *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U. S. 66, the Circuit found both isolated DNA and cDNA patent eligible.

Held: A naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but cDNA is patent eligible because it is not naturally occurring. Pp. 589–596.

(a) The Patent Act permits patents to be issued to "[w]hoever invents or discovers any new and useful . . . composition of matter," § 101, but "laws of nature, natural phenomena, and abstract ideas" "'are basic tools of scientific and technological work'" that lie beyond the domain of pat-

ent protection, *Mayo*, 566 U. S., at 70, 71. The rule against patents on naturally occurring things has limits, however. Patent protection strikes a delicate balance between creating "incentives that lead to creation, invention, and discovery" and "imped[ing] the flow of information that might permit, indeed spur, invention." *Id.*, at 92. This standard is used to determine whether Myriad's patents claim a "new and useful . . . composition of matter," § 101, or claim naturally occurring phenomena. Pp. 589–590.

(b) Myriad's DNA claim falls within the law of nature exception. Myriad's principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes. *Diamond* v. *Chakrabarty*, 447 U. S. 303, is central to the patent-eligibility inquiry whether such action was new "with markedly different characteristics from any found in nature," *id.*, at 310. Myriad did not create or alter either the genetic information encoded in the BRCA1 and BRCA2 genes or the genetic structure of the DNA. It found an important and useful gene, but groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry. See *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127. Finding the location of the BRCA1 and BRCA2 genes does not render the genes patent-eligible "new . . . composition[s] of matter," § 101. Myriad's patent descriptions highlight the problem with its claims: They detail the extensive process of discovery, but extensive effort alone is insufficient to satisfy § 101's demands. Myriad's claims are not saved by the fact that isolating DNA from the human genome severs the chemical bonds that bind gene molecules together. The claims are not expressed in terms of chemical composition, nor do they rely on the chemical changes resulting from the isolation of a particular DNA section. Instead, they focus on the genetic information encoded in the BRCA1 and BRCA2 genes. Finally, Myriad argues that the Patent and Trademark Office's (PTO) past practice of awarding gene patents is entitled to deference, citing *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124, a case where Congress had endorsed a PTO practice in subsequent legislation. There has been no such endorsement here, and the United States argued in the Federal Circuit and in this Court that isolated DNA was not patent eligible under § 101. Pp. 590–594.

(c) cDNA is not a "product of nature," so it is patent eligible under § 101. cDNA does not present the same obstacles to patentability as naturally occurring, isolated DNA segments. Its creation results in an exons-only molecule, which is not naturally occurring. Its order of the exons may be dictated by nature, but the lab technician unquestionably creates something new when introns are removed from a DNA sequence to make cDNA. Pp. 594–595.

(d) This case, it is important to note, does not involve method claims, patents on new applications of knowledge about the BRCA1 and BRCA2 genes, or the patentability of DNA in which the order of the naturally occurring nucleotides has been altered. Pp. 595–596.

689 F. 3d 1303, affirmed in part and reversed in part.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined, and in which SCALIA, J., joined in part. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 596.

Christopher A. Hansen argued the cause for petitioners. With him on the briefs were *Sandra S. Park*, *Steven R. Shapiro*, *Aden J. Fine*, *Lenora M. Lapidus*, and *Daniel B. Ravicher*.

Solicitor General Verrilli argued the cause for the United States as *amicus curiae* urging affirmance in part and reversal in part. With him on the brief were *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Stewart*, *Deputy Assistant Attorney General Brinkmann*, *Ginger D. Anders*, *Scott R. McIntosh*, and *Mark R. Freeman*.

Gregory A. Castanias argued the cause for respondents. With him on the brief were *Jennifer L. Swize*, *Brian M. Poissant*, *Laura A. Coruzzi*, *Israel Sasha Mayergoyz*, *Dennis Murashko*, *Benjamin G. Jackson*, and *Matthew S. Gordon*.*

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*Briefs of *amici curiae* urging reversal were filed for the Canavan Foundation et al. by *John L. Hendricks*, *Megan M. O'Laughlin*, and *John T. Tower*; for GeneDx et al. by *Aaron X. Fellmeth*; for Genformatic LLC by *Earl Landers Vickery* and *Daniel Binford Weaver*; for Knowledge Ecology International by *Krista L. Cox*; for the International Center for Technology Assessment et al. by *George A. Kimbrell*; for the National Women's Health Network et al. by *Debra Greenfield*; for Eileen M. Kane, by *Ms. Kane*, *pro se*; and for Kali N. Murray et al. by *Ms. Murray*, *pro se*. *Sarah M. Shalf* filed a brief for the Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. as *amici curiae* urging vacatur.

Briefs of *amici curiae* urging affirmance were filed for the American Bar Association by *Laurel G. Bellows*, *John P. Elwood*, and *Stephen C. Stout*;

JUSTICE THOMAS delivered the opinion of the Court.

Respondent Myriad Genetics, Inc. (Myriad), discovered the precise location and sequence of two human genes, muta-

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for the American Intellectual Property Law Association by *Barbara R. Rudolph*, *Robert D. Litowitz*, *Erika Harmon Arner*, *Robert C. Stanley*, and *Jeffrey I. D. Lewis*; for the Animal Health Institute et al. by *Judy Jarecki-Black*, *Frank G. Smith*, and *Matthew W. Howell*; for the Association of American Physicians & Surgeons, Inc., et al. by *David P. Felsher* and *Andrew L. Schlafly*; for the Biotechnology Industry Organization by *Seth P. Waxman* and *Nicole Ries Fox*; for the Coalition for 21st Century Medicine by *Jeffrey A. Lamken* and *Michael G. Pattillo, Jr.*; for CropLife International by *Evan A. Young*; for the Federal Circuit Bar Association by *Claire Laporte* and *Terence P. Stewart*; for Genentech, Inc., et al. by *Mr. Waxman*, *Ms. Fox*, *Kevin A. Marks*, *Blair Elizabeth Taylor*, and *D. Michael Young*; for Gilead Sciences, Inc., et al. by *J. Timothy Keane* and *Rudolph A. Telscher*; for Immatics Biotechnologies, GmbH, by *Kristine L. Roberts*; for InHouse Patent Counsel, LLC, by *Rochelle K. Seide*; for the Intellectual Property Owners Association by *Paul H. Berghoff*, *Richard F. Phillips*, and *Kevin H. Rhodes*; for the NanoBusiness Commercialization Association by *Andrew S. Baluch*, *Harold C. Wegner*, and *Stephen B. Maebius*; for the National Venture Capital Association by *Lynn H. Pasahow*, *Michael J. Shuster*, and *Carolyn Chang*; for the New York Intellectual Property Law Association by *Matthew B. McFarlane*, *Ronald M. Daignault*, *Charles R. Macedo*, *Thomas J. Kowalski*, *Robert M. Isackson*, and *David F. Ryan*; for the Pharmaceutical Research and Manufacturers of America by *Kurt G. Calia*, *Alexa R. Hansen*, *Robert A. Long, Jr.*, and *Natalie M. Derzko*; for the University of Baltimore/Johns Hopkins University Center for Medicine & Law et al. by *Bruce D. Abramson* and *Miles J. Zaremski*; for Larry Geier et al. by *Matthew S. Hellman* and *Joshua M. Segal*; and for Jeffrey A. Lefstin by *Kevin B. Laurence*.

Briefs of *amici curiae* were filed for AARP by *Barbara Jones* and *Michael Schuster*; for Academics in Law et al. by *Roy I. Liebman*; for the American Medical Association et al. by *Lori B. Andrews*; for the Boston Patent Law Association by *Erik Paul Belt* and *Frank Porcelli*; for CLS Bank International by *Mark A. Perry* and *Brian M. Buroker*; for Fédération Internationale des Conseils en Propriété Intellectuelle by *Maxim H. Waldbaum* and *Robert D. Katz*; for Fifteen Law Professors by *Joshua D. Sarnoff, pro se*; for the Institute of Professional Representatives Before the European Patent Office by *Mr. Liebman*; for the Intellectual Property Amicus Brief Clinic of the Franklin Pierce Center for Intellectual Property, University of New Hampshire School of Law, by *Ann M. McCrackin*;

tions of which can substantially increase the risks of breast and ovarian cancer. Myriad obtained a number of patents based upon its discovery. This case involves claims from three of them and requires us to resolve whether a naturally occurring segment of deoxyribonucleic acid (DNA) is patent eligible under 35 U. S. C. § 101 by virtue of its isolation from the rest of the human genome. We also address the patent eligibility of synthetically created DNA known as complementary DNA (cDNA), which contains the same protein-coding information found in a segment of natural DNA but omits portions within the DNA segment that do not code for proteins. For the reasons that follow, we hold that a naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but that cDNA is patent eligible because it is not naturally occurring. We, therefore, affirm in part and reverse in part the decision of the United States Court of Appeals for the Federal Circuit.

I

A

Genes form the basis for hereditary traits in living organisms. See generally *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 702 F. Supp. 2d 181, 192–211 (SDNY 2010). The human genome consists of approximately 22,000 genes packed into 23 pairs of chromosomes. Each gene is encoded as DNA, which takes

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for InVitae Corp. by *William P. Atkins*; for the Juhasz Law Firm, P. C., by *Paul R. Juhasz*; for Lynch Syndrome International by *Gideon A. Schor*; for MPEG LA, LLC, by *Daryl L. Joseffer*, *Kenneth H. Sonnenfeld*, and *Lawrence A. Horn*; for the Philadelphia Intellectual Property Law Association by *Paul F. Prestia* and *Brian S. Seal*; for Sigram Schindler Beteiligungsgesellschaft mbH by *Chidambaram S. Iyer*; for Target Discovery, Inc., by *David S. Forman*, *Courtney B. Casp*, *Victoria S. Lee*, and *Amelia F. Baur*; for Ananda Mohan Chakrabarty by *Jonathan E. Singer* and *Craig E. Countryman*; for Eric S. Lander by *Gideon A. Schor*; and for James D. Watson by *Matthew J. Dowd* and *James Wallace*.

the shape of the familiar "double helix" that Doctors James Watson and Francis Crick first described in 1953. Each "cross-bar" in the DNA helix consists of two chemically joined nucleotides. The possible nucleotides are adenine (A), thymine (T), cytosine (C), and guanine (G), each of which binds naturally with another nucleotide: A pairs with T; C pairs with G. The nucleotide cross-bars are chemically connected to a sugar-phosphate backbone that forms the outside framework of the DNA helix. Sequences of DNA nucleotides contain the information necessary to create strings of amino acids, which in turn are used in the body to build proteins. Only some DNA nucleotides, however, code for amino acids; these nucleotides are known as "exons." Nucleotides that do not code for amino acids, in contrast, are known as "introns."

Creation of proteins from DNA involves two principal steps, known as transcription and translation. In transcription, the bonds between DNA nucleotides separate, and the DNA helix unwinds into two single strands. A single strand is used as a template to create a complementary ribonucleic acid (RNA) strand. The nucleotides on the DNA strand pair naturally with their counterparts, with the exception that RNA uses the nucleotide base uracil (U) instead of thymine (T). Transcription results in a single strand RNA molecule, known as pre-RNA, whose nucleotides form an inverse image of the DNA strand from which it was created. Pre-RNA still contains nucleotides corresponding to both the exons and introns in the DNA molecule. The pre-RNA is then naturally "spliced" by the physical removal of the introns. The resulting product is a strand of RNA that contains nucleotides corresponding only to the exons from the original DNA strand. The exons-only strand is known as messenger RNA (mRNA), which creates amino acids through translation. In translation, cellular structures known as ribosomes read each set of three nucleotides, known as codons, in the mRNA. Each codon either tells the

ribosomes which of the 20 possible amino acids to synthesize or provides a stop signal that ends amino acid production.

DNA's informational sequences and the processes that create mRNA, amino acids, and proteins occur naturally within cells. Scientists can, however, extract DNA from cells using well-known laboratory methods. These methods allow scientists to isolate specific segments of DNA—for instance, a particular gene or part of a gene—which can then be further studied, manipulated, or used. It is also possible to create DNA synthetically through processes similarly well known in the field of genetics. One such method begins with an mRNA molecule and uses the natural bonding properties of nucleotides to create a new, synthetic DNA molecule. The result is the inverse of the mRNA's inverse image of the original DNA, with one important distinction: Because the natural creation of mRNA involves splicing that removes introns, the synthetic DNA created from mRNA also contains only the exon sequences. This synthetic DNA created in the laboratory from mRNA is known as cDNA.

Changes in the genetic sequence are called mutations. Mutations can be as small as the alteration of a single nucleotide—a change affecting only one letter in the genetic code. Such small-scale changes can produce an entirely different amino acid or can end protein production altogether. Large changes, involving the deletion, rearrangement, or duplication of hundreds or even millions of nucleotides, can result in the elimination, misplacement, or duplication of entire genes. Some mutations are harmless, but others can cause disease or increase the risk of disease. As a result, the study of genetics can lead to valuable medical breakthroughs.

B

This case involves patents filed by Myriad after it made one such medical breakthrough. Myriad discovered the precise location and sequence of what are now known as the BRCA1 and BRCA2 genes. Mutations in these genes can

dramatically increase an individual's risk of developing breast and ovarian cancer. The average American woman has a 12- to 13-percent risk of developing breast cancer, but for women with certain genetic mutations, the risk can range between 50 and 80 percent for breast cancer and between 20 and 50 percent for ovarian cancer. Before Myriad's discovery of the BRCA1 and BRCA2 genes, scientists knew that heredity played a role in establishing a woman's risk of developing breast and ovarian cancer, but they did not know which genes were associated with those cancers.

Myriad identified the exact location of the BRCA1 and BRCA2 genes on chromosomes 17 and 13. Chromosome 17 has approximately 80 million nucleotides, and chromosome 13 has approximately 114 million. *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 689 F. 3d 1303, 1328 (CA Fed. 2012). Within those chromosomes, the BRCA1 and BRCA2 genes are each about 80,000 nucleotides long. If just exons are counted, the BRCA1 gene is only about 5,500 nucleotides long; for the BRCA2 gene, that number is about 10,200. *Ibid.* Knowledge of the location of the BRCA1 and BRCA2 genes allowed Myriad to determine their typical nucleotide sequence.[1] That information, in turn, enabled Myriad to develop medical tests that are useful for detecting mutations in a patient's BRCA1 and BRCA2 genes and thereby assessing whether the patient has an increased risk of cancer.

Once it found the location and sequence of the BRCA1 and BRCA2 genes, Myriad sought and obtained a number of patents. Nine composition claims from three of those patents are at issue in this case.[2] See *id.*, at 1309, and n. 1 (noting

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[1] Technically, there is no "typical" gene because nucleotide sequences vary between individuals, sometimes dramatically. Geneticists refer to the most common variations of genes as "wild types."

[2] At issue are claims 1, 2, 5, 6, and 7 of U. S. Patent 5,747,282 (the '282 patent), claim 1 of U. S. Patent 5,693,473 (the '473 patent), and claims 1, 6, and 7 of U. S. Patent 5,837,492 (the '492 patent).

composition claims). Claims 1, 2, 5, and 6 from the '282 patent are representative. The first claim asserts a patent on "[a]n isolated DNA coding for a BRCA1 polypeptide," which has "the amino acid sequence set forth in SEQ ID NO:2." App. 822. SEQ ID NO:2 sets forth a list of 1,863 amino acids that the typical BRCA1 gene encodes. See *id.*, at 785–790. Put differently, claim 1 asserts a patent claim on the DNA code that tells a cell to produce the string of BRCA1 amino acids listed in SEQ ID NO:2.

Claim 2 of the '282 patent operates similarly. It claims "[t]he isolated DNA of claim 1, wherein said DNA has the nucleotide sequence set forth in SEQ ID NO:1." *Id.*, at 822. Like SEQ ID NO:2, SEQ ID NO:1 sets forth a long list of data, in this instance the sequence of cDNA that codes for the BRCA1 amino acids listed in claim 1. Importantly, SEQ ID NO:1 lists only the cDNA exons in the BRCA1 gene, rather than a full DNA sequence containing both exons and introns. See *id.*, at 779 (stating that SEQ ID NO:1's "MOLECULE TYPE:" is "cDNA"). As a result, the Federal Circuit recognized that claim 2 asserts a patent on the cDNA nucleotide sequence listed in SEQ ID NO:1, which codes for the typical BRCA1 gene. 689 F. 3d, at 1326, n. 9; *id.*, at 1337 (Moore, J., concurring in part); *id.*, at 1356 (Bryson, J., concurring in part and dissenting in part).

Claim 5 of the '282 patent claims a subset of the data in claim 1. In particular, it claims "[a]n isolated DNA having at least 15 nucleotides of the DNA of claim 1." App. 822. The practical effect of claim 5 is to assert a patent on any series of 15 nucleotides that exist in the typical BRCA1 gene. Because the BRCA1 gene is thousands of nucleotides long, even BRCA1 genes with substantial mutations are likely to contain at least one segment of 15 nucleotides that correspond to the typical BRCA1 gene. Similarly, claim 6 of the '282 patent claims "[a]n isolated DNA having at least 15 nucleotides of the DNA of claim 2." *Ibid.* This claim oper-

ates similarly to claim 5, except that it references the cDNA-based claim 2. The remaining claims at issue are similar, though several list common mutations rather than typical BRCA1 and BRCA2 sequences. See *ibid.* (claim 7 of the '282 patent); *id.*, at 930 (claim 1 of the '473 patent); *id.*, at 1028 (claims 1, 6, and 7 of the '492 patent).

C

Myriad's patents would, if valid, give it the exclusive right to isolate an individual's BRCA1 and BRCA2 genes (or any strand of 15 or more nucleotides within the genes) by breaking the covalent bonds that connect the DNA to the rest of the individual's genome. The patents would also give Myriad the exclusive right to synthetically create BRCA cDNA. In Myriad's view, manipulating BRCA DNA in either of these fashions triggers its "right to exclude others from making" its patented composition of matter under the Patent Act. 35 U. S. C. § 154(a)(1); see also § 271(a) ("[W]hoever without authority makes . . . any patented invention . . . infringes the patent").

But isolation is necessary to conduct genetic testing, and Myriad was not the only entity to offer BRCA testing after it discovered the genes. The University of Pennsylvania's Genetic Diagnostic Laboratory (GDL) and others provided genetic testing services to women. Petitioner Dr. Harry Ostrer, then a researcher at New York University School of Medicine, routinely sent his patients' DNA samples to GDL for testing. After learning of GDL's testing and Ostrer's activities, Myriad sent letters to them asserting that the genetic testing infringed Myriad's patents. App. 94–95 (Ostrer letter). In response, GDL agreed to stop testing and informed Ostrer that it would no longer accept patient samples. Myriad also filed patent infringement suits against other entities that performed BRCA testing, resulting in settlements in which the defendants agreed to cease all allegedly

infringing activity. 689 F. 3d, at 1315. Myriad, thus, solidified its position as the only entity providing BRCA testing.

Some years later, petitioner Ostrer, along with medical patients, advocacy groups, and other doctors, filed this lawsuit seeking a declaration that Myriad's patents are invalid under 35 U. S. C. § 101. 702 F. Supp. 2d, at 186. Citing this Court's decision in *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118 (2007), the District Court denied Myriad's motion to dismiss for lack of standing. *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 669 F. Supp. 2d 365, 385–392 (SDNY 2009). The District Court then granted summary judgment to petitioners on the composition claims at issue in this case based on its conclusion that Myriad's claims, including claims related to cDNA, were invalid because they covered products of nature. 702 F. Supp. 2d, at 220–237. The Federal Circuit reversed, *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 653 F. 3d 1329 (2011), and this Court granted the petition for certiorari, vacated the judgment, and remanded the case in light of *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U. S. 66 (2012). See *Association for Molecular Pathology* v. *Myriad Genetics, Inc.*, 566 U. S. 902 (2012).

On remand, the Federal Circuit affirmed the District Court in part and reversed in part, with each member of the panel writing separately. All three judges agreed that only petitioner Ostrer had standing. They reasoned that Myriad's actions against him and his stated ability and willingness to begin BRCA1 and BRCA2 testing if Myriad's patents were invalidated were sufficient for Article III standing. 689 F. 3d, at 1323; *id.*, at 1337 (opinion of Moore, J.); *id.*, at 1348 (opinion of Bryson, J.).

With respect to the merits, the court held that both isolated DNA and cDNA were patent eligible under § 101. The central dispute among the panel members was whether the

act of *isolating* DNA—separating a specific gene or sequence of nucleotides from the rest of the chromosome—is an inventive act that entitles the individual who first isolates it to a patent. Each of the judges on the panel had a different view on that question. Judges Lourie and Moore agreed that Myriad's claims were patent eligible under § 101 but disagreed on the rationale. Judge Lourie relied on the fact that the entire DNA molecule is held together by chemical bonds and that the covalent bonds at both ends of the segment must be severed in order to isolate segments of DNA. This process technically creates new molecules with unique chemical compositions. See *id.*, at 1328 ("Isolated DNA . . . is a free-standing portion of a larger, natural DNA molecule. Isolated DNA has been cleaved (*i. e.*, had covalent bonds in its backbone chemically severed) or synthesized to consist of just a fraction of a naturally occurring DNA molecule"). Judge Lourie found this chemical alteration to be dispositive, because isolating a particular strand of DNA creates a nonnaturally occurring molecule, even though the chemical alteration does not change the information-transmitting quality of the DNA. See *id.*, at 1330 ("The claimed isolated DNA molecules are distinct from their natural existence as portions of larger entities, and their informational content is irrelevant to that fact. We recognize that biologists may think of molecules in terms of their uses, but genes are in fact materials having a chemical nature"). Accordingly, he rejected petitioners' argument that isolated DNA was ineligible for patent protection as a product of nature.

Judge Moore concurred in part but did not rely exclusively on Judge Lourie's conclusion that chemically breaking covalent bonds was sufficient to render isolated DNA patent eligible. *Id.*, at 1341 ("To the extent the majority rests its conclusion on the chemical differences between [naturally occurring] and isolated DNA (breaking the covalent bonds), I cannot agree that this is sufficient to hold that the claims

to human genes are directed to patentable subject matter"). Instead, Judge Moore also relied on the United States Patent and Trademark Office's (PTO) practice of granting such patents and on the reliance interests of patent holders. *Id.*, at 1343. However, she acknowledged that her vote might have come out differently if she "were deciding this case on a blank canvas." *Ibid.*

Finally, Judge Bryson concurred in part and dissented in part, concluding that isolated DNA is not patent eligible. As an initial matter, he emphasized that the breaking of chemical bonds was not dispositive: "[T]here is no magic to a chemical bond that requires us to recognize a new product when a chemical bond is created or broken." *Id.*, at 1351. Instead, he relied on the fact that "[t]he nucleotide sequences of the claimed molecules are the same as the nucleotide sequences found in naturally occurring human genes." *Id.*, at 1355. Judge Bryson then concluded that genetic "structural similarity dwarfs the significance of the structural differences between isolated DNA and naturally occurring DNA, especially where the structural differences are merely ancillary to the breaking of covalent bonds, a process that is itself not inventive." *Ibid.* Moreover, Judge Bryson gave no weight to the PTO's position on patentability because of the Federal Circuit's position that "the PTO lacks substantive rulemaking authority as to issues such as patentability." *Id.*, at 1357.

Although the judges expressed different views concerning the patentability of isolated DNA, all three agreed that patent claims relating to cDNA met the patent-eligibility requirements of § 101. *Id.*, at 1326, and n. 9 (recognizing that some patent claims are limited to cDNA and that such claims are patent eligible under § 101); *id.*, at 1337 (Moore, J., concurring in part); *id.*, at 1356 (Bryson, J., concurring in part and dissenting in part) ("cDNA cannot be isolated from nature, but instead must be created in the laboratory . . . because the introns that are found in the native gene are re-

moved from the cDNA segment").[3] We granted certiorari. 568 U. S. 1045 (2012).

II

A

Section 101 of the Patent Act provides:

> "Whoever invents or discovers any new and useful . . . 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.

We have "long held that this provision contains an important implicit exception[:] Laws of nature, natural phenomena, and abstract ideas are not patentable." *Mayo*, 566 U. S., at 70 (internal quotation marks and brackets omitted). Rather, "'they are the basic tools of scientific and technological work'" that lie beyond the domain of patent protection. *Id.*, at 71. As the Court has explained, without this exception, there would be considerable danger that the grant of patents would "tie up" the use of such tools and thereby "inhibit future innovation premised upon them." *Id.*, at 86. This would be at odds with the very point of patents, which exist to promote creation. *Diamond* v. *Chakrabarty*, 447 U. S. 303, 309 (1980) (Products of nature are not created, and "'manifestations of . . . nature [are] free to all men and reserved exclusively to none'").

The rule against patents on naturally occurring things is not without limits, however, for "all inventions at some level

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[3] Myriad continues to challenge Dr. Ostrer's Declaratory Judgment Act standing in this Court. Brief for Respondents 17–22. But we find that, under the Court's decision in *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U. S. 118 (2007), Dr. Ostrer has alleged sufficient facts, "under all the circumstances, [to] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.*, at 127 (internal quotation marks omitted).

embody, use, reflect, rest upon, or apply laws of nature, natural phenomena, or abstract ideas," and "too broad an interpretation of this exclusionary principle could eviscerate patent law." 566 U. S., at 71. As we have recognized before, patent protection strikes a delicate balance between creating "incentives that lead to creation, invention, and discovery" and "imped[ing] the flow of information that might permit, indeed spur, invention." *Id.*, at 92. We must apply this well-established standard to determine whether Myriad's patents claim any "new and useful . . . composition of matter," § 101, or instead claim naturally occurring phenomena.

B

It is undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes. The location and order of the nucleotides existed in nature before Myriad found them. Nor did Myriad create or alter the genetic structure of DNA. Instead, Myriad's principal contribution was uncovering the precise location and genetic sequence of the BRCA1 and BRCA2 genes within chromosomes 17 and 13. The question is whether this renders the genes patentable.

Myriad recognizes that our decision in *Chakrabarty* is central to this inquiry. Brief for Respondents 14, 23–27. In *Chakrabarty*, scientists added four plasmids to a bacterium, which enabled it to break down various components of crude oil. 447 U. S., at 305, and n. 1. The Court held that the modified bacterium was patentable. It explained that the patent claim was "not to a hitherto unknown natural phenomenon, but to a nonnaturally occurring manufacture or composition of matter—a product of human ingenuity 'having a distinctive name, character [and] use.'" *Id.*, at 309–310 (quoting *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615 (1887); alteration in original). The *Chakrabarty* bacterium was new "with markedly different characteristics from any

found in nature," 447 U. S., at 310, due to the additional plasmids and resultant "capacity for degrading oil." *Id.*, at 305, n. 1. In this case, by contrast, Myriad did not create anything. To be sure, it found an important and useful gene, but separating that gene from its surrounding genetic material is not an act of invention.

Groundbreaking, innovative, or even brilliant discovery does not by itself satisfy the § 101 inquiry. In *Funk Brothers Seed Co.* v. *Kalo Inoculant Co.*, 333 U. S. 127 (1948), this Court considered a composition patent that claimed a mixture of naturally occurring strains of bacteria that helped leguminous plants take nitrogen from the air and fix it in the soil. *Id.*, at 128–129. The ability of the bacteria to fix nitrogen was well known, and farmers commonly "inoculated" their crops with them to improve soil nitrogen levels. But farmers could not use the same inoculant for all crops, both because plants use different bacteria and because certain bacteria inhibit each other. *Id.*, at 129–130. Upon learning that several nitrogen-fixing bacteria did not inhibit each other, however, the patent applicant combined them into a single inoculant and obtained a patent. *Id.*, at 130. The Court held that the composition was not patent eligible because the patent holder did not alter the bacteria in any way. *Id.*, at 132 ("There is no way in which we could call [the bacteria mixture a product of invention] unless we borrowed invention from the discovery of the natural principle itself"). His patent claim thus fell squarely within the law of nature exception. So do Myriad's. Myriad found the location of the BRCA1 and BRCA2 genes, but that discovery, by itself, does not render the BRCA genes "new . . . composition[s] of matter," § 101, that are patent eligible.

Indeed, Myriad's patent descriptions highlight the problem with its claims. For example, a section of the '282 patent's Detailed Description of the Invention indicates that Myriad found the location of a gene associated with increased

risk of breast cancer and identified mutations of that gene that increase the risk. See App. 748–749.[4] In subsequent language Myriad explains that the location of the gene was unknown until Myriad found it among the approximately 8 million nucleotide pairs contained in a subpart of chromosome 17. See *ibid.*[5] The '473 and '492 patents contain similar language as well. See *id.*, at 854, 947. Many of Myriad's patent descriptions simply detail the "iterative process" of discovery by which Myriad narrowed the possible locations for the gene sequences that it sought.[6] See, *e. g.*, *id.*, at 750.

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[4] The full relevant text of the Detailed Description of the Invention is as follows:

"It is a discovery of the present invention that the BRCA1 locus which predisposes individuals to breast cancer and ovarian cancer, is a gene encoding a BRCA1 protein, which has been found to have no significant homology with known protein or DNA sequences. . . . It is a discovery of the present invention that mutations in the BRCA1 locus in the germline are indicative of a predisposition to breast cancer and ovarian cancer. Finally, it is a discovery of the present invention that somatic mutations in the BRCA1 locus are also associated with breast cancer, ovarian cancer and other cancers, which represents an indicator of these cancers or of the prognosis of these cancers. The mutational events of the BRCA1 locus can involve deletions, insertions and point mutations." App. 749.

Notwithstanding Myriad's repeated use of the phrase "present invention," it is clear from the text of the patent that the various discoveries *are* the "invention."

[5] "Starting from a region on the long arm of human chromosome 17 of the human genome, 17q, which has a size estimated at about 8 million base pairs, a region which contains a genetic locus, BRCA1, which causes susceptibility to cancer, including breast and ovarian cancer, has been identified." *Ibid.*

[6] Myriad first identified groups of relatives with a history of breast cancer (some of whom also had developed ovarian cancer); because these individuals were related, scientists knew that it was more likely that their diseases were the result of genetic predisposition rather than other factors. Myriad compared sections of their chromosomes, looking for shared genetic abnormalities not found in the general population. It was that process which eventually enabled Myriad to determine where in the genetic sequence the BRCA1 and BRCA2 genes reside. See, *e. g.*, *id.*, at 749, 763–775.

Myriad seeks to import these extensive research efforts into the § 101 patent-eligibility inquiry. Brief for Respondents 8–10, 34. But extensive effort alone is insufficient to satisfy the demands of § 101.

Nor are Myriad's claims saved by the fact that isolating DNA from the human genome severs chemical bonds and thereby creates a nonnaturally occurring molecule. Myriad's claims are simply not expressed in terms of chemical composition, nor do they rely in any way on the chemical changes that result from the isolation of a particular section of DNA. Instead, the claims understandably focus on the genetic information encoded in the BRCA1 and BRCA2 genes. If the patents depended upon the creation of a unique molecule, then a would-be infringer could arguably avoid at least Myriad's patent claims on entire genes (such as claims 1 and 2 of the '282 patent) by isolating a DNA sequence that included both the BRCA1 or BRCA2 gene and one additional nucleotide pair. Such a molecule would not be chemically identical to the molecule "invented" by Myriad. But Myriad obviously would resist that outcome because its claim is concerned primarily with the information contained in the genetic *sequence*, not with the specific chemical composition of a particular molecule.

Finally, Myriad argues that the PTO's past practice of awarding gene patents is entitled to deference, citing *J. E. M. Ag Supply, Inc.* v. *Pioneer Hi-Bred Int'l, Inc.*, 534 U. S. 124 (2001). See Brief for Respondents 35–39, 49–50. We disagree. *J. E. M.* held that new plant breeds were eligible for utility patents under § 101 notwithstanding separate statutes providing special protections for plants, see 7 U. S. C. § 2321 *et seq.* (Plant Variety Protection Act); 35 U. S. C. §§ 161–164 (Plant Patent Act of 1930). After analyzing the text and structure of the relevant statutes, the Court mentioned that the Board of Patent Appeals and Interferences had determined that new plant breeds were patent eligible under § 101 and that Congress had recognized and

endorsed that position in a subsequent Patent Act amendment. 534 U. S., at 144–145 (citing *In re Hibberd*, 227 USPQ 443 (1985), and 35 U. S. C. § 119(f)). In this case, however, Congress has not endorsed the views of the PTO in subsequent legislation. While Myriad relies on Judge Moore's view that Congress endorsed the PTO's position in a single sentence in the Consolidated Appropriations Act of 2004, see Brief for Respondents 31, n. 8; 689 F. 3d, at 1346, that Act does not even mention genes, much less isolated DNA. § 634, 118 Stat. 101 ("None of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism").

Further undercutting the PTO's practice, the United States argued in the Federal Circuit and in this Court that isolated DNA was *not* patent eligible under § 101, Brief for United States as *Amicus Curiae* 20–33, and that the PTO's practice was not "a sufficient reason to hold that isolated DNA is patent-eligible." *Id.*, at 26. See also *id.*, at 28–29. These concessions weigh against deferring to the PTO's determination.[7]

C

cDNA does not present the same obstacles to patentability as naturally occurring, isolated DNA segments. As already explained, creation of a cDNA sequence from mRNA results in an exons-only molecule that is not naturally occurring.[8]

[7] Myriad also argues that we should uphold its patents so as not to disturb the reliance interests of patent holders like itself. Brief for Respondents 38–39. Concerns about reliance interests arising from PTO determinations, insofar as they are relevant, are better directed to Congress. See *Mayo Collaborative Services* v. *Prometheus Laboratories, Inc.*, 566 U. S. 66, 88–90 (2012).

[8] Some viruses rely on an enzyme called reverse transcriptase to reproduce by copying RNA into cDNA. In rare instances, a side effect of a viral infection of a cell can be the random incorporation of fragments of the resulting cDNA, known as a pseudogene, into the genome. Such

Petitioners concede that cDNA differs from natural DNA in that "the non-coding regions have been removed." Brief for Petitioners 49. They nevertheless argue that cDNA is not patent eligible because "[t]he nucleotide sequence of cDNA is dictated by nature, not by the lab technician." *Id.*, at 51. That may be so, but the lab technician unquestionably creates something new when cDNA is made. cDNA retains the naturally occurring exons of DNA, but it is distinct from the DNA from which it was derived. As a result, cDNA is not a "product of nature" and is patent eligible under § 101, except insofar as very short series of DNA may have no intervening introns to remove when creating cDNA. In that situation, a short strand of cDNA may be indistinguishable from natural DNA.[9]

III

It is important to note what is *not* implicated by this decision. First, there are no method claims before this Court. Had Myriad created an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, it could possibly have sought a method patent. But the processes used by Myriad to isolate DNA were well understood by geneticists at the time of Myriad's patents, "were well

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pseudogenes serve no purpose; they are not expressed in protein creation because they lack genetic sequences to direct protein expression. See J. Watson et al., Molecular Biology of the Gene 142, 144, fig. 7–5 (6th ed. 2008). Perhaps not surprisingly, given pseudogenes' apparently random origins, petitioners "have failed to demonstrate that the pseudogene consists of the same sequence as the BRCA1 cDNA." *Association for Molecular Pathology* v. *United States Patent and Trademark Office*, 689 F. 3d 1303, 1356, n. 5 (CA Fed. 2012). The possibility that an unusual and rare phenomenon *might* randomly create a molecule similar to one created synthetically through human ingenuity does not render a composition of matter nonpatentable.

[9] We express no opinion whether cDNA satisfies the other statutory requirements of patentability. See, *e. g.*, 35 U. S. C. §§ 102, 103, and 112; Brief for United States as *Amicus Curiae* 19, n. 5.

understood, widely used, and fairly uniform insofar as any scientist engaged in the search for a gene would likely have utilized a similar approach," 702 F. Supp. 2d, at 202–203, and are not at issue in this case.

Similarly, this case does not involve patents on new *applications* of knowledge about the BRCA1 and BRCA2 genes. Judge Bryson aptly noted that, "[a]s the first party with knowledge of the [BRCA1 and BRCA2] sequences, Myriad was in an excellent position to claim applications of that knowledge. Many of its unchallenged claims are limited to such applications." 689 F. 3d, at 1349.

Nor do we consider the patentability of DNA in which the order of the naturally occurring nucleotides has been altered. Scientific alteration of the genetic code presents a different inquiry, and we express no opinion about the application of § 101 to such endeavors. We merely hold that genes and the information they encode are not patent eligible under § 101 simply because they have been isolated from the surrounding genetic material.

* * *

For the foregoing reasons, the judgment of the Federal Circuit is affirmed in part and reversed in part.

It is so ordered.

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

I join the judgment of the Court, and all of its opinion except Part I–A and some portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief. It suffices for me to affirm, having studied the opinions below and the expert briefs presented here, that the portion of DNA isolated from its natural state sought to be patented is identical to that portion of the DNA in its natural state; and that complementary DNA (cDNA) is a synthetic creation not normally present in nature.

Syllabus

UNITED STATES *v.* DAVILA

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

No. 12–167. Argued April 15, 2013—Decided June 13, 2013

Federal Rule of Criminal Procedure 11 governs guilty pleas. Rule 11(c)(1) instructs that "[t]he court must not participate in [plea] discussions," and Rule 11(h) states that a "variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights." Rule 52(a), which covers trial court errors generally, similarly prescribes: "Any error . . . that does not affect substantial rights must be disregarded."

Respondent Davila, while under indictment on multiple tax fraud charges, wrote to the District Court, expressing dissatisfaction with his court-appointed attorney. Complaining that his attorney offered no defensive strategy, but simply advised him to plead guilty, Davila requested new counsel. A Magistrate Judge held an *in camera* hearing at which Davila and his attorney, but no representative of the United States, appeared. At the hearing, the Magistrate Judge told Davila that he would not get another court-appointed attorney and that his best course, given the strength of the Government's case, was to plead guilty. More than three months later, Davila pleaded guilty to a conspiracy charge in exchange for dismissal of 33 other charges. He stated under oath before a U. S. District Judge that he had not been forced or pressured to enter the plea, and he did not mention the *in camera* hearing before the Magistrate Judge. Prior to sentencing, however, Davila moved to vacate his plea and dismiss the indictment, asserting that he had entered the plea for a "strategic" reason, *i. e.*, to force the Government to acknowledge errors in the indictment. Finding that Davila's plea had been knowing and voluntary, the District Judge denied the motion. Again, Davila said nothing of the *in camera* hearing conducted by the Magistrate Judge. On appeal, the Eleventh Circuit, following Circuit precedent, held that the Magistrate Judge's violation of Rule 11(c)(1) required automatic vacatur of Davila's guilty plea, obviating any need to inquire whether the error was prejudicial.

Held: Under Rule 11(h), vacatur of the plea is not in order if the record shows no prejudice to Davila's decision to plead guilty. Pp. 605–613.

(a) Rule 11(c)(1)'s prohibition of judicial involvement in plea discussions was included in the 1974 amendment to the Rule out of concern that a defendant might be induced to plead guilty rather than risk an-

tagonizing the judge who would preside at trial. Rule 11(h) was added in the 1983 amendment to make clear that Rule 11 errors are not excepted from Rule 52(a)'s harmless-error inquiry. Rule 52 also states, in subdivision (b), that a "plain error that affects substantial rights may be considered even though it was not brought to the [trial] court's attention." When Rule 52(a) governs, the prosecution has the burden of showing harmlessness, but when Rule 52(b) controls, the defendant must show that the error affects substantial rights. See *United States* v. *Vonn*, 535 U. S. 55, 62.

As clarified in *Vonn* and *United States* v. *Dominguez Benitez*, 542 U. S. 74, Rule 11 error may be of the Rule 52(a) type or the Rule 52(b) kind, depending on when the error was raised. In *Vonn*, the judge who conducted the plea hearing failed to inform the defendant, as required by Rule 11(c)(3), that he would have "the right to the assistance of counsel" if he proceeded to trial. The defendant first objected to the omission on appeal. This Court held that "a silent defendant has the burden to satisfy [Rule 52(b)'s] plain-error rule." 535 U. S., at 59. In *Dominguez Benitez*, the error first raised on appeal was failure to warn the defendant, as Rule 11(c)(3)(B) instructs, that a plea could not be withdrawn even if the sentence imposed was higher than the plea-bargained sentence recommendation. The Court again held that Rule 52(b) controlled, and prescribed the standard a defendant silent until appeal must meet to show "plain error," namely, "a reasonable probability that, but for the [Rule 11] error, he would not have entered the plea." 542 U. S., at 83. Pp. 605–608.

(b) Here, the Magistrate Judge plainly violated Rule 11(c)(1) by exhorting Davila to plead guilty. Davila contends that automatic vacatur, while inappropriate for most Rule 11 violations, should attend conduct banned by Rule 11(c)(1). He distinguishes plea-colloquy omissions, *i. e.*, errors of the kind involved in *Vonn* and *Dominguez Benitez*, from preplea exhortations to admit guilt. The former come into play *after* a defendant has decided to plead guilty, the latter, *before* a defendant has decided to plead guilty or to stand trial. Nothing in Rule 11's text, however, indicates that the ban on judicial involvement in plea discussions, if dishonored, demands automatic vacatur without regard to case-specific circumstances. Nor does the Advisory Committee commentary single out any Rule 11 instruction as more basic than others. And Rule 11(h), specifically designed to stop automatic vacaturs, calls for across-the-board application of the harmless-error prescription (or, absent prompt objection, the plain-error rule).

Rule 11(c)(1) was adopted as a prophylactic measure, not one impelled by the Due Process Clause or any other constitutional requirement.

Syllabus

Thus, violation of the Rule does not belong in the highly exceptional category of structural errors—*e. g.*, denial of counsel of choice or denial of a public trial—that trigger automatic reversal because they undermine the fairness of the entire criminal proceeding. *United States* v. *Marcus*, 560 U. S. 258, 263. Instead, in assessing Rule 11 errors, a reviewing court must take account of all that transpired in the trial court. Had Davila's guilty plea followed soon after the Magistrate Judge's comments, the automatic-vacatur rule would have remained erroneous. The Court of Appeals' mistake in that regard, however, might have been inconsequential, for the Magistrate Judge's exhortations, if they immediately elicited a plea, would likely have qualified as prejudicial. Here, however, three months distanced the *in camera* meeting conducted by the Magistrate Judge from Davila's appearance before the District Judge who examined and accepted his guilty plea after an exemplary Rule 11 colloquy, at which Davila had the opportunity to raise any questions he might have about matters relating to his plea. The Court of Appeals, therefore, should not have assessed the Magistrate Judge's comments in isolation. Instead, it should have considered, in light of the full record, whether it was reasonably probable that, but for the Magistrate Judge's comments, Davila would have exercised his right to go to trial. Pp. 608–612.

(c) The Court of Appeals, having concluded that the Magistrate Judge's comments violated Rule 11(c)(1), cut off further consideration. It did not engage in a full-record assessment of the particular facts of Davila's case or the case-specific arguments raised by the parties, including the Government's assertion that Davila was not prejudiced by the Magistrate Judge's comments, and Davila's contention that the extraordinary circumstances his case presents should allow his claim to be judged under Rule 52(a)'s harmless-error standard rather than Rule 52(b)'s plain-error standard. The Court decides only that the automatic-vacatur rule is incompatible with Rule 11(h) and leaves all remaining issues to be addressed on remand. P. 612.

664 F. 3d 1355, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, ALITO, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined, *post*, p. 613.

Eric J. Feigin argued the cause for the United States. With him on the brief were *Solicitor General Verrilli*,

Assistant Attorney General Keneally, Deputy Solicitor General Dreeben, Frank P. Cihlar, S. Robert Lyons, and *Deborah K. Snyder.*

Robert M. Yablon argued the cause for respondent. With him on the brief were *E. Joshua Rosenkranz* and *Robert M. Loeb.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns Rule 11 of the Federal Rules of Criminal Procedure, which governs guilty pleas. Two provisions of that Rule are key here. The first, Rule 11(c)(1), instructs that "[t]he court must not participate in [plea] discussions." The second, Rule 11(h), states: "A variance from the requirements of th[e] rule is harmless error if it does not affect substantial rights." Rule 52(a), which covers trial court errors generally, similarly prescribes: "Any error . . . that does not affect substantial rights must be disregarded."

Anthony Davila, respondent here, entered a guilty plea to conspiracy to defraud the United States by filing false income tax returns. He maintains that he did so because a U. S. Magistrate Judge, at a pre-plea *in camera* hearing and in flagrant violation of Rule 11(c)(1), told him his best course, given the strength of the Government's case, was to plead guilty. Three months later, Davila entered a plea on advice of counsel. The hearing on Davila's plea, conducted by a U. S. District Judge, complied in all respects with Rule 11.

The question presented is whether, as the Court of Appeals for the Eleventh Circuit held, the violation of Rule 11(c)(1) by the Magistrate Judge warranted automatic vacatur of Davila's guilty plea. We hold that Rule 11(h) controls.

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*Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *John B. Owens, Daniel B. Levin,* and *Jonathan Hacker*; for Scholars and Practitioners of Legal and Judicial Ethics et al. by *Thomas S. Jones, Margaret C. Gleason,* and *Bruce Green*; and for 57 Criminal Law and Procedure Professors by *Daryl L. Joseffer, Alison Siegler, pro se,* and *Erica Zunkel.*

Under the inquiry that Rule instructs, vacatur of the plea is not in order if the record shows no prejudice to Davila's decision to plead guilty.

I

In May 2009, a federal grand jury in the Southern District of Georgia returned a 34-count indictment against respondent Anthony Davila. The indictment charged that Davila filed over 120 falsified tax returns, receiving over $423,000 from the United States Treasury as a result of his fraudulent scheme.

In January 2010, Davila sent a letter to the District Court expressing dissatisfaction with his court-appointed attorney and requesting new counsel. His attorney, Davila complained, offered no defensive strategy, "'never mentioned a defense at all,'" but simply advised that he plead guilty.[1] In response to Davila's letter, a U. S. Magistrate Judge held an *in camera* hearing at which Davila and his attorney, but no representative of the United States, appeared. At the start of the hearing, the Magistrate Judge told Davila that he was free to represent himself, but would not get another court-appointed attorney. See App. 148.

Addressing Davila's complaint that his attorney had advised him to plead guilty, the Magistrate Judge told Davila that "oftentimes . . . that is the best advice a lawyer can give his client." *Id.*, at 152. "In view of whatever the Government's evidence in a case might be," the judge continued,

> "it might be a good idea for the Defendant to accept responsibility for his criminal conduct[,] to plead guilty[,] and go to sentencing with the best arguments . . . still available [without] wasting the Court's time, [and] causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case." *Ibid.*

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[1] See Brief for Appellee in No. 10–15310–I (CA11), p. 3 (quoting Record (Exh. B)).

As to Davila's objection that his attorney had given him no options other than pleading guilty, the Magistrate Judge commented: "[T]here may not be a viable defense to these charges." *Id.*, at 155. The judge then urged Davila to cooperate in order to gain a downward departure from the sentence indicated by the Federal Sentencing Guidelines. "[T]ry to understand," he counseled,

> "the Government, they have all of the marbles in this situation and they can file that . . . motion for [a] downward departure from the guidelines if they want to, you know, and the rules are constructed so that nobody can force them to file that [motion] for you. The only thing at your disposal that is entirely up to you is the two or three level reduction for acceptance of responsibility. That means you've got to go to the cross. You've got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance." *Id.*, at 159–160.

Davila's Sentencing Guidelines range, the Magistrate Judge said, would "probably [be] pretty bad because [his] criminal history score would be so high." *Id.*, at 160. To reduce his sentencing exposure, the Magistrate Judge suggested, Davila could "cooperate with the Government in this or in other cases." *Ibid.* As the hearing concluded, the judge again cautioned that "to get the [sentence] reduction for acceptance [of responsibility]," Davila had to "come to the cross":

> "[T]hat two- or three-level reduction for acceptance is something that you have the key to and you can ensure that you get that reduction in sentence simply by virtue of being forthcoming and not trying to make yourself look like you really didn't know what was going on. . . .

> You've got to go [to the cross] and you've got to tell it all, Brother, and convince that probation officer that you are being as open and honest with him as you can possibly be because then he will go to the [D]istrict [J]udge and he will say, you know, that Davila guy, he's got a long criminal history but when we were in there talking about this case he gave it all up so give him the two-level, give him the three-level reduction." *Id.*, at 160–161.

Nearly a month after the *in camera* hearing, Davila filed a motion demanding a speedy trial. The District Court set a trial date for April 2010, which was continued at the Government's request.

In May 2010, more than three months after the hearing before the Magistrate Judge, Davila agreed to plead guilty to the conspiracy charge in exchange for dismissal of the other 33 counts charged in the indictment. Davila entered his guilty plea before a U. S. District Judge six days later. Under oath, Davila stated that he had not been forced or pressured to plead guilty. *Id.*, at 122. Davila did not mention the *in camera* hearing before the Magistrate Judge, and the record does not indicate whether the District Judge was aware that the pre-plea hearing had taken place. See *id.*, at 82–99, 115–125.

Before he was sentenced, Davila moved to vacate his plea and to dismiss the indictment. The reason for his plea, Davila asserted, was "strategic." *Id.*, at 58. Aware that the prosecutor had a duty to disclose all information relevant to the court's determination whether to accept the plea bargain, he stated that his purpose in entering the plea was to force the Government to acknowledge timeframe errors made in the indictment. *Id.*, at 58–59. By pleading guilty, Davila said, he would make the court aware that the prosecution was "vindictive." *Id.*, at 59.

The District Judge denied Davila's motion. In so ruling, the court observed that, at the plea hearing, Davila had affirmed that he was under no "pressure, threats, or promises,

other than promises [made] by the government in the plea agreement." *Id.*, at 70. Furthermore, he had been fully advised of his rights and the consequences of his plea. *Id.*, at 71. It was therefore clear to the District Judge, who had himself presided at the plea hearing, that Davila's guilty plea "was knowing and voluntary." *Id.*, at 72. In view of Davila's extensive criminal history, the court sentenced him to a prison term of 115 months. *Id.*, at 75–77. Again, neither Davila nor the court mentioned the *in camera* hearing conducted by the Magistrate Judge. *Id.*, at 55–80.

On appeal, Davila's court-appointed attorney sought leave to withdraw from the case, asserting, in a brief filed pursuant to *Anders* v. *California*, 386 U. S. 738 (1967), that there were no issues of arguable merit to be raised on Davila's behalf. The Eleventh Circuit denied counsel's motion without prejudice to renewal. App. to Pet. for Cert. 6a–8a. It did so based on a discovery the appeals court made upon "independent review" of the record. That review "revealed an irregularity in the statements of a magistrate judge, made during a hearing prior to Davila's plea, which appeared to urge [him] to cooperate and be candid about his criminal conduct to obtain favorable sentencing consequences." *Id.*, at 7a. The court requested counsel to address whether the "irregularity" constituted reversible error under Federal Rule of Criminal Procedure 11(c)(1). *Id.*, at 7a–8a.

Following the court's instruction, counsel filed a brief arguing that Davila's plea should be set aside due to the Magistrate Judge's comments. In response, the Government conceded that those comments violated Rule 11(c)(1). Even so, the Government urged, given the three-month gap between the comments and the plea, and the fact that a different judge presided over Davila's plea and sentencing hearings, no adverse effect on Davila's substantial rights could be demonstrated. Pursuant to Circuit precedent, the appeals court held that the Rule 11(c)(1) violation required automatic vacatur of Davila's guilty plea. Under the Circuit's "bright

line rule," the court explained, there was no need to inquire whether the error was, in fact, prejudicial. 664 F. 3d 1355, 1359 (CA11 2011) (*per curiam*).

We granted certiorari to resolve a Circuit conflict concerning the consequences of a Rule 11(c)(1) violation. 568 U. S. 1080 (2013).[2]

II

Rule 11(c)(1)'s prohibition of judicial involvement in plea discussions was introduced as part of the 1974 amendment to the Rule. See Advisory Committee's 1974 Note on Subd. (e)(1) of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., p. 1420 (1976 ed.) (hereinafter Advisory Committee's 1974 Note).[3] As the Advisory Committee's note explains, commentators had observed, prior to the amendment, that judicial participation in plea negotiations was "common practice." *Id.*, at 1420 (citing D. Newman, Conviction: The Determination of

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[2] Compare *United States* v. *Bradley*, 455 F. 3d 453, 461 (CA4 2006) (Rule 11(c) errors are not structural and are subject to plain-error review); *United States* v. *Pagan-Ortega*, 372 F. 3d 22, 27–28 (CA1 2004) ("[A] facially appealing claim of improper judicial participation in a plea proceeding prior to its solemnization in writing did not, on close analysis, demonstrate a basic unfairness and lack of integrity in the proceeding."); *United States* v. *Ebel*, 299 F. 3d 187, 191 (CA3 2002) ("[W]hen Rule 11 error has been committed in the taking of a guilty plea, we can consider the record as a whole to determine whether, under Rule 11(h), [the defendant's] substantial rights were affected."); *United States* v. *Kraus*, 137 F. 3d 447, 457–458 (CA7 1998) (applying harmless-error review); and *United States* v. *Miles*, 10 F. 3d 1135, 1140–1141 (CA5 1993) ("Rule 11(h) . . . compel[s] harmless error review."), with 664 F. 3d 1355 (CA11 2011) (case below); *United States* v. *Anderson*, 993 F. 2d 1435, 1438–1439 (CA9 1993) ("Rule 11's ban [on judicial involvement in plea negotiations is] an absolute command which admits of no exceptions." (internal quotation marks omitted)); and *United States* v. *Barrett*, 982 F. 2d 193, 196 (CA6 1992) ("This court's role is not to weigh the judge's statements to determine whether they were so oppressive as to abrogate the voluntariness of the plea.").

[3] As originally enacted, the prohibition of court participation in plea discussions was found in Rule 11(e)(1). See Fed. Rule Crim. Proc. 11(e)(1) (1976).

Guilt or Innocence Without Trial 32–52, 78–104 (1966); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 891, 905 (1964)). Nonetheless, the prohibition was included out of concern that a defendant might be induced to plead guilty rather than risk displeasing the judge who would preside at trial. Advisory Committee's 1974 Note 1420. Moreover, the Advisory Committee anticipated, barring judicial involvement in plea discussions would facilitate objective assessments of the voluntariness of a defendant's plea. *Ibid.*

Added as a part of the 1983 amendment, Rule 11(h) provides that "[a] variance from the requirements of [Rule 11] is harmless error if it does not affect substantial rights." Subdivision (h), the Advisory Committee's note informs, "rejects the extreme sanction of automatic reversal" for Rule 11 violations and clarifies that Rule 52(a)'s harmlessness inquiry applies to plea errors. Advisory Committee's 1983 Note on Subd. (h) of Fed. Rule Crim. Proc. 11, 18 U. S. C. App., pp. 749, 751 (1988 ed.) (hereinafter Advisory Committee's 1983 Note).

The addition of subdivision (h) was prompted by lower court overreadings of *McCarthy* v. *United States*, 394 U. S. 459 (1969). That decision called for vacatur of a guilty plea accepted by the trial court without any inquiry into the defendant's understanding of the nature of the charge. The Advisory Committee explained that subdivision (h) would deter reading *McCarthy* "as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings." Advisory Committee's 1983 Note 751. Substantial compliance with Rule 11 would remain the requirement, but the new subdivision would guard against exalting "ceremony . . . over substance." *Id.*, at 749.

For trial court errors generally, Rule 52(a) states that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Rule 11(h), as just noted, was designed to make it clear that Rule 11

errors are not excepted from that general Rule. Advisory Committee's 1983 Note 749. Rule 52, in addition to stating the "harmless-error rule" in subdivision (a), also states, in subdivision (b), the "plain-error rule," applicable when a defendant fails to object to the error in the trial court. Rule 52(b) states: "A plain error that affects substantial rights may be considered even though it was not brought to the [trial] court's attention." When Rule 52(a)'s "harmless-error rule" governs, the prosecution bears the burden of showing harmlessness. See *United States* v. *Vonn*, 535 U. S. 55, 62 (2002). When Rule 52(b) controls, the defendant must show that the error affects substantial rights. *Ibid.*

In two cases, *United States* v. *Vonn*, 535 U. S. 55, and *United States* v. *Dominguez Benitez*, 542 U. S. 74 (2004), this Court clarified that a Rule 11 error may be of the Rule 52(a) type, or it may be of the Rule 52(b) kind, depending on when the error was raised. In *Vonn*, the judge who conducted the plea hearing failed to inform the defendant, as required by Rule 11, that he would have "the right to the assistance of counsel" if he proceeded to trial. See Fed. Rule Crim. Proc. 11(c)(3) (2000).[4] The defendant first objected to the omission on appeal. We addressed the question "whether a defendant who lets Rule 11 error pass without objection in the trial court must carry the burdens of Rule 52(b) or whether even the silent defendant can put the Government to the burden of proving the Rule 11 error harmless." 535 U. S., at 58.

The defendant in *Vonn* had urged that "importation of [Rule 52(a)'s] harmless-error standard into Rule 11(h) without its companion plain-error rule was meant to eliminate a silent defendant's burdens under . . . Rule 52(b)." *Id.*, at 63. This Court rejected the defendant's argument and held that "a silent defendant has the burden to satisfy the plain-error rule." *Id.*, at 59.

[4] The requirement that the judge inform the defendant that he has "the right to be represented by counsel" is currently found in Rule 11(b)(1)(D).

In *Dominguez Benitez*, the Court addressed what the silent defendant's burden entailed. The judge presiding at the plea hearing in that case failed to warn the defendant, as Rule 11(c)(3)(B) directs, that he would not be permitted to withdraw his guilty plea even if the court did not accept the plea-bargained sentencing recommendation. 542 U. S., at 79. As in *Vonn*, the error was first raised on appeal. 542 U. S., at 79. This Court again held that Rule 52(b) was controlling. *Id.*, at 82. Stressing "the particular importance of the finality of guilty pleas," *ibid.*, the Court prescribed the standard a defendant complaining of a Rule 11 violation must meet to show "plain error": "[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea," *id.*, at 83.

III

In Davila's case, the Government acknowledged in this Court, as it did before the Eleventh Circuit, that the Magistrate Judge violated Rule 11(c)(1) by improperly participating in plea discussions. As the excerpts from the *in camera* hearing, set out *supra*, at 601–603, show, there is no room for doubt on that score. The Magistrate Judge's repeated exhortations to Davila to "tell it all" in order to obtain a more favorable sentence, see App. 157–160, were indeed beyond the pale.

Did that misconduct in itself demand vacatur of Davila's plea, as the Eleventh Circuit held, or, as the Government urges, must a reviewing court consider all that transpired in the trial court in order to assess the impact of the error on the defendant's decision to plead guilty? We hold that the latter inquiry is the one the Rules and our precedent require.

Davila contends that automatic vacatur, while inappropriate for most Rule 11 violations, should attend conduct banned by Rule 11(c)(1). He distinguishes plea-colloquy

omissions, *i. e.*, errors of the kind involved in *Vonn* and *Dominguez Benitez*, from pre-plea exhortations to admit guilt. Plea-colloquy requirements come into play *after* a defendant has agreed to plead guilty. The advice and questions now specified in Rules 11(b) and 11(c)(3)(B), Davila observes, are designed to ensure that a defendant's plea is fully informed and intelligently made. Errors or omissions in following Rule 11's plea-colloquy instructions, Davila recognizes, are properly typed procedural, and are therefore properly assessed under the harmless-error instruction of Rule 11(h).

Rule 11(c)(1)'s prohibition on judicial participation in plea discussions, in contrast, becomes operative *before* a defendant has decided whether to plead guilty or to stand trial. The Rule serves a more basic purpose, Davila urges, one "central to the proper functioning of the criminal process." Brief for Respondent 18. Therefore, "the remedial analysis that applies to violations of . . . procedural provisions does not and should not apply to th[is] distinct class of error." *Id.*, at 16. Violations of Rule 11(c)(1), Davila elaborates, heighten the risk that a defendant's plea will be coerced or pressured, and not genuinely an exercise of free will. When a judge conveys his belief that pleading guilty would be to a defendant's advantage, Davila adds, the judge becomes, in effect, a second prosecutor, depriving the defendant of the impartial arbiter to which he is entitled. "Rule 11(c)(1)'s bright-line prohibition on judicial exhortations to plead guilty," Davila concludes, is "no mere procedural technicality," *id.*, at 21, for such exhortations inevitably and incurably infect the ensuing pretrial process, *id.*, at 43.

Nothing in Rule 11's text, however, indicates that the ban on judicial involvement in plea discussions, if dishonored, demands automatic vacatur of the plea without regard to case-specific circumstances. The prohibition appears in subdivision (c), headed "Plea Agreement Procedure." See Fed. Rule Crim. Proc. 11(c). That subdivision affirms that the prosecution and defense attorney (or the defendant when

proceeding *pro se*) "may discuss and reach a plea agreement." Rule 11(c)(1). Further, Rule 11(c) describes permissible types of plea agreements, see Rule 11(c)(1)(A)–(C), and addresses the court's consideration, acceptance, or rejection of a proffered agreement, see Rule 11(c)(3)–(5).

In recommending the disallowance of judicial participation in plea negotiations now contained in subdivision (c)(1), the Advisory Committee stressed that a defendant might be induced to plead guilty to avoid antagonizing the judge who would preside at trial. See Advisory Committee's 1974 Note 1420. But the Committee nowhere suggested that violation of Rule 11(c)(1) is necessarily an error graver than, for example, the error in *Dominguez Benitez*, *i. e.*, the failure to tell a defendant that the plea would bind him even if the sentence imposed significantly exceeded in length the term of years stated in the plea bargain. As earlier noted, see *supra*, at 605–606, the Committee pointed to commentary describing judicial engagement in plea bargaining as a once "common practice,"[5] and it observed that, in particular cases, questions may arise "[a]s to what . . . constitute[s] 'participation,'" Advisory Committee's 1974 Note 1420.

In short, neither Rule 11 itself, nor the Advisory Committee's commentary on the Rule singles out any instruction as more basic than others. And Rule 11(h), specifically designed to stop automatic vacaturs, calls for across-the-board application of the harmless-error prescription (or, absent prompt objection, the plain-error rule). See *supra*, at 606–607.

Rule 11(c)(1) was adopted as a prophylactic measure, see *supra*, at 606, not one impelled by the Due Process Clause or any other constitutional requirement. See 664 F. 3d, at 1359 (recognizing that Rule 11(c)(1) is part of a "prophylactic

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[5] For state provisions permitting at least some judicial participation in plea bargaining, see, *e. g.*, N. C. Gen. Stat. Ann. § 15A–1021(a) (Lexis 2011); Idaho Crim. Rule 11(f) (2012); Vt. Rule Crim. Proc. 11 Reporter's Notes (2003 and Supp. 2012).

scheme"). We have characterized as "structural" "a very limited class of errors" that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. *United States* v. *Marcus*, 560 U. S. 258, 263 (2010) (internal quotation marks omitted). Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt. See, *e. g.*, *United States* v. *Gonzalez-Lopez*, 548 U. S. 140, 150 (2006) (ranking "deprivation of the right to counsel of choice" as "'structural error'"). Rule 11(c)(1) error does not belong in that highly exceptional category. See *Neder* v. *United States*, 527 U. S. 1, 7 (1999) (structural errors are "fundamental constitutional errors that 'defy analysis by "harmless error" standards'" (quoting *Arizona* v. *Fulminante*, 499 U. S. 279, 309 (1991))).

Had Davila's guilty plea followed soon after the Magistrate Judge told Davila that pleading guilty might be "the best advice" a lawyer could give him, see App. 152, this case may not have warranted our attention. The automatic-vacatur rule would have remained erroneous, but the Court of Appeals' mistake might have been inconsequential. See Tr. of Oral Arg. 47 (counsel for the Government acknowledged that if there is a "serious [Rule 11(c)(1)] error," and the defendant pleads guilty "right after that," the error would likely qualify as prejudicial). Our essential point is that particular facts and circumstances matter. Three months distanced the *in camera* meeting with the Magistrate Judge from Davila's appearance before the District Judge who examined and accepted his guilty plea and later sentenced him. Nothing in the record shows that the District Judge knew of the *in camera* hearing. After conducting an exemplary Rule 11 colloquy, the judge inquired: "Mr. Davila, has anyone forced or pressured you to plead guilty today?," to which Davila responded: "No, sir." App. 122. At the time of the

plea hearing, there was no blending of judicial and prosecutorial functions.

Given the opportunity to raise any questions he might have about matters relating to his plea, Davila simply affirmed that he wished to plead guilty to the conspiracy count. When he later explained why he elected to plead guilty, he said nothing of the Magistrate Judge's exhortations. Instead, he called the decision "strategic," designed to get the prosecutor to correct misinformation about the conspiracy count. *Id.*, at 58–59, 61. Rather than automatically vacating Davila's guilty plea because of the Rule 11(c)(1) violation, the Court of Appeals should have considered whether it was reasonably probable that, but for the Magistrate Judge's exhortations, Davila would have exercised his right to go to trial. In answering that question, the Magistrate Judge's comments should be assessed, not in isolation, but in light of the full record.

IV

The Court of Appeals did not engage in that full-record assessment here. Rather, the court cut off consideration of the particular facts of Davila's case upon concluding that the Magistrate Judge's comments violated Rule 11(c)(1). That pretermission kept the court from reaching case-specific arguments raised by the parties, including the Government's assertion that Davila was not prejudiced by the Magistrate Judge's comments, and Davila's contention that the extraordinary circumstances his case presents should allow his claim to be judged under the harmless-error standard of Rule 52(a) rather than the plain-error standard of Rule 52(b), the Rule that ordinarily attends a defendant's failure to object to a Rule 11 violation. See *supra*, at 606; 664 F. 3d, at 1358 (citing *United States* v. *Moriarty*, 429 F. 3d 1012, 1019 (CA11 2005) (*per curiam*)). Having explained why automatic vacatur of a guilty plea is incompatible with Rule 11(h), see *supra*, at 610–611 and this page, we leave all remaining issues to be addressed by the Court of Appeals on remand.

* * *

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

It is so ordered.

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

I agree with the Court that a defendant must be prejudiced by a Rule 11(c)(1) error to obtain relief. That is because the text of Federal Rule of Criminal Procedure 11(h) says exactly that, in words whose meaning is crystal clear: "Harmless error. A variance from the requirements of *this rule* is harmless error if it does not affect substantial rights." (Emphasis added.) As the Court recognizes, this rule "calls for across-the-board application of the harmless-error prescription (or, absent prompt objection, the plain-error rule)." *Ante*, at 610. That is the beginning and the end of this case. We should not rely on the notes of the Advisory Committee to unearth Rule 11's alleged design, for "[t]he Committee's view is not authoritative" and the text of the Rule conclusively resolves the question before us. See *Black* v. *United States*, 561 U. S. 465, 475 (2010) (SCALIA, J., concurring in part and concurring in judgment).

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TARRANT REGIONAL WATER DISTRICT *v.* HERRMANN ET AL.

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

No. 11–889. Argued April 23, 2013—Decided June 13, 2013

The Red River Compact (or Compact) is a congressionally sanctioned agreement that allocates water rights within the Red River basin among the States of Oklahoma, Texas, Arkansas, and Louisiana. The area it governs is divided into five separate subdivisions called "Reaches," each of which is further divided into smaller "subbasins." At issue here are rights under the Compact to water located in Oklahoma's portion of Reach II, subbasin 5. In Reach II, the Compact—recognizing that Louisiana lacks suitable reservoir sites to store water during high flow periods and that the upstream States (Texas, Oklahoma, and Arkansas) were unwilling to release their own stored water for the benefit of a downstream State—granted control over the water in four upstream subbasins (subbasins 1 through 4) to the States in which each subbasin is located and required that water in a fifth subbasin, subbasin 5, be allowed to flow to Louisiana at certain minimum levels. Section 5.05(b)(1) of the Compact gives the States "equal rights" to the use of subbasin 5's waters when the flow is 3,000 cubic feet per second (CFS) or more, "provided no state is entitled to more than 25 percent of the water in excess of 3,000 [CFS]." Under the Compact, States are also entitled to continue with their intrastate water administration.

Petitioner Tarrant Regional Water District (Tarrant) is a Texas state agency responsible for providing water to north-central Texas and its rapidly growing population. After unsuccessfully attempting to purchase water from Oklahoma and others, Tarrant sought a water resource permit from the Oklahoma Water Resources Board (OWRB), respondents here, to take surface water from a tributary of the Red River at a point located in Oklahoma's portion of subbasin 5 of Reach II. Knowing that the OWRB would likely deny its permit application because of Oklahoma water laws that effectively prevent out-of-state applicants from taking or diverting water from within Oklahoma's borders, Tarrant filed suit in federal court simultaneously with its permit application, seeking to enjoin the OWRB's enforcement of the state statutes on grounds that they were pre-empted by federal law in the form of the Compact and violated the Commerce Clause by discriminating against

interstate commerce in water. The District Court granted summary judgment for the OWRB, and the Tenth Circuit affirmed.

Held:

1. The Compact does not pre-empt the Oklahoma water statutes. Pp. 626–639.

(a) Tarrant claims that § 5.05(b)(1) creates a borderless common in subbasin 5 in which each of the signatory States may cross each other's boundaries to access a shared pool of water. Tarrant observes that § 5.05(b)(1)'s "equal rights" language grants each State an equal entitlement to subbasin 5's waters, subject to a 25-percent cap, and argues that its silence concerning state lines indicates that the Compact's drafters did not intend the provision to allocate water according to state borders. The OWRB counters that § 5.05(b)(1)'s "equal rights" afford each State an equal opportunity to use subbasin 5's excess water within each State's own borders, but that its silence on cross-border rights indicates that the Compact's drafters had no intention to create any such rights in the signatory States. Pp. 626–628.

(b) Because interstate compacts are construed under contract-law principles, see *Texas* v. *New Mexico*, 482 U. S. 124, 128, the Court begins by examining the Compact's express terms as the best indication of the parties' intent. However, § 5.05(b)(1)'s silence is, at the very least, ambiguous regarding cross-border rights under the Compact, so the Court turns to other interpretive tools to shed light on the drafters' intent. Three things persuade the Court that the Compact did not grant cross-border rights: the well-established principle that States do not easily cede their sovereign powers; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing. Pp. 628–638.

(1) The sovereign States possess an "absolute right to all their navigable waters and the soils under them for their own common use." *Martin* v. *Lessee of Waddell*, 16 Pet. 367, 410. So, for example, "'[a] court deciding a question of title to [a] bed of navigable water [within a State's boundaries] must . . . begin with a strong presumption' against defeat of a State's title." *United States* v. *Alaska*, 521 U. S. 1, 34. It follows, then, that "[i]f any inference at all is to be drawn from" silence in compacts touching on the States' authority to control their waters, "it is that each State was left to regulate the activities of her own citizens." *Virginia* v. *Maryland*, 540 U. S. 56, 67. Tarrant contends that § 5.05(b)(1)'s silence infers that the signatory States dispensed with the core state prerogative to control water within its borders. But since States rarely relinquish their sovereign powers, the better understanding is that there would be a clear indication of such devolution, not

inscrutable silence. Tarrant counters that its interpretation would not intrude on any sovereign prerogative of Oklahoma, which would retain its authority to regulate the water within its borders. But adopting Tarrant's reading would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over their waters when they agreed to the Compact. Pp. 631–633.

(2) Looking to the customary practices employed in other interstate compacts also helps in ascertaining the parties' intent. See, *e. g.*, *Alabama* v. *North Carolina*, 560 U. S. 330, 341. Many compacts feature unambiguous language permitting signatory States to cross each other's borders to fulfill obligations under the compacts, and many provide for the terms and mechanics of how such relationships will operate. The absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the agreement. Tarrant claims that not all interstate compacts have such explicit language, but cites only one such compact, and even it sets out a detailed scheme that would apply to any contemplated diversions. Similarly, even if § 2.05(d) of the Compact, which gives "[e]ach Signatory State . . . the right to" "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact," is read to establish cross-border diversions, it does so through express language, not through an inference from silence. Pp. 633–636.

(3) The parties' conduct under the Compact also undermines Tarrant's position. See *Alabama* v. *North Carolina*, 560 U. S., at 346. Once the Compact was approved in 1980, no signatory State pressed for a cross-border diversion until Tarrant filed suit in 2007. And Tarrant's earlier offer to purchase water from Oklahoma was a strange decision if Tarrant believed the Compact entitled it to demand water without payment. Nor is there any indication that Tarrant, any other Texas agency, or Texas itself previously made any mention of cross-border rights within the Compact; and none of the other signatory States has ever made such a claim. Pp. 636–637.

(4) Tarrant's remaining arguments—that its interpretation is necessary to realize the "structure and purpose of Reach II"; and that § 5.05(b)(1)'s 25-percent cap on each State's access to subbasin 5's excess water implies that if a State cannot access sufficient water within its borders to meet the cap, it must be able to cross borders to reach that water—are unpersuasive. Pp. 637–638.

2. The Oklahoma water statutes also do not run afoul of the Commerce Clause. Tarrant claims that the statutes discriminate against interstate commerce by preventing water left unallocated under the Compact from being distributed out of State. But Tarrant's assumption

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that some water is left "unallocated" is incorrect. The interpretive comment for Article V of the Compact makes clear that when the flow is above 3,000 CFS, "all states are free to use whatever amount of water they can put to beneficial use," subject to the requirement that if the amount of available water cannot satisfy all of those uses, "each state will honor the other's right to 25% of the excess flow." If more than 25 percent of subbasin 5's water is located in Oklahoma, that water is not "unallocated"; rather, it is allocated to Oklahoma unless and until another State calls for an accounting and Oklahoma is asked to refrain from utilizing more than its entitled share. Pp. 639–640.

656 F. 3d 1222, affirmed.

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

Charles A. Rothfeld argued the cause for petitioner. With him on the briefs were *Timothy S. Bishop*, *Michael B. Kimberly*, *Kevin L. Patrick*, *Scott C. Miller*, *Clyde A. Muchmore*, *Harvey D. Ellis*, and *L. Mark Walker*.

Ann O'Connell argued the cause for the United States as *amicus curiae* urging vacatur. With her on the brief were *Solicitor General Verrilli*, *Assistant Attorney General Moreno*, *Deputy Solicitor General Kneedler*, and *Mary Gabrielle Sprague*.

Lisa S. Blatt argued the cause for respondents. With her on the brief were *E. Scott Pruitt*, Attorney General of Oklahoma, *Patrick R. Wyrick*, Solicitor General, *Andrew T. Karron*, *R. Reeves Anderson*, and *Charles T. DuMars*.*

*Briefs of *amici curiae* urging reversal were filed for the State of Texas by *Greg Abbott*, Attorney General of Texas, *Evan S. Greene*, Assistant Solicitor General, *Daniel T. Hodge*, First Assistant Attorney General, and *Jonathan F. Mitchell*, Solicitor General; for the City of Arlington, Texas, et al. by *Mark T. Stancil*; for the City of Dallas, Texas, by *Thomas C. Goldstein*, *Kevin R. Amer*, *Thomas P. Perkins, Jr.*, and *Christopher D. Bowers*; for the City of Irving, Texas, et al. by *Douglas G. Caroom* and *Dale E. Cottingham*; for the Fort Worth Chamber of Commerce et al. by *Erik S. Jaffe*; for the North Texas Commission by *Michael J. Booth*; for the North Texas Municipal Water District by *R. Lambeth Townsend*; for the Texas Water Conservation Association by *Andrew S. Miller*; for the Upper Trinity Regional Water District by *Patrick O. Waddel*, *J. David*

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Red River Compact (or Compact), 94 Stat. 3305, allocates water rights among the States within the Red River basin as it winds through Texas, Oklahoma, Arkansas, and Louisiana. Petitioner Tarrant Regional Water District (Tarrant), a Texas agency, claims that it is entitled to acquire water under the Compact from within Oklahoma and that therefore the Compact pre-empts several Oklahoma statutes that restrict out-of-state diversions of water. In the alternative, Tarrant argues that the Oklahoma laws are unconstitutional restrictions on interstate commerce. We hold that Tarrant's claims lack merit.

Jorgenson, and *G. Steven Stidham*; and for Olen Paul Matthews et al. by *Joel D. Bertocchi*.

Briefs of *amici curiae* urging affirmance were filed for the State of Colorado et al. by *John Suthers*, Attorney General of Colorado, *Daniel D. Domenico*, Solicitor General, *Frederick R. Yarger*, Assistant Solicitor General, *Casey Shpall*, Deputy Attorney General, *Karen Kwon*, First Assistant Attorney General, and *Shanti Rosset O'Donovan*, Assistant Attorney General, and by the Attorneys General and other officials for their respective States as follows: *Lawrence G. Wasden*, Attorney General of Idaho, *Gregory F. Zoeller*, Attorney General of Indiana, *Bill Schuette*, Attorney General of Michigan, *Catherine Cortez Masto*, Attorney General of Nevada, *Gary K. King*, Attorney General of New Mexico, and *Stephen R. Farris*, Assistant Attorney General, and *John E. Swallow*, Attorney General of Utah; for the State of Louisiana et al. by *James D. "Buddy" Caldwell*, Attorney General of Louisiana, *Ryan M. Seidemann* and *Megan K. Terrell*, Assistant Attorneys General, and *Sam Kalen*, and by *Dustin McDaniel*, Attorney General of Arkansas, *Charles L. Moulton*, Senior Assistant Attorney General, and *Kendra Akin Jones*, Assistant Attorney General; for the City of Oklahoma City et al. by *Brian M. Nazarenus* and *Susan M. Ryan*; for the Chickasaw and Choctaw Nations by *Michael Burrage*, *Bob Rabon*, *Douglas B. L. Endreson*, and *Stephen H. Greetham*; for the Oklahoma Independent Petroleum Association by *L. William Staudenmaier*; for Oklahomans for Responsible Water Policy by *Larry Derryberry* and *Jason Aamodt*; for Professors of Law and Political Science by *Kannon K. Shanmugam* and *James M. McDonald*; and for the Republican River Water Conservation District et al. by *David W. Robbins*, *Dennis M. Montgomery*, and *Peter J. Ampe*.

I

A

The Red River (or River) begins in the Llano Estacado Mesa on the border between New Mexico and Texas. From this broad plain, it first runs through the Texas Panhandle and then marks the border between Texas and Oklahoma. It continues in an easterly direction until it reaches the shared border with Arkansas. Once the River enters Arkansas, it turns southward and flows into Louisiana, where it empties into the Mississippi and Atchafalaya Rivers.

As an important geographic feature of this region, the Red River has lent its name to a valley, a Civil War campaign, and a famed college football rivalry between the Longhorns of Texas and the Sooners of Oklahoma. But college pride has not been the only source of controversy between Texas and Oklahoma regarding the Red River. The River has been the cause of numerous historical conflicts between the two States, leading to a mobilization of their militias at one time, *Oklahoma* v. *Texas*, 258 U. S. 574, 580 (1922), and the declaration of martial law along a stretch of the River by Oklahoma Governor "Alfalfa Bill" Murray at another, see Okla. H. Res. 1121, 50th Leg., 2d Sess. (2006) (resolution commemorating "Alfalfa Bill" Murray's actions during the "Red River Bridge War"). Such disputes over the River and its waters are a natural result of the River's distribution of water flows. The River's course means that upstream States like Oklahoma and Texas may appropriate substantial amounts of water from both the River and its tributaries to the disadvantage of downstream States like Arkansas and especially Louisiana, which lacks sufficiently large reservoirs to store water.

Absent an agreement among the States, disputes over the allocation of water are subject to equitable apportionment by the courts, *Arizona* v. *California*, 460 U. S. 605, 609 (1983), which often results in protracted and costly legal pro-

ceedings. Thus in 1955, to forestall future disputes over the River and its water, Congress authorized the States of Arkansas, Louisiana, Oklahoma, and Texas to negotiate a compact to apportion the water of the Red River basin among themselves. See Act of Aug. 11, 1955, Pub. L. 346, 69 Stat. 654. These negotiations lasted over 20 years and finally culminated in the signing of the Red River Compact in 1978. Congress approved the Compact in 1980, transforming it into federal law. See Act of Dec. 22, 1980, 94 Stat. 3305; Compact, 1 App. 7–51.

One of the Compact's principal purposes was "[t]o provide an equitable apportionment among the Signatory States of the water of the Red River and its tributaries." § 1.01(b), *id.*, at 9. The Compact governs the allocation of water along the Red River and its tributaries from the New Mexico and Texas border to its terminus in Louisiana. §§ 2.12(a)–(e), *id.*, at 13. This stretch is divided into five separate subdivisions called "Reach[es]," *ibid.*, each of which is further divided into smaller "subbasins," see, *e. g.*, §§ 5.01–5.05, *id.*, at 22–26 (describing subbasins 1 through 5 of Reach II). (See Appendix A, *infra*, for a map.)

At issue in this case are rights under the Compact to water located in Oklahoma's portion of subbasin 5 of Reach II, which occupies "that portion of the Red River, together with its tributaries, from Denison Dam down to the Arkansas-Louisiana state boundary, excluding all tributaries included in the other four subbasins of Reach II." § 5.05(a), 1 App. 24–25. (See Appendix B, *infra*, for a map.) The Compact's interpretive comments[1] explain that during negotiations, Reach II posed the greatest difficulty to the parties' efforts to reach agreement. Comment on Art. V, 1 App. 27. The problem was that Louisiana, the farthest downstream State,

[1] Interpretive comments were included in the Compact so that future readers "might be apprised of the intent of the Compact Negotiating Committee with regard to each Article of the Compact." Compact, Comment on Preamble, 1 App. 9.

lacks suitable reservoir sites and therefore cannot store water during high flow periods to meet its future needs. The upstream States (Texas, Oklahoma, and Arkansas), which control the River's flow, were unwilling to release water stored within their own reservoirs for the benefit of any downstream States, like Louisiana. Without any such release, there would be no guaranteed flow of water to Louisiana.

The provisions of the Compact relating to Reach II were crafted to address this problem. To this end, Reach II was divided into five subbasins. The upstream subbasins, numbered 1 through 4, were drawn to end at "existing, authorized or proposed last downstream major damsites," see, *e. g.*, § 5.01(a), *id.*, at 22, on the tributaries leading to the Red River before reaching the main stem of the River. These dams allow the parties managing them to control water along the tributaries before it travels farther downstream and joins the flow of the main stem of the River. For the most part, the Compact granted control over the water in these subbasins to the States in which each subbasin is located.[2] The remaining subbasin, subbasin 5, instead requires that water be allowed to flow to Louisiana through the main stem of the River at certain minimum levels, assuring Louisiana an allocation of the River's waters and solving its flowthrough problem.

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[2] Within subbasins 1, 2, and 4, water was fully apportioned to a single State. See Compact § 5.01(b), *id.*, at 22 (apportioning water of subbasin 1 and its "unrestricted use" to Oklahoma); § 5.02(b), *id.*, at 23 (same for Texas with respect to subbasin 2); § 5.04(b), *id.*, at 24 (same for Texas with respect to subbasin 4). Only subbasin 3, which includes portions of Oklahoma and Arkansas, breaks from this pattern and was divided along the lines of a 60-to-40 split, with both States having "free and unrestricted use of the water of this subbasin within their respective states, subject, however, to the limitation that Oklahoma shall allow a quantity of water equal to the 40 percent of the total runoff originating below the following existing, authorized or proposed last major downstream damsites in Oklahoma to flow into Arkansas." § 5.03(b), *id.*, at 23–24.

The provision of the Compact central to the present dispute is § 5.05(b)(1), which sets the following allocation during times of normal flow:

> "(1) The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 cubic feet per second [hereinafter CFS] or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 [CFS]."[3] *Id.*, at 25.

In these normal circumstances (*i. e.*, when flows at the Arkansas-Louisiana border are above 3,000 CFS), this provision and its interpretive comment make clear that "all states are free to use whatever amount of water they can put to beneficial use." Comment on Art. V, *id.*, at 30. But if the amount of water above 3,000 CFS cannot satisfy all such uses, then "each state will honor the other's right to 25% of the excess flow." *Ibid.* However, when the flow of the River diminishes at the Arkansas-Louisiana border, the upstream States must permit more water to reach Louisiana.[4]

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[3] The Compact defines "undesignated water" as "all water released from storage other than 'designated water.'" § 3.01(l), *id.*, at 17. "[D]esignated water" means "water released from storage, paid for by non-Federal interests, for delivery to a specific point of use or diversion." § 3.01(k), *ibid.*

[4] In such circumstances, the two relevant paragraphs provide:

"(2) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary is less than 3,000 [CFS], but more than 1,000 [CFS], the States of Arkansas, Oklahoma, and Texas shall allow to flow into the Red River for delivery to the State of Louisiana a quantity of water equal to 40 percent of the total weekly runoff originating in subbasin 5 and 40 percent of undesignated water flowing into subbasin 5; provided, however, that this requirement shall not be interpreted to require any state to release stored water.

"(3) Whenever the flow of the Red River at the Arkansas-Louisiana state boundary falls below 1,000 [CFS], the States of Arkansas, Oklahoma, and Texas shall allow a quantity of water equal to all the weekly runoff

Subbasin 5's allocation scheme allows upstream States to keep the water that they have stored, but also ensures that Louisiana will receive a steady supply of water from the Red River, with each upstream State contributing during times of low flow.

To ensure that its apportionments are honored, the Compact includes an accounting provision, but an accounting is not mandatory "until one or more affected states deem the accounting necessary." § 2.11, *id.*, at 13; see Comment on Art. II, *id.*, at 15–16. This is because the "extensive gaging and record keeping required" to carry out such an accounting would impose "a significant financial burden on the involved states." *Id.*, at 16. Given these costs, the signatory States did "not envisio[n] that it w[ould] be undertaken as a routine matter." *Ibid.* Indeed, it appears that no State has ever asked for such an accounting in the Compact's history. See Brief for Respondents 45; Reply Brief 11–12.

While the Compact allocates water rights among its signatories, it also provides that it should not "be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriation, use, and control of water, or quality of water, not inconsistent with its obligations under this Compact." § 2.10, 1 App. 12. Rather, "[s]ubject to the general constraints of water availability and the apportionment of the Compact, each state [remains] free to continue its existing internal water administration." Comment on Art. II, *id.*, at 14. Even during periods of water shortage, "no attempt is made to specify the steps that will be taken [by States to ensure water deliveries]; it is left to the state's internal water administration." *Ibid.*

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originating in subbasin 5 and all undesignated water flowing into subbasin 5 within their respective states to flow into the Red River as required to maintain a 1,000 [CFS] flow at the Arkansas-Louisiana state boundary." § 5.05(b), *id.*, at 25.

B

In the years since the Red River Compact was ratified by Congress, the region's population has increased dramatically. In particular, the population of the Dallas-Fort Worth metropolitan area in north Texas has grown from roughly 5.1 million inhabitants in 2000 to almost 6.4 million in 2010, a jump of over 23 percent and among the largest in the United States during this period. See Dept. of Commerce, Census Bureau, P. Mackun & S. Wilson, Population Distribution and Change: 2000 to 2010 (Mar. 2011). This growth has strained regional water supplies, and north Texas' need for water has been exacerbated in recent years by a long and costly drought. See generally Galbraith, A Drought More Than Texas-Size, International Herald Tribune, Oct. 31, 2011, p. 20.

Against this backdrop, petitioner Tarrant, a Texas state agency responsible for providing water to north-central Texas (including the cities of Fort Worth, Arlington, and Mansfield), has endeavored to secure new sources of water for the area it serves. From 2000 to 2002, Tarrant, along with several other Texas water districts, offered to purchase water from Oklahoma and the Choctaw and Chickasaw Nations. See 2 App. 336–382. But these negotiations were unsuccessful and Tarrant eventually abandoned these efforts.

Because Texas' need for water only continued to grow, Tarrant settled on a new course of action. In 2007, Tarrant sought a water resource permit from the Oklahoma Water Resources Board (OWRB),[5] respondents here, to take

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[5] Under § 2.10 of the Compact each signatory State retains "the right or power . . . to regulate within its boundaries the appropriation, use, and control of water." *Id.*, at 12. Thus, the Compact does not expressly preempt any state laws that address the control of water. Oklahoma law, in turn, requires that any "state or federal governmental agency" that "intend[s] to acquire the right to the beneficial use of any water" in Oklahoma must apply to the OWRB for "a permit to appropriate" water before "commencing any construction" or "taking [any water] from any constructed works." Okla. Stat., Tit. 82, § 105.9 (West 2011).

310,000 acre-feet[6] per year of surface water from the Kiamichi River, a tributary of the Red River located in Oklahoma. Tarrant proposed to divert the Kiamichi River, at a point located in subbasin 5 of Reach II, before it discharges into the Red River and, according to Tarrant, becomes too saline for potable use.

Tarrant knew, however, that Oklahoma would likely deny its permits because various state laws (collectively, the Oklahoma water statutes) effectively prevent out-of-state applicants from taking or diverting water from within Oklahoma's borders. These statutes include a requirement that the OWRB consider, when evaluating an application to take water out of State, whether that water "could feasibly be transported to alleviate water shortages in the State of Oklahoma." Okla. Stat., Tit. 82, § 105.12(A)(5). The statutes also require that no permit issued by the OWRB to use water outside of the State shall "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact." § 105.12A(B)(1). A separate provision creates a permitting review process that applies only to out-of-state water users. § 105.12(F). Oklahoma also requires legislative approval for out-of-state water-use permits, § 105.12A(D), and further provides that "[w]ater use within Oklahoma . . . be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state," § 1086.1(A)(3). Interpreting these laws, Oklahoma's attorney general has concluded that "we consider the proposition unrealistic that an out-of-state user is a proper permit applicant before the [OWRB]" because "[w]e can find no intention to create the possibility that such a valuable resource as water may be-

[6] An acre-foot is equivalent to the volume of one acre of surface area filled to a depth of one foot. Webster's Third New International Dictionary 19 (1966).

come bound, without compensation, to use by an out-of-state user." 1 App. 118.

When Tarrant filed its permit application, it also filed suit against respondents in Federal District Court. As relevant here, Tarrant sought to enjoin enforcement of the Oklahoma water statutes by the OWRB. Tarrant argued that the statutes, and the interpretation of them adopted by Oklahoma's attorney general, were pre-empted by federal law and violated the Commerce Clause by discriminating against interstate commerce in water.

The District Court granted summary judgment for the OWRB on both of Tarrant's claims. See No. CIV–07–0045–HE, 2010 WL 2817220, *4 (WD Okla., July 16, 2010); No. CIV–07–0045–HE (WD Okla., Nov. 18, 2009), App. to Pet. for Cert. 72a–73a, 2009 WL 3922803, *8. The Tenth Circuit affirmed. 656 F. 3d 1222, 1250 (2011).[7]

We granted Tarrant's petition for a writ of certiorari, 568 U. S. 1081 (2013), and now affirm the judgment of the Tenth Circuit.

II

A

Tarrant claims that under § 5.05(b)(1) of the Compact, it has the right to cross state lines and divert water from Oklahoma located in subbasin 5 of Reach II and that the Oklahoma water statutes interfere with its ability to exercise that right. Section 5.05(b)(1) provides:

> "The Signatory States shall have equal rights to the use of runoff originating in subbasin 5 and undesignated water flowing into subbasin 5, so long as the flow of the Red River at the Arkansas-Louisiana state boundary is 3,000 [CFS] or more, provided no state is entitled to more than 25 percent of the water in excess of 3,000 [CFS]." 1 App. 25.

[7] The parties have stipulated that OWRB will not take action on Tarrant's application until this litigation has concluded. Brief for Petitioner 16.

In Tarrant's view, this provision essentially creates a borderless common in which each of the four signatory States may cross each other's boundaries to access a shared pool of water. Tarrant reaches this interpretation in two steps. First, it observes that § 5.05(b)(1)'s "equal rights" language grants each State an equal entitlement to the waters of subbasin 5, subject to a 25-percent cap. Second, Tarrant argues § 5.05(b)(1)'s silence concerning state lines indicates that the Compact's drafters did not intend to allocate water according to state borders in this section. According to Tarrant, "the '25 percent' language [of § 5.05(b)(1)] makes clear that, in exercising its 'equal rights' to the common pool of water, no State may take more than a one-quarter *share*," Reply Brief 3, but any of the signatory States may "cross state lines to obtain [its] shar[e] of Subbasin 5 waters," Brief for Petitioner 32.

The OWRB disputes this reading. In its view, the "equal rights" promised by § 5.05(b)(1) afford each State an equal opportunity to make use of the excess water within subbasin 5 of Reach II but only within each State's own borders. This is because the OWRB reads § 5.05(b)(1)'s silence differently from Tarrant. The OWRB interprets that provision's absence of language granting any cross-border rights to indicate that the Compact's drafters had no intention to create any such rights in the signatory States.

Unraveling the meaning of § 5.05(b)(1)'s silence with respect to state lines is the key to resolving whether the Compact pre-empts the Oklahoma water statutes.[8] If

[8] The Compact Clause of the Constitution provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." Art. I, § 10, cl. 3. Accordingly, before a compact between two States can be given effect it must be approved by Congress. See *Virginia* v. *Maryland*, 540 U. S. 56, 66 (2003). Once a compact receives such approval, it is "transform[ed] . . . into a law of the United States." *Ibid.* (internal quotation marks omitted). The Supremacy Clause, Art. VI, cl. 2, then ensures that a congressionally approved compact, as a federal law, pre-empts any state law that conflicts with the

§ 5.05(b)(1)'s silence means that state borders are irrelevant to the allocation of water in subbasin 5 of Reach II, then the Oklahoma water laws at issue conflict with the cross-border rights created by federal law in the form of the Compact and must be pre-empted. But if § 5.05(b)(1)'s silence instead reflects a background understanding on the part of the Compact's drafters that state borders were to be respected within the Compact's allocation, then the Oklahoma statutes do not conflict with the Compact's allocation of water.

B

Interstate compacts are construed as contracts under the principles of contract law. *Texas* v. *New Mexico*, 482 U. S. 124, 128 (1987). So, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties, see also *Montana* v. *Wyoming*, 563 U. S. 368, 375, and n. 4, 386–387 (2011); Restatement (Second) of Contracts § 203(b) (1979).

Tarrant argues that because other provisions of the Compact reference state borders, § 5.05(b)(1)'s silence with respect to state lines must mean that the Compact's drafters intended to permit cross-border diversions. For example, § 5.03(b), which governs subbasin 3 of Reach II, provides that

> "[t]he States of Oklahoma and Arkansas shall have free and unrestricted use of the water of this subbasin *within their respective states*, subject, however, to the limitation that Oklahoma shall allow a quantity of water equal to . . . 40 percent of the total runoff originating below the following existing, authorized or proposed last major downstream damsites in Oklahoma to flow into Arkansas." 1 App. 23–24 (emphasis added).

Section 6.03(b), which covers subbasin 3 of Reach III, similarly provides that "Texas and Louisiana *within their respec-*

Compact. See *Fidelity Fed. Sav. & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 152–153 (1982).

tive boundaries shall each have the unrestricted use of the water of this subbasin subject to the following [conditions]." *Id.*, at 33 (emphasis added). Thus, § 5.03(b) and § 6.03(b) mimic § 5.05(b)(1) in allocating water rights within a subbasin, but differ in that they make explicit reference to water use "within" state boundaries. Relying on the *expressio unius* canon of construction, Tarrant finds that § 5.05(b)'s silence regarding borders is significant because "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed [that] Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Brief for Petitioner 29 (quoting *Russello* v. *United States*, 464 U. S. 16, 23 (1983)).

But Tarrant's argument fails to account for other sections of the Compact that cut against its reading. For example, § 5.05(b)(3), which governs the waters of subbasin 5 in Reach II when flows are below 1,000 CFS, requires that during such periods, Arkansas, Texas, and Oklahoma allow water "*within their respective states* to flow into the Red River as required to maintain a 1,000 [CFS] flow at the Arkansas-Louisiana state boundary." 1 App. 25 (emphasis added). Obviously none of the upstream States can redirect water that lies outside of their borders, so the phrase "within their respective states" is superfluous in § 5.05(b)(3). In contrast, § 5.05(b)(2), which governs when the River's flow at the Arkansas-Louisiana border is above 1,000 CFS but below 3,000 CFS, requires that upstream States allow a flow to Louisiana equivalent to 40 percent of total weekly runoff originating within the subbasin and 40 percent of undesignated water flowing into subbasin 5 of Reach II. *Id.*, at 25. This language can only refer to water within each State's borders because otherwise *each* State would have to contribute 40 percent to the total water flow, which would add up to more than 100 percent. Read together and to avoid absurd results, §§ 5.05(b)(2) and (3) suggest that each upstream

State is individually responsible for ensuring that sufficient subbasin 5 water located *within its respective* borders flows down to Louisiana, even though § 5.05(b)(2) lacks any explicit reference to state lines.

Applying Tarrant's understanding of § 5.05(b)(1)'s silence regarding state lines to other of the Compact's provisions would produce further anomalous results. Consider § 6.01(b). That provision states that "Texas is apportioned sixty (60) percent of the runoff of [subbasin 1 of Reach III] and shall have unrestricted use thereof; Arkansas is entitled to forty (40) percent of the runoff of this subbasin." *Id.*, at 32. Because Texas is upstream from Arkansas, water flows from Texas to Arkansas. Given this situation, the commonsense reason for § 6.01(b)'s 60-to-40 allocation is to prevent Texas from barring the flow of water to Arkansas. While there is no reference to state boundaries in the section's text, the unstated assumption underlying this provision is that Arkansas must wait for its 40-percent share to go through Texas before it can claim it. But applying Tarrant's understanding of silence regarding state borders to this section would imply that Arkansas could enter into Texas without having to wait for the water that will inevitably reach it. This counterintuitive outcome would thwart the self-evident purposes of the Compact. Further, other provisions of the Compact share this structure of allocating a proportion of water that will flow from an upstream State to a downstream one.[9] Accepting Tarrant's reading would upset the balance struck by all these sections.

At the very least, the problems that arise from Tarrant's proposed reading suggest that § 5.05(b)(1)'s silence is ambig-

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[9] See Compact § 4.01(b), 1 App. 18 ("The annual flow within this subbasin is hereby apportioned sixty (60) percent to Texas and forty (40) percent to Oklahoma"); § 6.02(b), *id.*, at 32 ("Arkansas is apportioned sixty (60) percent of the runoff of this subbasin and shall have unrestricted use thereof; Louisiana is entitled to forty (40) percent of the runoff of this subbasin").

uous regarding cross-border rights under the Compact. We therefore turn to other interpretive tools to shed light on the intent of the Compact's drafters. See *Oklahoma* v. *New Mexico*, 501 U. S. 221, 235, n. 5 (1991).[10] Three things persuade us that cross-border rights were not granted by the Compact: the well-established principle that States do not easily cede their sovereign powers, including their control over waters within their own territories; the fact that other interstate water compacts have treated cross-border rights explicitly; and the parties' course of dealing.

1

The background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts. We have long understood that as sovereign entities in our federal system, the States possess an "absolute right to all their navigable waters and the soils under them for their own common use." *Martin* v. *Lessee of Waddell*, 16 Pet. 367, 410 (1842). Drawing on this principle, we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, "is an essential attribute of sovereignty," *United States* v. *Alaska*, 521 U. S. 1, 5 (1997). Consequently, "'[a] court deciding a question of title to [a] bed of navigable water [within a State's boundaries] must . . . begin with a strong presumption' against defeat of a State's title." *Id.*, at 34 (quoting *Montana* v. *United States*, 450 U. S. 544, 552

[10] There is, however, one interpretive tool that is inapplicable here: the presumption against pre-emption. The Court of Appeals repeatedly referenced and relied upon the presumption in its opinion. See 656 F. 3d 1222, 1239, 1242, 1245–1246 (CA10 2011). Yet the presumption against pre-emption is rooted in "respect for the States as 'independent sovereigns in our federal system'" and "assume[s] that 'Congress does not cavalierly pre-empt'" state laws. *Wyeth* v. *Levine*, 555 U. S. 555, 565–566, n. 3 (2009). When the States themselves have drafted and agreed to the terms of a compact, and Congress' role is limited to approving that compact, there is no reason to invoke the presumption.

(1981)). See also *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 174 (2001); *Utah Div. of State Lands* v. *United States*, 482 U. S. 193, 195 (1987).

Given these principles, when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that "[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Virginia* v. *Maryland*, 540 U. S. 56, 67 (2003). Cf. *New Jersey* v. *New York*, 523 U. S. 767, 783, n. 6 (1998) ("[T]he silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify").

Tarrant asks us to infer from § 5.05(b)(1)'s silence regarding state borders that the signatory States have dispensed with the core state prerogative to control water within their own boundaries.[11] But as the above demonstrates, States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence. We think that the better understanding of § 5.05(b)(1)'s silence is that the parties drafted the Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the Compact.

In response, Tarrant contends that its interpretation would not intrude on any sovereign prerogative of Oklahoma because that State would retain its authority to regulate the

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[11] Of course, the power of States to control water within their borders may be subject to limits in certain circumstances. For example, those imposed by the Commerce Clause. See *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941, 954–958 (1982). Here we deal only with whether the parties' silence on state boundaries in the allocation of water under a compact suggests that borders are irrelevant for that allocation. And Tarrant has not raised any Commerce Clause challenge to Oklahoma's control of the water allocated to it by the Compact.

water within its borders. Because anyone seeking water from Oklahoma would still have to apply to the OWRB, receive a permit, and abide by its conditions, Tarrant argues that Oklahoma's sovereign authority remains untouched by its interpretation. But Tarrant cannot have it both ways. Adopting Tarrant's reading would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over the water within their borders when they agreed to the Compact. Given the background principles we have described above, we find this unlikely to have been the intent of the Compact's signatories.

2

Looking to the customary practices employed in other interstate compacts also helps us to ascertain the intent of the parties to this Compact. See *Alabama* v. *North Carolina*, 560 U. S. 330, 341 (2010); *Oklahoma*, 501 U. S., at 235, n. 5; *Texas* v. *New Mexico*, 462 U. S. 554, 565 (1983). See also Restatement (Second) of Contracts § 203(b) (explaining that "usage of trade" may be relevant in interpreting a contract). Many of these other compacts feature language that unambiguously permits signatory States to cross each other's borders to fulfill obligations under the compacts. See, *e. g.*, Amended Bear River Compact, Art. VIII(A), 94 Stat. 12 ("[N]o State shall deny the right of another signatory State . . . to acquire rights to the use of water . . . in one State for use of water in another").[12] The absence of comparable

[12] See also Amended Costilla Creek Compact, Art. III(2), 77 Stat. 353 ("Each State grants for the benefit of the other . . . the rights . . . in one State for use in the other"); Klamath River Basin Compact, Art. V(A), 71 Stat. 500 ("Each state hereby grants for the benefit of the other . . . the right . . . in one state for use in the other"); Snake River Compact, Art. VIII(A), 64 Stat. 32 ("[N]either State shall deny the right of the other State to acquire rights to the use of water . . . in one State for use in the other"); South Platte River Compact, Art. VI(1), 44 Stat. 198 ("Colorado consents that Nebraska and its citizens may . . . divert water from the South Platte River within Colorado for use in Nebraska"); Upper Colorado

language in the Red River Compact counts heavily against Tarrant's reading of it.

Tellingly, many of these compacts provide for the terms and mechanics of how such cross-border relationships will operate, including who can assert such cross-border rights, see, *e. g.*, Kansas-Nebraska Big Blue River Compact, Art. VII(1), 86 Stat. 198, who should bear the costs of any cross-border diversions, see, *e. g.*, Belle Fourche River Compact, Art. VI, 58 Stat. 96–97, and how such diversions should be administered, Arkansas River Basin Compact, Kansas-Oklahoma, Art. VII(A), 80 Stat. 1411. See also Brief for Professors of Law and Political Science as *Amici Curiae* 11–14 (giving more examples).

Provisions like these are critical for managing the complexities that ensue from cross-border diversions. Consider the mechanics of a cross-border diversion or taking of water in this case. If Tarrant were correct, then applicants from Arkansas, Texas, and Louisiana could all apply to the OWRB for permits to take water from Oklahoma. The OWRB would then be obligated to determine the total amount of water in Oklahoma beyond the 25-percent cap created in § 5.05(b)(1), given that the Compact would only obligate Oklahoma to deliver water beyond its quarter share. This alone would be a herculean task because the Compact does not require ongoing monitoring or accounting, see Compact § 2.11, 1 App. 13, and not all of the water in subbasin 5 is located or originates in Oklahoma. Moreover, the OWRB would be tasked with determining the priority under the Compact of applicants from other States. This would almost certainly require the OWRB to not only determine whether Oklahoma had received more or less than its 25-percent allotment, but whether other States had as well.

River Basin Compact, Art. IX(a), 63 Stat. 37 ("[N]o State shall deny the right of another signatory State . . . to acquire rights to the use of water . . . in an upper signatory State for consumptive use in a lower signatory State").

Put plainly, the end result would be a jurisdictional and administrative quagmire. The provisions in the other interstate water compacts resolve these complications. The absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the States' agreement.

Tarrant counters that not all interstate compacts that permit cross-border diversions have explicit language to this effect. On this front, Tarrant manages to identify one interstate compact that it contends permits cross-border diversions without express language to that effect, the Upper Niobrara River Compact, Pub. L. 91–52, 83 Stat. 86. Tarrant observes that this compact, which deals with a river mostly located in Nebraska with only a small portion in Wyoming, provides that "[t]here shall be no restrictions on the use of the surface waters of [the river] by Wyoming." See Art. V(A)(1), *id.*, at 88. Tarrant suggests that this language, coupled with the fact that the bulk of the river is in Nebraska, implicitly indicates that the compact grants Wyoming a right to enter Nebraska and use the river's water. First, we are not convinced that a single compact's failure to reference state borders does much to detract from the overall custom in this area. See *supra*, at 633–634 and this page, and n. 12. Second, the Upper Niobrara River Compact is not a helpful counterexample for Tarrant. The general provision that Tarrant quotes is paired with a host of detailed conditions. See Arts. V(A)(1)(a)–(f), 83 Stat. 88. Contrary to Tarrant's position, then, assuming that the Upper Niobrara River Compact does create any cross-border rights, it does so not through silence, but through the detailed scheme that would apply to any such contemplated diversions.

Tarrant also argues that §2.05(d) of the Red River Compact, which provides that "[e]ach Signatory State shall have the right to" "[u]se the bed and banks of the Red River and its tributaries to convey stored water, imported or exported water, and water apportioned according to this Compact," 1

App. 11, in fact authorizes cross-border diversions. Because the present border between Texas and Oklahoma east of the Texas Panhandle is set by the vegetation line on the south bank of the River, Red River Boundary Compact, 114 Stat. 919, Tarrant contends that § 2.05(d) reflects an understanding on the part of the Compact's drafters that state borders could be crossed. But the issue is not as simple as Tarrant makes it out to be. When the Compact was drafted, the Texas-Oklahoma border was fixed at the south bank of the River. See *Texas* v. *Oklahoma*, 457 U. S. 172 (1982). If Texas was able to access water through the south bank of the River—an issue left unbriefed by the parties—the Compact's framers may have believed that Texas could reach the River and take water from it without having to enter Oklahoman land, casting doubt on Tarrant's theory. In any event, even if § 2.05(d) is read to establish a cross-border right, it does so through express language setting forth the location and purposes under which such an incursion is permissible. This is different from the inference from silence that Tarrant asks us to draw in § 5.05(b)(1).

3

The parties' conduct under the Compact also undermines Tarrant's position. A "part[y's] course of performance under the Compact is highly significant" evidence of its understanding of the compact's terms. *Alabama* v. *North Carolina*, 560 U. S., at 346. Since the Compact was approved by Congress in 1980, no signatory State had pressed for a cross-border diversion under the Compact until Tarrant filed its suit in 2007. Brief for Respondents 26, 49–51. Indeed, Tarrant attempted to purchase water from Oklahoma over the course of 2000 until 2002, see *supra*, at 624, a strange offer if Tarrant believed it was entitled to demand such water without payment under the Compact.

In response, Tarrant maintains that there were "compelling business reasons" for it to purchase water. Reply Brief 17. We are unpersuaded. If Tarrant believed that it had a

right to water located in Oklahoma, there would have been "compelling business reasons" to mention this right given that billions of dollars were at stake. See 2 App. 362–363 (summarizing Texas purchase proposal). Yet there is no indication that Tarrant or any other Texas agency or the State of Texas itself previously made any mention of cross-border rights within the Compact, and none of the other signatory States has ever made such a claim.

4

The Compact creates no cross-border rights in Texas. Tarrant's remaining arguments do not persuade us otherwise.

First, Tarrant argues that its interpretation of the Compact is necessary to realize the "structure and purpose of Reach II." Brief for Petitioner 34–38. Tarrant contends that because the boundary of subbasin 5 is set by the location of the last existing, authorized, or proposed sites for a downstream dam before the Red River, see Compact §§ 5.01(a), 5.02(a), 5.03(b), 5.04(a), 1 App. 22–24, the Compact allows each of the States upstream from Louisiana to prevent water from flowing from its tributaries into subbasin 5. Tarrant reasons that each State will therefore hold whatever water it needs in its upstream basins. Given this, Tarrant maintains that any water that a State voluntarily allows to reach subbasin 5 must be surplus water that State did not intend to use, and if the upstream State has no need for that water, then there is no reason not to allow other States to access and use it, even across borders.

This argument is founded on a shaky premise: It assumes that flows from these dammed-up tributaries are the sole source of water in subbasin 5. But § 5.05(b)(1) explains that "[s]ignatory States shall have equal rights to the use of runoff originating in subbasin 5," as well as "water flowing into subbasin 5," which would include flows from the main stem of the River itself. *Id.*, at 25. Thus, there are waters that are specific to subbasin 5 separate from those originating in

the tributaries covered by subbasins 1 through 4. Tarrant's account of the purposes of subbasin 5 does not explain how these waters were to be allocated.

Tarrant's second argument regarding the purposes of Reach II is that § 5.05(b)(1)'s 25-percent cap on each State's access to excess water in subbasin 5 should be read to imply that if a State cannot access sufficient water within its borders to meet its share under the cap, then it must be able to cross borders to reach that water. Were it otherwise, Tarrant explains, the 25-percent cap would have no purpose. To support this argument, Tarrant draws on a 1970 engineering report that it contends shows that only 16 percent of the freshwater flowing into subbasin 5 was located in Texas. Brief for Petitioner 9, n. 5. The OWRB challenges this percentage with its own calculations drawn from the report, and asserts that Texas had access to at least 29 percent of the excess water in subbasin 5 within its own borders. Brief for Respondents 26, 47–48, and n. 17.

Fortunately, we need not delve into calculations based on a decades-old engineering report to resolve this argument. As we have explained, *supra*, at 621–623, Texas does not have a minimum guarantee of 25 percent of the excess water in subbasin 5. If it believes that Oklahoma is using more than its 25-percent allotment and wishes to stop it from doing so, then it may call for an accounting under § 2.11 of the Compact and, depending on the results of that accounting, insist that Oklahoma desist from taking more than its provided share. See Compact § 2.11, and Comment on Art. II, 1 App. 13–16. This is the appropriate remedy provided under the Compact. But Texas has never done so and Tarrant offers no evidence that in the present day Texas cannot access its 25-percent share on its own land.

C

Under the Compact's terms, water located within Oklahoma's portion of subbasin 5 of Reach II remains under Oklaho-

ma's control. Accordingly, Tarrant's theory that Oklahoma's water statutes are pre-empted because they prevent Texas from exercising its rights under the Compact must fail for the reason that the Compact does not create any cross-border rights in signatory States.

III

Tarrant also challenges the constitutionality of the Oklahoma water statutes under a dormant Commerce Clause theory. Tarrant argues that the Oklahoma water statutes impermissibly "'discriminat[e] against interstate commerce' for the 'forbidden purpose' of favoring local interests" by erecting barriers to the distribution of water left unallocated under the Compact. Brief for Petitioner 47–48 (quoting *Department of Revenue of Ky.* v. *Davis*, 553 U. S. 328, 338 (2008)). Tarrant's argument is premised on the position that if we "adopt the Tenth Circuit's or respondents' interpretation [of the Compact], . . . a substantial amount of Reach II, Subbasin 5 water located in Oklahoma is not apportioned to *any* State and therefore is available to permit applicants like Tarrant." Brief for Petitioner 47. So, Tarrant continues, because Oklahoma's laws prevent this "unallocated water" from being distributed out of State, those laws violate the Commerce Clause.

Tarrant's assumption that the Compact leaves some water "unallocated" is incorrect. The interpretive comment for Article V of the Compact makes clear that when the River's flow is above 3,000 CFS, "all states are free to use whatever amount of water they can put to beneficial use," subject to the requirement that "[i]f the states have competing uses and the amount of water available in excess of 3000 [CFS] cannot satisfy all such uses, each state will honor the other's right to 25% of the excess flow." 1 App. 29–30. If more than 25 percent of subbasin 5's water is located in Oklahoma, that water is not "unallocated"; rather, it is allocated to Oklahoma unless and until another State calls for an account-

ing and Oklahoma is asked to refrain from utilizing more than its entitled share.[13] The Oklahoma water statutes cannot discriminate against interstate commerce with respect to unallocated waters because the Compact leaves no waters unallocated. Tarrant's Commerce Clause argument founders on this point.

* * *

The Red River Compact does not pre-empt Oklahoma's water statutes because the Compact creates no cross-border rights in its signatories for these statutes to infringe. Nor do Oklahoma's laws run afoul of the Commerce Clause. We affirm the judgment of the Court of Appeals for the Tenth Circuit.

It is so ordered.

[Appendixes A and B to opinion of the Court follow this page.]

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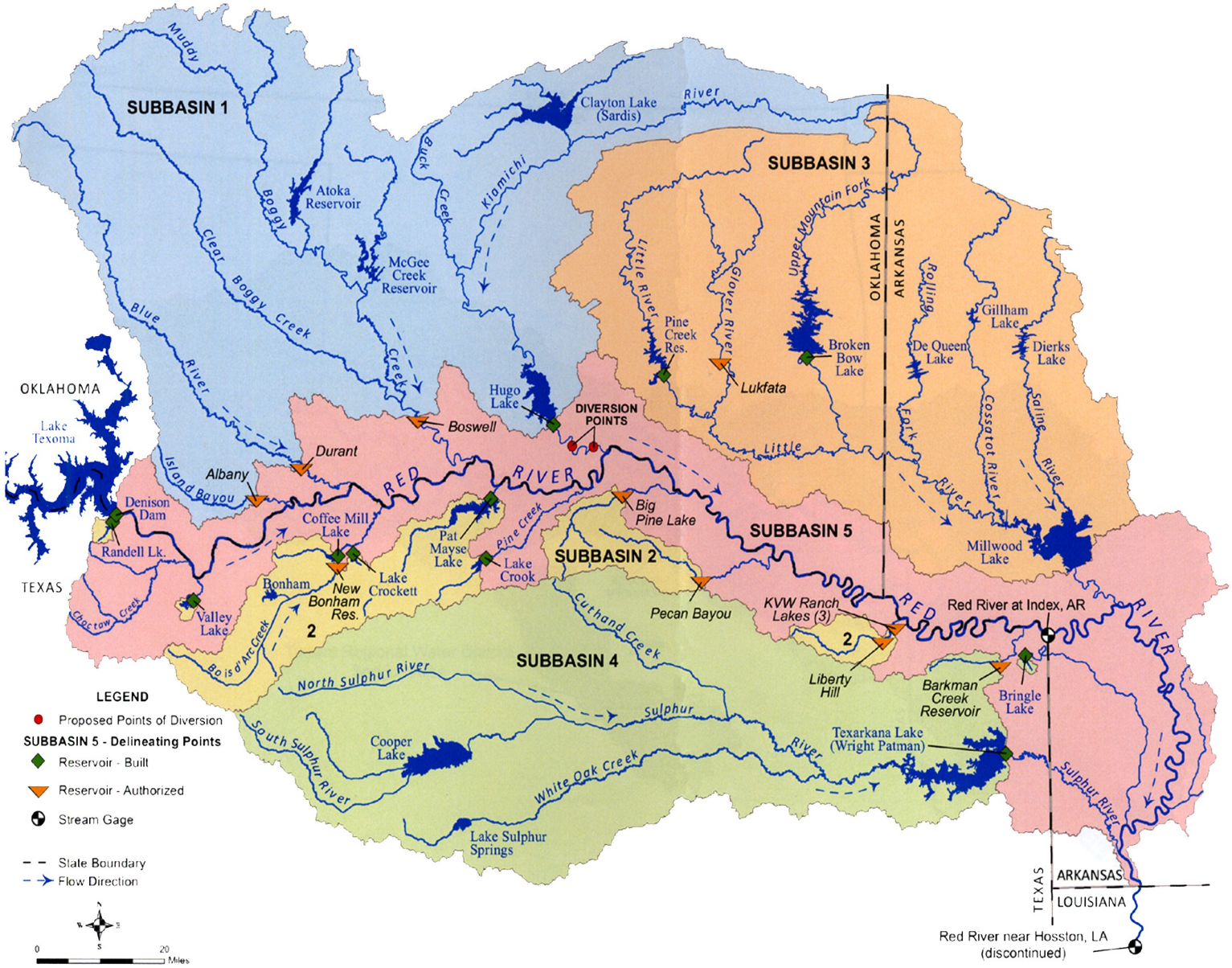
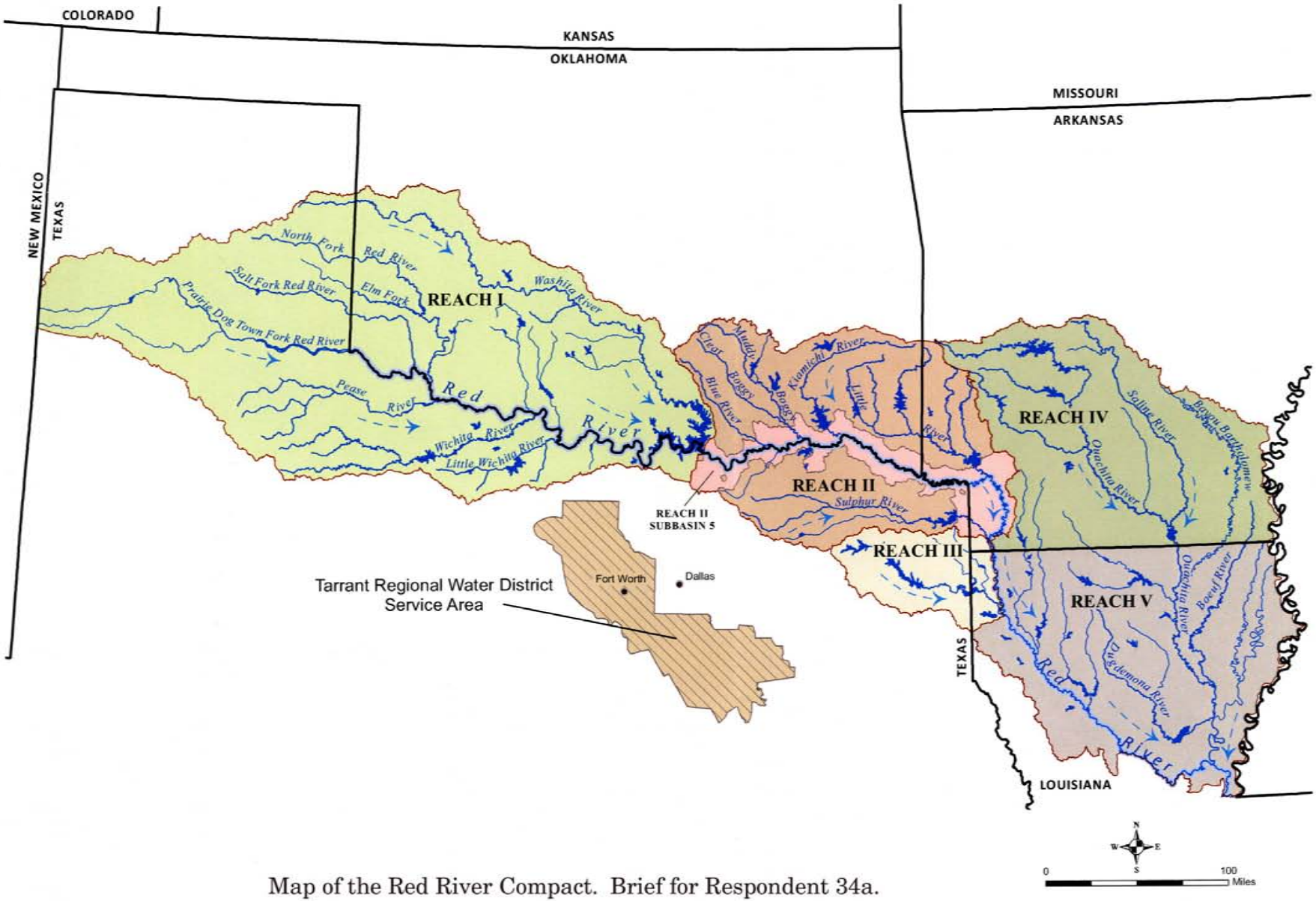
[13] Moreover, even if Oklahoma utilized less than 25 percent of the excess subbasin 5 water within its territory and allowed the rest to flow down the River, that water would pass from Reach II into Reach V, see Compact § 2.12, 1 App. 13, the waters of which are completely allocated to Louisiana, § 8.01, *id.*, at 38. Again, no water is left "unallocated."

APPENDIX A



Map of Reach II. Brief for Respondent 33a.

APPENDIX B



Map of the Red River Compact. Brief for Respondent 34a.

Syllabus

AMERICAN TRUCKING ASSOCIATIONS, INC. *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL.

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

No. 11–798. Argued April 16, 2013—Decided June 13, 2013

The Port of Los Angeles, a division of the City of Los Angeles, is run by a Board of Harbor Commissioners pursuant to a municipal ordinance known as a tariff. The Port leases marine terminal facilities to operators that load cargo onto and unload it from docking ships. Federally licensed short-haul trucks, called "drayage trucks," assist in those operations by moving cargo into and out of the Port. In 2007, in response to community concerns over the impact of a proposed port expansion on traffic, the environment, and safety, the Board implemented a Clean Truck Program. As part of that program, the Board devised a standard-form "concession agreement" to govern the relationship between the Port and drayage companies. The agreement requires a company to affix a placard on each truck with a phone number for reporting concerns, and to submit a plan listing off-street parking locations for each truck. Other requirements relate to a company's financial capacity, its maintenance of trucks, and its employment of drivers. The concession agreement sets out penalties for violations, including possible suspension or revocation of the right to provide drayage services. The Board also amended the Port's tariff to ensure that every drayage company would enter into the agreement. The amended tariff makes it a misdemeanor, punishable by fine or imprisonment, for a terminal operator to grant access to an unregistered drayage truck.

Petitioner American Trucking Associations, Inc. (ATA), whose members include many of the drayage companies at the Port, sued the Port and City, seeking an injunction against the concession agreement's requirements. ATA principally contended that the requirements are expressly preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), see 49 U. S. C. § 14501(c)(1). ATA also argued that even if the requirements are valid, *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61, prevents the Port from enforcing the requirements by withdrawing a defaulting company's right to operate at the Port. The District Court held that neither § 14501(c)(1) nor *Castle* prevented the Port from proceeding with its program. The Ninth Circuit mainly affirmed, finding only the driver-employment provision preempted and rejecting petitioner's *Castle* claim.

Syllabus

Held:

1. The FAAAA expressly preempts the concession agreement's placard and parking requirements. Section 14501(c)(1) preempts a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U. S. C. § 14501(c)(1). Because the parties agree that the Port's placard and parking requirements relate to a motor carrier's price, route, or service with respect to transporting property, the only disputed question is whether those requirements "hav[e] the force and effect of law." Section 14501(c)(1) draws a line between a government's exercise of regulatory authority and its own contract-based participation in a market. The statute's "force and effect of law" language excludes from the clause's scope contractual arrangements made by a State when it acts as a market participant, not as a regulator. See, *e. g.*, *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219, 229. But here, the Port exercised classic regulatory authority in imposing the placard and parking requirements. It forced terminal operators—and through them, trucking companies—to alter their conduct by implementing a criminal prohibition punishable by imprisonment. That counts as action "having the force and effect of law" if anything does.

The Port's primary argument to the contrary focuses on motives rather than means. But the Port's proprietary intentions do not control. When the government employs a coercive mechanism, available to no private party, it acts with the force and effect of law, whether or not it does so to turn a profit. Only if it forgoes the (distinctively governmental) exercise of legal authority may it escape § 14501(c)(1)'s preemptive scope. That the criminal sanctions fall on terminal operators, not directly on the trucking companies, also makes no difference. See, *e. g.*, *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 371–373. Pp. 648–652.

2. This Court declines to decide in the case's present, pre-enforcement posture whether *Castle* limits the way the Port can enforce the financial-capacity and truck-maintenance requirements upheld by the Ninth Circuit. *Castle* rebuffed a State's attempt to bar a federally licensed motor carrier from its highways for past infringements of state safety regulations. But *Castle* does not prevent a State from taking off the road a vehicle that is contemporaneously out of compliance with such regulations. And at this juncture, there is no basis for finding that the Port will actually use the concession agreement's penalty provision as *Castle* proscribes. Pp. 652–655.

660 F. 3d 384, reversed in part and remanded.

Syllabus

KAGAN, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 655.

Daniel N. Lerman argued the cause for petitioner. With him on the briefs were *Roy T. Englert, Jr.*, *Alan Untereiner*, *Prasad Sharma*, and *Richard Pianka*.

John F. Bash argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Verrilli*, *Principal Deputy Assistant Attorney General Delery*, *Deputy Solicitor General Kneedler*, *Mark B. Stern*, *Robert S. Rivkin*, *Paul M. Geier*, *Peter J. Plocki*, *Christopher S. Perry*, *T. F. Scott Darling III*, and *Debra S. Straus*.

Steven S. Rosenthal argued the cause for respondents. With him on the brief for respondent City of Los Angeles et al. were *Alan K. Palmer*, *Susanna Y. Chu*, *Joy M. Crose*, and *Simon M. Kann*. *Melissa Lin Perrella* and *David Pettit* filed a brief for respondent Natural Resources Defense Council, Inc., et al.*

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*Briefs of *amici curiae* urging reversal were filed for Airlines for America by *Robert K. Spotswood* and *Emily J. Tidmore*; for the California Construction Trucking Association by *Patrick J. Whalen*; for the Chamber of Commerce of the United States of America by *Jeffrey Bossert Clark*, *Aditya Bamzai*, *Robin S. Conrad*, *Kate Comerford Todd*, and *Sheldon Gilbert*; and for the Owner-Operator Independent Drivers Association, Inc., et al. by *Paul D. Cullen, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Kamala D. Harris*, Attorney General of California, *Susan Duncan Lee*, Acting State Solicitor General, *Karin S. Schwartz*, Supervising Deputy Attorney General, *Craig J. Konnoth*, Deputy Solicitor General, and *Susan Durbin*, Deputy Attorney General, and by *Robert W. Ferguson*, Attorney General of Washington; for Airports Council International-North America by *W. Eric Pilsk* and *Thomas R. Devine*; for the Los Angeles Area Chamber of Commerce by *Albert Giang*; and for the National Organization of Counties et al. by *Michael Burger* and *Lisa E. Soronen*.

John C. Eastman and *Anthony T. Caso* filed a brief for the Center for Constitutional Jurisprudence et al. as *amici curiae*.

JUSTICE KAGAN delivered the opinion of the Court.

In this case, we consider whether federal law preempts certain provisions of an agreement that trucking companies must sign before they can transport cargo at the Port of Los Angeles. We hold that the Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts two of the contract's provisions, which require such a company to develop an off-street parking plan and display designated placards on its vehicles. We decline to decide in the case's present, pre-enforcement posture whether, under *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954), federal law governing licenses for interstate motor carriers prevents the Port from using the agreement's penalty clause to punish violations of other, non-preempted provisions.

I

A

The Port of Los Angeles, a division of the City of Los Angeles, is the largest port in the country. The Port owns marine terminal facilities, which it leases to "terminal operators" (such as shipping lines and stevedoring companies) that load cargo onto and unload it from docking ships. Short-haul trucks, called "drayage trucks," move the cargo into and out of the Port. The trucking companies providing those drayage services are all federally licensed motor carriers. Before the events giving rise to this case, they contracted with terminal operators to transport cargo, but did not enter into agreements with the Port itself.

The City's Board of Harbor Commissioners runs the Port pursuant to a municipal ordinance known as a tariff, which sets out various regulations and charges. In the late 1990's, the Board decided to enlarge the Port's facilities to accommodate more ships. Neighborhood and environmental groups objected to the proposed expansion, arguing that it would increase congestion and air pollution and decrease safety in the surrounding area. A lawsuit they brought, and another

they threatened, stymied the Board's development project for almost 10 years.

To address the community's concerns, the Board implemented a Clean Truck Program beginning in 2007. Among other actions, the Board devised a standard-form "concession agreement" to govern the relationship between the Port and any trucking company seeking to operate on the premises. Under that contract, a company may transport cargo at the Port in exchange for complying with various requirements. The two directly at issue here compel the company to (1) affix a placard on each truck with a phone number for reporting environmental or safety concerns (You've seen the type: "How am I driving? 213–867–5309") and (2) submit a plan listing off-street parking locations for each truck when not in service. Three other provisions in the agreement, formerly disputed in this litigation, relate to the company's financial capacity, its maintenance of trucks, and its employment of drivers.

The Board then amended the Port's tariff to ensure that every company providing drayage services at the facility would enter into the concession agreement. The mechanism the Board employed is a criminal prohibition on terminal operators. The amended tariff provides that "no Terminal Operator shall permit access into any Terminal in the Port of Los Angeles to any Drayage Truck unless such Drayage Truck is registered under a Concession [Agreement]." App. 105. A violation of that provision—which occurs "each and every day" a terminal operator provides access to an unregistered truck—is a misdemeanor. *Id.*, at 86. It is punishable by a fine of up to $500 or a prison sentence of up to six months. *Id.*, at 85–86.

The concession agreement itself spells out penalties for any signatory trucking company that violates its requirements. When a company commits a "Minor Default," the Port may issue a warning letter or order the company to undertake "corrective action," complete a "course of . . .

training," or pay the costs of the Port's investigation. *Id.*, at 81–82. When a company commits a "Major Default," the Port may also suspend or revoke the company's right to provide drayage services at the Port. *Id.*, at 82. The agreement, however, does not specify which breaches of the contract qualify as "Major," rather than "Minor." And the parties agree that the Port has never suspended or revoked a trucking company's license to operate at the Port for a prior violation of one of the contract provisions involved in this case. See Tr. of Oral Arg. 42–43, 49–51.

B

Petitioner American Trucking Associations, Inc. (ATA), is a national trade association representing the trucking industry, including drayage companies that operate at the Port. ATA filed suit against the Port and City, seeking an injunction against the five provisions of the concession agreement discussed above. The complaint principally contended that § 14501(c)(1) of the FAAAA expressly preempts those requirements. That statutory section states:

> "[A] State [or local government] may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U. S. C. § 14501(c)(1).[1]

[1] ATA also contended that a separate provision, 49 U. S. C. § 14506(a), preempts the agreement's placard requirement. That section bars state and local governments from enacting or enforcing "any law, rule, regulation[,] standard, or other provision having the force and effect of law" that obligates a motor carrier to display any form of identification other than those the Secretary of Transportation has required. *Ibid.* The just-quoted language is the only part of § 14506(a) disputed here, and it is materially identical to language in § 14501(c)(1). We focus on § 14501(c)(1) for ease of reference, but everything we say about that provision also applies to § 14506(a).

ATA also offered a back-up argument: Even if the requirements are valid, ATA claimed, the Port may not enforce them by withdrawing a defaulting company's right to operate at the Port. That argument rested on *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954), which held that Illinois could not bar a federally licensed motor carrier from its highways for prior violations of state safety regulations. We reasoned in *Castle* that the State's action conflicted with federal law providing for certification of motor carriers; and ATA argued here that a similar conflict would inhere in applying the concession agreement to suspend or revoke a trucking company's privileges. Following a bench trial, the District Court held that neither § 14501(c)(1) nor *Castle* prevents the Port from proceeding with any part of its Clean Truck Program.

The Court of Appeals for the Ninth Circuit mainly affirmed. Most important for our purposes, the court held that § 14501(c)(1) does not preempt the agreement's placard and parking requirements because they do not "'ha[ve] the force and effect of law.'" 660 F. 3d 384, 395 (2011) (quoting § 14501(c)(1)). The court reasoned that those requirements, rather than regulating the drayage market, advance the Port's own "business interest" in "managing its facilities." *Id.*, at 401. Both provisions were "designed to address [a] specific proprietary problem[ ]"—the need to "increase the community good-will necessary to facilitate Port expansion." *Id.*, at 406–407; see *id.*, at 409. The Ninth Circuit also held the agreement's financial-capacity and truck-maintenance provisions not preempted, for reasons not relevant here.[2] Section 14501(c)(1), the court decided, preempts only the con-

[2] For those curious, the court held that the financial-capacity requirement is not "'related to a [motor carrier's] price, route, or service,'" and that the truck-maintenance requirement falls within a statutory exception for safety regulation. 660 F. 3d, at 395, 403–406 (quoting § 14501(c)(1)); see § 14501(c)(2)(A) (safety exception).

tract's employment provision. Finally, the Ninth Circuit rejected ATA's claim that *Castle* bars the Port from applying the agreement's penalty clause to withdraw a trucking company's right to operate at the facility. The court thought *Castle* inapplicable because of the narrower exclusion in this case: "Unlike a ban on using *all* of a State's freeways," the court reasoned, "a limitation on access to a single Port does not prohibit motor carriers" from generally participating in interstate commerce. 660 F. 3d, at 403.

We granted certiorari to resolve two questions: first, whether § 14501(c)(1) of the FAAAA preempts the concession agreement's placard and parking provisions; and second, whether *Castle* precludes reliance on the agreement's penalty clause to suspend or revoke a trucking company's privileges. See 568 U. S. 1119 (2013). Contrary to the Ninth Circuit, we hold that the placard and parking requirements are preempted as "provision[s] having the force and effect of law." That determination does not obviate the enforcement issue arising from *Castle* because the Ninth Circuit's rulings upholding the agreement's financial-capacity and truck-maintenance provisions have now become final;[3] accordingly, the Port could try to apply its penalty provision to trucking companies that have violated those surviving requirements. But we nonetheless decline to address the *Castle* question because the case's pre-enforcement posture obscures the nature of the agreement's remedial scheme, rendering any decision at this point a shot in the dark.

II

Section 14501(c)(1), once again, preempts a state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . .

[3] ATA's petition for certiorari did not seek review of the Ninth Circuit's determination that the truck-maintenance provision is valid. The petition did ask us to consider the court's ruling on the financial-capacity provision, but we declined to do so.

with respect to the transportation of property." All parties agree that the Port's placard and parking requirements relate to a motor carrier's price, route, or service with respect to transporting property. The only disputed question is whether those requirements "hav[e] the force and effect of law." The Port claims that they do not, because the "concession contract is just [like] a private agreement," made to advance the Port's commercial and "proprietary interests." Brief for Respondent City of Los Angeles et al. 19 (Brief for City of Los Angeles) (internal quotation marks omitted).[4]

We can agree with the Port on this premise: Section 14501(c)(1) draws a rough line between a government's exercise of regulatory authority and its own contract-based participation in a market. We recognized that distinction in *American Airlines, Inc.* v. *Wolens*, 513 U. S. 219 (1995), when we construed another statute's near-identical "force and effect of law" language. That phrase, we stated, "connotes official, government-imposed policies" prescribing "binding standards of conduct." *Id.*, at 229, n. 5 (internal quotation marks omitted). And we contrasted that quintessential regulatory action to "contractual commitment[s] voluntarily undertaken." *Id.*, at 229 (internal quotation marks omitted). In *Wolens*, we addressed a State's enforcement of an agreement between two private parties. But the same reasoning holds if the government enters into a contract just

[4] The Port's brief occasionally frames the issue differently—as whether a freestanding "market-participant exception" limits § 14501(c)(1)'s express terms. See Brief for City of Los Angeles 24. But at oral argument, the Port emphasized that the supposed exception it invoked in fact derives from § 14501(c)(1)'s "force and effect of law" language. See Tr. of Oral Arg. 31 ("[W]hat we are calling the market participant exception . . . is generally congruent with[ ] what is meant by Congress by the term 'force and effect of law' "); *id.*, at 39–40 ("I'm . . . relying on the language . . . force and effect of law," which "invites a market participant analysis"). We therefore have no occasion to consider whether or when a preemption clause lacking such language would except a state or local government's proprietary actions.

as a private party would—for example, if a State (or city or port) signs an agreement with a trucking company to transport goods at a specified price. See, *e. g.*, *Building & Constr. Trades Council* v. *Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U. S. 218, 233 (1993) (When a State acts as a purchaser of services, "it does not 'regulate' the workings of the market . . . ; it exemplifies them" (some internal quotation marks omitted)). The "force and effect of law" language in § 14501(c)(1) excludes such everyday contractual arrangements from the clause's scope. That phrasing targets the State acting as a State, not as any market actor—or otherwise said, the State acting in a regulatory rather than proprietary mode.

But that statutory reading gets the Port nothing, because it exercised classic regulatory authority—complete with the use of criminal penalties—in imposing the placard and parking requirements at issue here. Consider again how those requirements work. They are, to be sure, contained in contracts between the Port and trucking companies. But those contracts do not stand alone, as the result merely of the parties' voluntary commitments. The Board of Harbor Commissioners aimed to "require parties who access Port land and terminals for purposes of providing drayage services" to enter into concession agreements with the Port. App. 107, 108 (Board's "Findings"). And it accomplished that objective by amending the Port's tariff—a form of municipal ordinance—to provide that "no Terminal Operator shall permit" a drayage truck to gain "access into any Terminal in the Port" unless the truck is "registered under" such a concession agreement. *Id.*, at 105. A violation of that tariff provision is a violation of criminal law. And it is punishable by a fine or a prison sentence of up to six months. *Id.*, at 85–86. So the contract here functions as part and parcel of a governmental program wielding coercive power over private parties, backed by the threat of criminal punishment.

That counts as action "having the force and effect of law" if anything does. The Port here has not acted as a private party, contracting in a way that the owner of an ordinary commercial enterprise could mimic. Rather, it has forced terminal operators—and through them, trucking companies—to alter their conduct by implementing a criminal prohibition punishable by time in prison. In some cases, the question whether governmental action has the force of law may pose difficulties; the line between regulatory and proprietary conduct has soft edges. But this case takes us nowhere near those uncertain boundaries. Contractual commitments resulting not from ordinary bargaining (as in *Wolens*), but instead from the threat of criminal sanctions manifest the government *qua* government, performing its prototypical regulatory role.

The Port's primary argument to the contrary, like the Ninth Circuit's, focuses on motive rather than means. The Court of Appeals related how community opposition had frustrated the Port's expansion, and concluded that the Clean Truck Program "respon[ded] to perceived business necessity." 660 F. 3d, at 407. The Port tells the identical story, emphasizing that private companies have similar business incentives to "adopt[ ] 'green growth' plans like the Port's." Brief for City of Los Angeles 30. We have no reason to doubt that account of events; we can assume the Port acted to enhance goodwill and improve the odds of achieving its business plan—just as a private company might. But the Port's intentions are not what matters. That is because, as we just described, the Port chose a tool to fulfill those goals which only a government can wield: the hammer of the criminal law. See *United Haulers Assn., Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 438 F. 3d 150, 157 (CA2 2006), aff'd, 550 U. S. 330 (2007). And when the government employs such a coercive mechanism, available to no private party, it acts with the force and effect of law, whether or not

it does so to turn a profit. Only if it forgoes the (distinctively governmental) exercise of legal authority may it escape § 14501(c)(1)'s preemptive scope.

The Port also tries another tack, reminding us that the criminal sanctions here fall on terminal operators alone, not on the trucking companies subject to the agreement's requirements; hence, the Port maintains, the matter of "criminal penalties is a red herring." Tr. of Oral Arg. 31; see Brief for City of Los Angeles 39–40. But we fail to see why the target of the sanctions makes any difference. The Port selected an indirect but wholly effective means of "requir[ing] parties . . . providing drayage services" to display placards and submit parking plans: To wit, the Port required terminal operators, on pain of criminal penalties, to insist that the truckers make those commitments. App. 108; see *supra*, at 645, 650. We have often rejected efforts by States to avoid preemption by shifting their regulatory focus from one company to another in the same supply chain. See, *e. g.*, *Rowe* v. *New Hampshire Motor Transp. Assn.*, 552 U. S. 364, 371–373 (2008) (finding preemption under the FAAAA although the State's requirements directly targeted retailers rather than motor carriers); *Engine Mfrs. Assn.* v. *South Coast Air Quality Management Dist.*, 541 U. S. 246, 255 (2004) (finding preemption under the Clean Air Act although the requirements directly targeted car buyers rather than sellers). The same goes here. The Port made its regulation of drayage trucks mandatory by imposing criminal penalties on the entities hiring all such trucks at the facility. Slice it or dice it any which way, the Port thus acted with the "force of law."

III

Our rejection of the concession agreement's placard and parking requirements does not conclude this case. Two other provisions of the agreement are now in effect: As noted earlier, the Ninth Circuit upheld the financial-capacity and truck-maintenance requirements, and that part of its deci-

sion has become final. See *supra*, at 647, and n. 2. ATA argues that our holding in *Castle* limits the way the Port can enforce those remaining requirements. According to ATA, the Port may not rely on the agreement's penalty provision to suspend or revoke the right of non-complying trucking companies to operate on the premises.

As we have described, *Castle* rebuffed a State's attempt to bar a federally licensed motor carrier from its highways for past infringements of state safety regulations. A federal statute, we explained, gave a federal agency the authority to license interstate motor carriers, as well as a carefully circumscribed power to suspend or terminate those licenses for violations of law. That statute, we held, implicitly prohibited a State from "tak[ing] action"—like a ban on the use of its highways—"amounting to a suspension or revocation of an interstate carrier's [federally] granted right to operate." 348 U. S., at 63–64.

The parties here dispute whether *Castle* restricts the Port's remedial authority. The Port echoes the Ninth Circuit's view that banning a truck from "*all* of a State's freeways" is meaningfully different from denying it "access to a single Port." 660 F. 3d, at 403; see Brief for City of Los Angeles 49. ATA responds that because the Port is a "crucial channel of interstate commerce," *Castle* applies to it just as much as to roads. Brief for Petitioner 18.

But we see another question here: Does the Port's enforcement scheme involve curtailing drayage trucks' operations in the way *Castle* prohibits, even assuming that decision applies to facilities like this one? As just indicated, *Castle* puts limits on how a State or locality can punish an interstate motor carrier for prior violations of trucking regulations (like the concession agreement's requirements). Nothing we said there, however, prevents a State from taking off the road a vehicle that is contemporaneously out of compliance with such regulations. Indeed, ATA filed an *amicus* brief in *Castle* explaining that a vehicle "that fails to comply with

the state's regulations may be barred from the state's highways." Brief for ATA, O. T. 1954, No. 44, p. 12; see Brief for Respondent, *id.*, p. 23 (A State may "stop and prevent from continuing on the highway any motor vehicle which it finds not to be in compliance"). And ATA reiterates that view here, as does the United States as *amicus curiae*. See Reply Brief 22; Brief for United States 29–30. So the Port would not violate *Castle* if it barred a truck from operating at its facilities to prevent an ongoing violation of the agreement's requirements.

And at this juncture, we have no basis for finding that the Port will ever use the agreement's penalty provision for anything more than that. That provision, to be sure, might be read to give the Port broader authority: As noted earlier, the relevant text enables the Port to suspend or revoke a trucking company's right to provide drayage services at the facility as a "[r]emedy" for a "Major Default." App. 82; see *supra*, at 646. But the agreement nowhere states what counts as a "Major Default"—and specifically, whether a company's breach of the financial-capacity or truck-maintenance requirements would qualify. And the Port has in fact never used its suspension or revocation power to penalize a past violation of those requirements. See Tr. of Oral Arg. 43, 50–51. Indeed, the Port's brief states that "it does not claim[ ] the authority to punish past, cured violations of the requirements challenged here through suspension or revocation." Brief for City of Los Angeles 62 (internal quotation marks omitted). So the kind of enforcement ATA fears, and believes inconsistent with *Castle*, might never come to pass at all.

In these circumstances, we decide not to decide ATA's *Castle*-based challenge. That claim, by its nature, attacks the Port's enforcement scheme. But given the pre-enforcement posture of this case, we cannot tell what that scheme entails. It might look like the one forbidden in *Castle* (as ATA anticipates), or else it might not (as the Port assures us). We see no reason to take a guess now about

what the Port will do later. There will be time enough to address the *Castle* question when, if ever, the Port enforces its agreement in a way arguably violating that decision.

IV

Section 14501(c)(1) of the FAAAA preempts the placard and parking provisions of the Port's concession agreement. We decline to decide on the present record ATA's separate challenge, based on *Castle*, to that agreement's penalty provision. Accordingly, the judgment of the Ninth Circuit is reversed in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I write separately to highlight a constitutional concern regarding § 601 of the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1606, a statute the Court has now considered twice this Term. See *Dan's City Used Cars, Inc.* v. *Pelkey*, *ante*, p. 251.

The Constitution grants Congress authority "[t]o regulate Commerce . . . *among* the several States." Art. I, § 8, cl. 3 (emphasis added). Section 14501 of Title 49 is titled "Federal authority over *intrastate* transportation." (Emphasis added.) The tension between § 14501 and the Constitution is apparent, because the Constitution does not give Congress power to regulate intrastate commerce. *United States* v. *Lopez*, 514 U. S. 549, 587, n. 2 (1995) (THOMAS, J., concurring). Nevertheless, § 14501(c)(1) purports to pre-empt any state or local law "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." By its terms, § 14501(c) would pre-empt even a city ordinance establishing a uniform rate for most transportation services originating and ending inside city limits, so long as the services were provided by a motor carrier. Such an extraordi-

nary assertion of congressional authority cannot be reconciled with our constitutional system of enumerated powers.

The Supremacy Clause provides the constitutional basis for the pre-emption of state laws. Art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land"). Because the Constitution and federal laws are supreme, conflicting state laws are without legal effect. See *Crosby* v. *National Foreign Trade Council*, 530 U. S. 363, 372 (2000). However, the constitutional text leaves no doubt that only federal laws made "in Pursuance" of the Constitution are supreme. See *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991) ("As long as it is acting *within the powers granted it* under the Constitution, Congress may impose its will on the States" (emphasis added)); *Wyeth* v. *Levine*, 555 U. S. 555, 583–587 (2009) (THOMAS, J., concurring in judgment).

Given this limitation, Congress cannot pre-empt a state law merely by promulgating a conflicting statute—the pre-empting statute must also be constitutional, both on its face and as applied. As relevant here, if Congress lacks authority to enact a law regulating a particular intrastate activity, it follows that Congress also lacks authority to pre-empt state laws regulating that activity. See U. S. Const., Amdt. 10 ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

In this case, the Court concludes that "[s]ection 14501(c)(1) . . . preempts the placard and parking provisions of the Port's concession agreement." *Ante*, at 655. Although respondents waived any argument that Congress lacks authority to regulate the placards and parking arrangements of drayage trucks using the port, I doubt that Congress has such authority. The Court has identified three categories of activity that Congress may regulate under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, and persons or things in

interstate commerce; and (3) "activities having a substantial relation to interstate commerce . . . , *i. e.*, those activities that substantially affect interstate commerce." *Lopez*, *supra*, at 558–559. Drayage trucks that carry cargo into and out of the Port of Los Angeles undoubtedly operate within the "channels of interstate commerce"—for that is what a port is. Congress can therefore regulate conduct taking place within the port. But it is doubtful whether Congress has the power to decide where a drayage truck should park once it has left the port or what kind of placard the truck should display while offsite. Even under the "substantial effects" test, which I have rejected as a "'rootless and malleable standard' at odds with the constitutional design," *Gonzales* v. *Raich*, 545 U. S. 1, 67 (2005) (dissenting opinion) (quoting *United States* v. *Morrison*, 529 U. S. 598, 627 (2000) (THOMAS, J., concurring)), it is difficult to say that placards and parking arrangements substantially affect interstate commerce. Congress made no findings indicating that offsite parking—conduct that falls within the scope of the States' traditional police powers—substantially affects interstate commerce. And I doubt that it could. Nevertheless, because respondents did not preserve a constitutional challenge to the FAAAA and because I agree that the provisions in question have the "force and effect of law," I join the Court's opinion.

Reporter's Note

The next page is purposely numbered 901. The numbers between 657 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR MARCH 28 THROUGH
JUNE 12, 2013

MARCH 28, 2013

Dismissal Under Rule 46

No. 12–1000. SECURITIES AND EXCHANGE COMMISSION *v.* BARTEK ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 484 Fed. Appx. 949.

APRIL 1, 2013

Certiorari Granted—Reversed and Remanded. (See No. 12–382, *ante*, p. 58.)

Certiorari Granted—Vacated and Remanded

No. 12–165. RBS CITIZENS, N. A., DBA CHARTER ONE, ET AL. *v.* ROSS ET AL. C. A. 7th Cir. Reported below: 667 F. 3d 900; and

No. 12–322. WHIRLPOOL CORP. *v.* GLAZER ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 6th Cir. Reported below: 678 F. 3d 409. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Comcast Corp.* v. *Behrend*, *ante*, p. 27.

Certiorari Dismissed

No. 12–8458. GOWAN *v.* KELLER, JUDGE, COURT OF CRIMINAL APPEALS OF TEXAS, ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 471 Fed. Appx. 288.

Miscellaneous Orders

No. 12M103. MACHARIA *v.* DAMOUR ET AL.;

No. 12M104. NIXON *v.* RECTOR ET AL.; and

No. 12M105. RAWLINGS *v.* CITY OF BALTIMORE, MARYLAND, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 11–798. American Trucking Assns., Inc. *v.* City of Los Angeles, California, et al. C. A. 9th Cir. [Certiorari granted, 568 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–10189. Trevino *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. [Certiorari granted, 568 U. S. 977.] Motion of petitioner for appointment of counsel granted. Warren A. Wolf, Esq., of San Antonio, Tex., is appointed to serve as counsel for petitioner in this case.

No. 12–398. Association for Molecular Pathology et al. *v.* Myriad Genetics, Inc., et al. C. A. Fed. Cir. [Certiorari granted, 568 U. S. 1045.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted, and the time is to be divided as follows: 25 minutes for petitioners, 10 minutes for the Solicitor General, and 30 minutes for respondents.

No. 12–399. Adoptive Couple *v.* Baby Girl, a Minor Child Under the Age of 14 Years, et al. Sup. Ct. S. C. [Certiorari granted, 568 U. S. 1081.] Renewed motion of petitioners for leave to file joint appendix under seal with redacted copies for the public record granted. Upon consideration of motions for leave to participate in oral argument as *amicus curiae* and motions for divided argument, the time is to be divided as follows: 20 minutes for petitioners, 10 minutes for respondent guardian ad litem, 20 minutes for respondent birth father, and 10 minutes for the Solicitor General.

No. 12–536. McCutcheon et al. *v.* Federal Election Commission. D. C. D. C. [Probable jurisdiction noted, 568 U. S. 1156.] Motion of appellants to dispense with printing joint appendix granted.

No. 12–7098. Orsello *v.* Gaffney et al. Ct. App. Minn. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1081] denied.

No. 12–7990. Williams *v.* United States. C. A. 11th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1153] denied.

No. 12–8419. Park *v.* TD Ameritrade Trust Co., Inc., et al. C. A. 10th Cir.; and

No. 12–8524. Rahmaan *v.* Medical University of South Carolina et al. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 22, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9081. In re Zambrella; and

No. 12–9148. In re Reece. Petitions for writs of habeas corpus denied.

Certiorari Granted

No. 12–929. Atlantic Marine Construction Co., Inc. *v.* United States District Court for the Western District of Texas et al. C. A. 5th Cir. Certiorari granted. Reported below: 701 F. 3d 736.

Certiorari Denied

No. 11–10965. Keith *v.* Ohio. Ct. App. Ohio, Crawford County. Certiorari denied. Reported below: 192 Ohio App. 3d 231, 2011-Ohio-407, 948 N. E. 2d 976.

No. 12–425. Bazuaye *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 12–622. Cassens Transport Co. et al. *v.* Brown et al. C. A. 6th Cir. Certiorari denied. Reported below: 675 F. 3d 946.

No. 12–656. Spirit Airlines, Inc., et al. *v.* Department of Transportation. C. A. D. C. Cir. Certiorari denied. Reported below: 687 F. 3d 403.

No. 12–673. Haile *v.* United States; and

No. 12–7723. Beckford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 3d 1211.

No. 12–692. Talawanda School District *v.* Litton. C. A. 6th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 804.

No. 12–708. Petrello *v.* Prucka et al. C. A. 5th Cir. Certiorari denied. Reported below: 484 Fed. Appx. 939.

No. 12–719. CHURCHILL *v.* UNIVERSITY OF COLORADO AT BOULDER ET AL. Sup. Ct. Colo. Certiorari denied. Reported below: 285 P. 3d 986.

No. 12–760. AMERICAN PETROLEUM INSTITUTE *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 684 F. 3d 1342.

No. 12–769. ENG ET AL. *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY. C. A. 2d Cir. Certiorari denied. Reported below: 685 F. 3d 135.

No. 12–777. LEPAK ET AL. *v.* CITY OF IRVING, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 522.

No. 12–910. SOLOMON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 12–912. ALSTON *v.* DELAWARE STATE UNIVERSITY ET AL. Sup. Ct. Del. Certiorari denied. Reported below: 49 A. 3d 1192.

No. 12–915. DOUGHERTY ET AL. *v.* CITY OF COVINA, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 654 F. 3d 892.

No. 12–917. GLEASON *v.* UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 86.

No. 12–921. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. C. A. D. C. Cir. Certiorari denied.

No. 12–923. SANTALIZ-RIOS *v.* METROPOLITAN LIFE INSURANCE CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 693 F. 3d 57.

No. 12–927. ALEXANDER, ZELMANSKI, DANNER & FIORITTO, PLLC *v.* HADDAD. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 3d 290.

No. 12–934. ANGELLOZ *v.* IBERVILLE PARISH SCHOOL BOARD. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2011–2294 (La. App. 1 Cir. 6/14/12).

No. 12–939. ARMATAS *v.* MAROULLETI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 484 Fed. Appx. 576.

No. 12–944. SUBRAMANIAN *v.* ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 817.

No. 12–945. ARIZPE *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 471.

No. 12–949. WALKER *v.* WALKER. C. A. 7th Cir. Certiorari denied. Reported below: 701 F. 3d 1110.

No. 12–977. GREEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 690.

No. 12–984. ALCON RESEARCH, LTD., ET AL. *v.* APOTEX, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 687 F. 3d 1362.

No. 12–985. BEDARD *v.* NATIONAL CASUALTY INSURANCE CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 445.

No. 12–1001. ANDERSON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 208 Cal. App. 4th 851, 144 Cal. Rptr. 3d 606.

No. 12–1005. RABALAIS *v.* LEON. C. A. 5th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 498.

No. 12–1007. ST. MARY'S MEDICAL CENTER, INC., DBA ST. MARY'S MEDICAL CENTER *v.* R. K. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 229 W. Va. 712, 735 S. E. 2d 715.

No. 12–1013. BROWN *v.* HALE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 342.

No. 12–1052. BANUSHI *v.* PALMER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 500 Fed. Appx. 84.

No. 12–1064. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 697 F. 3d 216.

No. 12–7001. ROBBINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 682 F. 3d 1111.

No. 12–7336. BEN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 95 So. 3d 1236.

No. 12–7390. Ross *v.* Attorney Grievance Commission. Ct. App. Md. Certiorari denied. Reported below: 428 Md. 50, 50 A. 3d 1166.

No. 12–7773. Mazuca *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 375 S. W. 3d 294.

No. 12–7849. Franklin *v.* Robinson, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 695 F. 3d 439.

No. 12–7949. McKinzie *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 54 Cal. 4th 1302, 281 P. 3d 412.

No. 12–7970. Ruiz *v.* Texas. Ct. Crim. App. Tex. Certiorari denied.

No. 12–8180. C. B. *v.* West Virginia Department of Health and Human Resources et al. Sup. Ct. App. W. Va. Certiorari denied.

No. 12–8393. Butler *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 100 So. 3d 638.

No. 12–8395. Morton *v.* Crews, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 684 F. 3d 1157.

No. 12–8396. Whitley *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied.

No. 12–8405. Snodgrass *v.* Brunsman, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–8412. Ruderman *v.* Ryan, Director, Arizona Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 484 Fed. Appx. 144.

No. 12–8418. Merritt *v.* Blumenthal et al. Ct. App. N. Y. Certiorari denied. Reported below: 19 N. Y. 3d 806, 973 N. E. 2d 202.

No. 12–8421. Perez *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 55 A. 3d 124.

No. 12–8422. Stacker *v.* Norman, Warden. C. A. 8th Cir. Certiorari denied.

No. 12–8423. Rodriguez *v.* Sullivan, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–8425. Pierson *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 12–8428. Adams *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 12–8432. Prince *v.* Chicago Public Schools et al. C. A. 7th Cir. Certiorari denied.

No. 12–8440. Negrete *v.* Lewis, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 12–8444. Conklin *v.* Anthou et al. C. A. 3d Cir. Certiorari denied. Reported below: 495 Fed. Appx. 257.

No. 12–8451. Law *v.* Siegel. C. A. 9th Cir. Certiorari denied.

No. 12–8455. Ragab *v.* Flynn. App. Ct. Mass. Certiorari denied. Reported below: 82 Mass. App. 1102, 969 N. E. 2d 185.

No. 12–8457. Guman *v.* Pugh, Warden. Ct. App. Wis. Certiorari denied.

No. 12–8459. Harriman *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 12–8460. Fowler *v.* Van Pelt, Judge, Superior Court of Georgia, Lookout Mountain Judicial Circuit. C. A. 11th Cir. Certiorari denied.

No. 12–8462. Gomez *v.* Grounds, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–8463. Goff *v.* Salinas et al. C. A. 9th Cir. Certiorari denied.

No. 12–8464. Hurt *v.* District of Columbia Court Services and Offender Supervision Agency et al. C. A. D. C. Cir. Certiorari denied.

No. 12–8465. GARRETTE *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8470. CALDERON *v.* EVERGREEN OWNERS, INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–8472. HILL *v.* GRADY, JUDGE, CIRCUIT COURT OF MISSOURI, CITY OF ST. LOUIS, ET AL. Sup. Ct. Mo. Certiorari denied.

No. 12–8476. HOLMES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 12–8477. HOLLAND *v.* HEAD AND NECK SPECIALTY GROUP OF NEW HAMPSHIRE ET AL. Sup. Ct. N. H. Certiorari denied.

No. 12–8478. FORNEY *v.* BROWARD COUNTY SHERIFF'S OFFICE ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8479. HOGGE *v.* STEPHENS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 469 Fed. Appx. 160.

No. 12–8480. FIELDS *v.* MILLER, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 483 Fed. Appx. 509.

No. 12–8483. COOPER *v.* MISSOURI ET AL. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 379 S. W. 3d 225.

No. 12–8487. PARMELEE *v.* KING COUNTY DEPARTMENT OF ADULT AND JUVENILE DETENTION. Ct. App. Wash. Certiorari denied. Reported below: 162 Wash. App. 337, 254 P. 3d 927.

No. 12–8488. JACKSON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8489. AGUIRRE BARAJAS *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8490. MANLEY *v.* UNKNOWN PARTY. C. A. 6th Cir. Certiorari denied.

No. 12–8491. ALMOND *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 12–8492. BELL *v.* RIVARD, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8494. STEVENS *v.* VALLEY VIEW MEDICAL CENTER ET AL. Ct. App. Ariz. Certiorari denied.

No. 12–8497. SHERRILL *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8499. WARREN *v.* BROWN, WARDEN. Super. Ct. Richmond County, Ga. Certiorari denied.

No. 12–8500. WILSON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 715.

No. 12–8503. BINGHAM *v.* MORALES, WARDEN. Super. Ct. Johnson County, Ga. Certiorari denied.

No. 12–8504. BROWN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 12–8511. GARY *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 3d 1261.

No. 12–8514. ROBERTSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 81 So. 3d 629.

No. 12–8519. MOON *v.* BACA ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8521. SHAVERS *v.* BERGH, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8527. VANAC *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied. Reported below: 2011-Ohio-6338.

No. 12–8528. SHEHATA *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–8534. JENKINS *v.* ONONDAGA COUNTY SHERIFF'S DEPARTMENT. C. A. 2d Cir. Certiorari denied.

No. 12–8542. JOHNSON *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8565. MATTHEWS *v.* BUCHANAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 561.

No. 12–8573. GEORGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 75, 979 N. E. 2d 1173.

No. 12–8578. POTTS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 104 So. 3d 1086.

No. 12–8584. YOUNG *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 12–8588. PLOUFFE *v.* CEVALLOS ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–8609. HATZFELD *v.* FISCHER, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–8617. JOHNSON *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied.

No. 12–8695. PORTEE *v.* ALVARADO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 475 Fed. Appx. 177.

No. 12–8711. VANDENBURG *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8723. BUSTILLO *v.* BEELER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 343.

No. 12–8727. BLUNT *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 569.

No. 12–8759. FRAZIER *v.* WENEROWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–8775. DIBARTOLOMEO *v.* LAMPERT, DIRECTOR, WYOMING DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 836.

No. 12–8796. GARCIA *v.* SAUERS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FOREST. C. A. 3d Cir. Certiorari denied.

No. 12–8848. LEWIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 3d 783.

No. 12–8854. SAFFOLD *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 834.

No. 12–8898. BYUNG JANG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 190.

No. 12–8942. SHEA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 792.

No. 12–8964. ROZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 701 F. 3d 681.

No. 12–8966. RAMIREZ-PEINADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 799.

No. 12–8967. SCHARDIEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 717.

No. 12–8971. BELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 475 Fed. Appx. 713.

No. 12–8973. BIVINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 533.

No. 12–8979. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 211.

No. 12–8980. HOKANSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 821 N. W. 2d 340.

No. 12–8987. DANIEL *v.* DREW, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 490 Fed. Appx. 584.

No. 12–8988. CAMP *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 12–8993. HOOVER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 12–8995. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9001. GAULDEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9003. BIAO HUANG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 687 F. 3d 1197.

No. 12–9004. HARNED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9006. ORTIZ-MIRANDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–9013. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 3d 401.

No. 12–9021. ROYSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 687 F. 3d 935.

No. 12–9022. SIMON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–9027. DROTLEFF ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 357.

No. 12–9029. CHAPMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 690 F. 3d 358.

No. 12–9031. CAMPIE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 700.

No. 12–9032. MCGUIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 3d 1333.

No. 12–9034. LUKASHOV *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 694 F. 3d 1107.

No. 12–9036. JENKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 833.

No. 12–9037. JACKSON-FORSYTHE ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 224.

No. 12–9041. COLLIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 459.

No. 12–9044. THOMAS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 511.

No. 12–9046. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 719.

No. 12–9053. WASHINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 81.

No. 12–9057. DOUGLAS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 476 Fed. Appx. 967.

No. 12–9075. CARNEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9077. MCKISSIC *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9086. THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 440.

No. 12–9093. RAMIREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 488 Fed. Appx. 517.

No. 12–924. ARNONE, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION *v.* EBRON. Sup. Ct. Conn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 307 Conn. 342, 53 A. 3d 983.

No. 12–1062. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 698 F. 3d 1005.

No. 12–8530. JOHNSON *v.* TARGET CORP. C. A. 7th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 487 Fed. Appx. 298.

No. 12–8955. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 502 Fed. Appx. 262.

Rehearing Denied

No. 12–42. GERMALIC *v.* NEW YORK STATE BOARD OF ELECTIONS COMMISSIONERS, 568 U. S. 884;

No. 12–637. WEATHERBY *v.* FEDERAL EXPRESS CORP., 568 U. S. 1090;

No. 12–672. HILL *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY, 568 U. S. 1159;

No. 12–890. FERMIN *v.* UNITED STATES, 568 U. S. 1213;

No. 12–6959. MIXON *v.* CHARLOTTE MECKLENBURG SCHOOLS, 568 U. S. 1101;

No. 12–7031. MOYA-FELICIANO *v.* TUCKER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 568 U. S. 1104;

No. 12–7062. Frederick *v.* Tucker, Secretary, Florida Department of Corrections, et al., 568 U. S. 1104;

No. 12–7076. Haddix *v.* Texas et al., 568 U. S. 1127;

No. 12–7255. Smith *v.* Pennsylvania et al., 568 U. S. 1130;

No. 12–7259. Muhammad *v.* Clarke, Director, Virginia Department of Corrections, 568 U. S. 1130;

No. 12–7263. Moore *v.* Federal Bureau of Prisons, 568 U. S. 1130;

No. 12–7420. Moon, aka Lewis *v.* Lewis, 568 U. S. 1132;

No. 12–7434. Randolph *v.* Gansler, Attorney General of Maryland, et al., 568 U. S. 1165;

No. 12–7538. Makdessi *v.* Virginia, 568 U. S. 1167;

No. 12–7695. Lewis *v.* District of Columbia et al., 568 U. S. 1148; and

No. 12–7944. Pugh *v.* Humphrey, Warden, et al., 568 U. S. 1178. Petitions for rehearing denied.

No. 12–625. MacEntee *v.* IBM (International Business Machines), 568 U. S. 1150. Petition for rehearing denied. Justice Breyer and Justice Alito took no part in the consideration or decision of this petition.

April 10, 2013

Certiorari Denied

No. 12–9643 (12A968). Mann *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. Motion of Mark Fondacaro et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 112 So. 3d 1158.

No. 12–9671 (12A974). Mann *v.* Palmer, Warden, et al. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied. Reported below: 713 F. 3d 1306.

No. 12–9672 (12A975). Mann *v.* Crews, Secretary, Florida Department of Corrections. C. A. 11th Cir. Application for stay of execution of sentence of death, presented to Justice Thomas, and by him referred to the Court, denied. Certiorari denied.

April 11, 2013

Dismissal Under Rule 46

No. 11–740. Zurn Pex, Inc., et al. *v.* Cox et al. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 644 F. 3d 604.

April 12, 2013

Miscellaneous Orders

No. 11–889. Tarrant Regional Water District *v.* Herrmann et al. C. A. 10th Cir. [Certiorari granted, 568 U. S. 1081.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 11–1221. Hillman *v.* Maretta. Sup. Ct. Va. [Certiorari granted, 568 U. S. 1118.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–246. Salinas *v.* Texas. Ct. Crim. App. Tex. [Certiorari granted, 568 U. S. 1119.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 12–484. University of Texas Southwestern Medical Center *v.* Nassar. C. A. 5th Cir. [Certiorari granted, 568 U. S. 1140.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

April 15, 2013

Certiorari Granted—Vacated and Remanded

No. 12–539. USPPS, Ltd. *v.* Avery Dennison Corp. et al. C. A. Fed. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Gunn* v. *Minton*, 568 U. S. 251 (2013). Reported below: 676 F. 3d 1341.

Certiorari Dismissed

No. 12–8619. Brown *v.* McKee, Warden. 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. 12–8977. GOIST *v.* COMMISSIONER OF INTERNAL REVENUE. 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. 12–9194. NOWELL *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–2724. IN RE DISBARMENT OF MAHONEY. Disbarment entered. [For earlier order herein, see 567 U. S. 903.]

No. 12M106. NATKUNANATHAN *v.* UNITED STATES;

No. 12M107. HERNANDEZ-PORTILLO *v.* UNITED STATES; and

No. 12M108. VERGARA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 126, Orig. KANSAS *v.* NEBRASKA ET AL. Motion of the Special Master for allowance of fees and disbursements granted, and the Special Master is awarded a total of $246,328.05 for the period August 24, 2012, through March 7, 2013, to be allocated among the States as follows: Kansas $98,531.22; Nebraska $98,531.22; and Colorado $49,265.61. [For earlier order herein, see, *e. g.*, 568 U. S. 961.]

No. 141, Orig. TEXAS *v.* NEW MEXICO ET AL.; and

No. 12–842. REPUBLIC OF ARGENTINA *v.* NML CAPITAL, LTD. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 12–7607. DUMONT *v.* BASSETT MEDICAL CENTER ET AL. C. A. 2d Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1152] denied.

No. 12–7840. GREEN *v.* JUSTICES OF THE COURT OF CRIMINAL APPEALS OF TEXAS ET AL. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1190] denied.

No. 12–8620. ALEXANDER *v.* BOONE HOSPITAL CENTER ET AL.; and ALEXANDER *v.* CH ALLIED SERVICES, INC., ET AL. C. A. 8th Cir.;

No. 12–8694. HUNTER *v.* EXECUTIVES, INC. Sup. Ct. Va.; and

No. 12–9242. MANOS *v.* UNITED STATES. C. A. 8th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 6, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9253. IN RE WHITE;

No. 12–9273. IN RE MCLEOD;

No. 12–9330. IN RE LOI NGOC NGHIEM;

No. 12–9367. IN RE RENTSCHLER;

No. 12–9371. IN RE RODRIGUEZ;

No. 12–9382. IN RE TILTON; and

No. 12–9400. IN RE BELL. Petitions for writs of habeas corpus denied.

No. 12–9357. IN RE MITCHELL, AKA HAYES. 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. 12–957. IN RE HEFFINGTON;

No. 12–8435. IN RE LEE;

No. 12–8665. IN RE TIPPENS;

No. 12–9174. IN RE LAN THI TRAN NGUYEN; and

No. 12–9186. IN RE VAKSMAN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 12–815. SPRINT COMMUNICATIONS CO., L. P. *v.* JACOBS ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 690 F. 3d 864.

No. 12–729. HEIMESHOFF *v.* HARTFORD LIFE & ACCIDENT INSURANCE CO. ET AL. C. A. 2d Cir. Certiorari granted limited to Question 1 presented by the petition. Reported below: 496 Fed. Appx. 129.

Certiorari Denied

No. 12–531. BOURKE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 667 F. 3d 122.

No. 12–690. GlaxoSmithKline et al. *v.* Humana Medical Plans, Inc., et al. C. A. 3d Cir. Certiorari denied. Reported below: 685 F. 3d 353.

No. 12–699. Renda Marine, Inc. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 667 F. 3d 651.

No. 12–717. Scott et al. *v.* Hensley et vir. C. A. 6th Cir. Certiorari denied. Reported below: 693 F. 3d 681.

No. 12–722. Initiative and Referendum Institute et al. *v.* United States Postal Service. C. A. D. C. Cir. Certiorari denied. Reported below: 685 F. 3d 1066.

No. 12–759. Bernacki *v.* Connecticut. Sup. Ct. Conn. Certiorari denied. Reported below: 307 Conn. 1, 52 A. 3d 605.

No. 12–772. Straub *v.* Richardson et al. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2011–1689 (La. App. 1 Cir. 5/2/12), 92 So. 3d 548.

No. 12–813. Butts, Superintendent, Pendleton Correctional Facility *v.* Hall. C. A. 7th Cir. Certiorari denied. Reported below: 692 F. 3d 793.

No. 12–829. Tonga Partners, L. P., et al. *v.* Analytical Surveys, Inc. C. A. 2d Cir. Certiorari denied. Reported below: 684 F. 3d 36.

No. 12–831. Jennings *v.* Broome. Sup. Ct. S. C. Certiorari denied. Reported below: 401 S. C. 1, 736 S. E. 2d 242.

No. 12–845. Kachalsky et al. *v.* Cacace et al. C. A. 2d Cir. Certiorari denied. Reported below: 701 F. 3d 81.

No. 12–851. Miller et al. *v.* Walt Disney World Co. et al. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 3d 1212.

No. 12–859. Proud, Acting Commissioner of the New York State Office of Temporary and Disability Assistance, et al. *v.* Shakhnes et al. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 3d 244.

No. 12–916. Harris *v.* Bradley Memorial Hospital & Health Center, Inc. Sup. Ct. Conn. Certiorari denied. Reported below: 306 Conn. 304, 50 A. 3d 841.

No. 12–950. KERNEL RECORDS OY *v.* MOSLEY, AKA TIMBALAND, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 3d 1294.

No. 12–952. EDEM *v.* ETHIOPIAN AIRLINES ENTERPRISE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 501 Fed. Appx. 99.

No. 12–954. M. C. N. *v.* K. D. F. Super. Ct. Pa. Certiorari denied. Reported below: 46 A. 3d 829.

No. 12–955. DOWNS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–956. JANKEY *v.* SONG KOO LEE. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 1038, 290 P. 3d 187.

No. 12–962. ASAP COPY & PRINT ET AL. *v.* CANON BUSINESS SOLUTIONS, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–966. GULLEY *v.* OREGON. Cir. Ct. Ore., 20th Jud. Dist. Certiorari denied.

No. 12–967. HOLCOMBE *v.* US AIRWAYS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 478 Fed. Appx. 7.

No. 12–975. BARRETT *v.* UNIVERSAL MAILING SERVICE, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 700 F. 3d 65.

No. 12–981. ARENCIBIA *v.* BARTA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 773.

No. 12–988. RUDE ET AL. *v.* COOK INLET REGION, INC. C. A. 9th Cir. Certiorari denied. Reported below: 690 F. 3d 1127.

No. 12–989. HALL, INDIVIDUALLY AND AS NEXT FRIEND AND PERSONAL REPRESENTATIVE OF THE ESTATE OF J. C. P. *v.* SMITH. C. A. 5th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 366.

No. 12–993. MARTINEZ OCHOA *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 12–994. HOFFMAN, AKA ALAMO *v.* ONDIRSEK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 698 F. 3d 1020.

No. 12–995. FUNAYAMA *v.* NICHIA AMERICA CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 482 Fed. Appx. 723.

No. 12–1002. WILSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 101038, 966 N. E. 2d 1215.

No. 12–1006. CHONGQING ZONGSHEN GROUP IMPORT/EXPORT CORP. ET AL. *v.* RUBICON GLOBAL VENTURES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 736.

No. 12–1014. IRAZU *v.* SAINZ DE AJA. App. Ct. Conn. Certiorari denied. Reported below: 139 Conn. App. 904, 55 A. 3d 625.

No. 12–1032. AGUIRRE-ONATE, AKA GLAVAN *v.* HOLDER, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 797.

No. 12–1040. VAN FLEET INTERNATIONAL AIRPORT DEVELOPMENT GROUP, LLC *v.* MOSAIC FERTILIZER, LLC. C. A. 11th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 869.

No. 12–1049. CARPET SERVICE INTERNATIONAL, INC., ET AL. *v.* CHICAGO REGIONAL COUNCIL OF CARPENTERS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 3d 394.

No. 12–1054. YI MIA ZHENG, AKA YI MEI ZHEN *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 478.

No. 12–1061. THOMPKINS *v.* PFISTER, ACTING WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 3d 976.

No. 12–1069. CITY OF TOMBSTONE, ARIZONA *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 681.

No. 12–1075. FLINT *v.* HEWLETT-PACKARD CO. C. A. 6th Cir. Certiorari denied.

No. 12–1082. CARL ET UX. *v.* BAC HOME LOANS SERVICING, LP. C. A. 6th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 732.

No. 12–1090. EISEN *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 47 A. 3d 1249.

No. 12–1098. Bove *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 12–1102. Huerta *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 12–1107. Arline *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 12–1108. Byrd *v.* United States. C. A. 5th Cir. Certiorari denied.

No. 12–1113. Datavs *v.* United States. C. A. Armed Forces. Certiorari denied. Reported below: 71 M. J. 420.

No. 12–1120. Aspex Eyewear, Inc., et al. *v.* Altair Eyewear, Inc. C. A. Fed. Cir. Certiorari denied. Reported below: 484 Fed. Appx. 565.

No. 12–1139. Zazueta-Miranda *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 702.

No. 12–6828. Cruzado-Laureano *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 12–6897. Coon *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 449.

No. 12–6901. Kelly *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 83 So. 3d 723.

No. 12–6905. Powell *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 83 So. 3d 725.

No. 12–6906. Panteles *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 83 So. 3d 725.

No. 12–6914. Willis *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 95 So. 3d 233.

No. 12–6916. Smaller *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 458.

No. 12–6917. Seda *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 95 So. 3d 231.

No. 12–6918. Cadet *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 448.

No. 12–7012. GOLDIE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 93 So. 3d 1025.

No. 12–7016. CULVER *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 94 So. 3d 598.

No. 12–7124. ADAMS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 95 So. 3d 463.

No. 12–7158. JOHNSON *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 615 Pa. 354, 42 A. 3d 1017.

No. 12–7237. WILKERSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 95 So. 3d 233.

No. 12–7238. THOMPSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 95 So. 3d 232.

No. 12–7270. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 490 Fed. Appx. 255.

No. 12–7316. HURLEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 224.

No. 12–7317. GOLDEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 451.

No. 12–7318. DENEUS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 449.

No. 12–7321. JACKSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 835.

No. 12–7325. SHAW *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 68 So. 3d 244.

No. 12–7349. MCCOMAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 836.

No. 12–7350. GIBSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 833.

No. 12–7351. WILSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 840.

No. 12–7352. WALTERS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 839.

No. 12–7353. WALTON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 839.

No. 12–7354. GAWRONSKI *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 93 So. 3d 1025.

No. 12–7355. MILLER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 836.

No. 12–7356. BOWMAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 831.

No. 12–7357. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 839.

No. 12–7362. NILES *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 837.

No. 12–7364. BARTON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 831.

No. 12–7376. RYAN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 117 So. 3d 418.

No. 12–7402. FIJNJE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 833.

No. 12–7406. GIONFRIDDO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 834.

No. 12–7409. GEORGE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 110 So. 3d 450.

No. 12–7422. GRAHAM *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 95 So. 3d 225.

No. 12–7430. SHELTON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 691 F. 3d 1348.

No. 12–7498. LOCKWOOD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 521.

No. 12–7620. CASTLEBERRY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 223.

No. 12–7648. DAVIS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 576.

No. 12–7651. DIXON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 576.

No. 12–7662. MOUNT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 577.

No. 12–7663. PEREZ-RIVA *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 577.

No. 12–7666. SMITH *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 838.

No. 12–7667. BRITT *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 575.

No. 12–7668. WATSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 578.

No. 12–7669. WHIPPER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 839.

No. 12–7670. WOODS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 840.

No. 12–7671. MACIAS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 577.

No. 12–7672. KILPATRICK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 98 So. 3d 577.

No. 12–7742. WEAVER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 95 So. 3d 261.

No. 12–7763. ALEXIS *v.* FLORIDA (Reported below: 117 So. 3d 414); ANDERSON *v.* FLORIDA (98 So. 3d 575); ANDERSON *v.* FLORIDA (99 So. 3d 949); ANDERSON *v.* FLORIDA (97 So. 3d 830); BAKER *v.* FLORIDA (100 So. 3d 685); BARNETT *v.* FLORIDA (97 So. 3d 831); BETSILL *v.* FLORIDA (100 So. 3d 685); BOERSMA *v.* FLORIDA (99 So. 3d 949); BRADLEY *v.* FLORIDA (97 So. 3d 831); BROOKSHIRE *v.* FLORIDA (97 So. 3d 831); BURGESS *v.* FLORIDA (99 So. 3d 950); CALHOUN *v.* FLORIDA (98 So. 3d 575); CARSON *v.* FLORIDA (97 So. 3d 832); COLLINS *v.* FLORIDA (117 So. 3d 415); CONLEY *v.* FLORIDA (99 So. 3d 950); COOPER *v.* FLORIDA (98 So. 3d 575); CORDERO *v.* FLORIDA (97 So. 3d 832); DANIELS *v.* FLORIDA (97 So. 3d 832); EPPS *v.* FLORIDA (97 So. 3d 833); ESTREMERA-TORRES *v.* FLORIDA (117 So. 3d 415); FRANCOIS *v.* FLORIDA (117 So. 3d

415); Franks *v.* Florida (98 So. 3d 576); Funderburk *v.* Florida (97 So. 3d 833); Goff *v.* Florida (100 So. 3d 689); Greenwood *v.* Florida (98 So. 3d 576); Hardin *v.* Florida (98 So. 3d 576); Hartley *v.* Florida (99 So. 3d 952); Hawkins *v.* Florida (117 So. 3d 416); Haynes *v.* Florida (98 So. 3d 576); Hernandez *v.* Florida (93 So. 3d 1026); Johnson *v.* Florida (97 So. 3d 835); Johnson *v.* Florida (117 So. 3d 416); Larouche *v.* Florida (117 So. 3d 416); Lassiter *v.* Florida (100 So. 3d 693); R. M. *v.* Florida (99 So. 3d 955); Mack *v.* Florida (98 So. 3d 577); McClinton *v.* Florida (98 So. 3d 577); McGruder *v.* Florida (117 So. 3d 417); McIntyre *v.* Florida (97 So. 3d 836); McKinley *v.* Florida (98 So. 3d 577); Miles *v.* Florida (98 So. 3d 577); Montinat *v.* Florida (97 So. 3d 836); Moyd *v.* Florida (98 So. 3d 577); Murphy *v.* Florida (99 So. 3d 955); Pumphrey *v.* Florida (98 So. 3d 578); Reeves *v.* Florida (98 So. 3d 578); Sampson *v.* Florida (97 So. 3d 838); Sawyers *v.* Florida (97 So. 3d 838); Schmidt *v.* Florida (99 So. 3d 956); Seltzer *v.* Florida (117 So. 3d 418); Simmons *v.* Florida (98 So. 3d 578); Solomon *v.* Florida (99 So. 3d 956); Son *v.* Florida (100 So. 3d 698); Soto *v.* Florida (117 So. 3d 418); Staton *v.* Florida (98 So. 3d 578); Stringer *v.* Florida (117 So. 3d 418); Tokonitz *v.* Florida (100 So. 3d 699); Turner *v.* Florida (100 So. 3d 699); Turner *v.* Florida (97 So. 3d 839); Ugbomah *v.* Florida (117 So. 3d 419); Valdes *v.* Florida (100 So. 3d 699); Valentino *v.* Florida (117 So. 3d 419); Velez *v.* Florida (98 So. 3d 578); Walker *v.* Florida (98 So. 3d 578); Washington *v.* Florida (97 So. 3d 839); Watson *v.* Florida (100 So. 3d 700); Weber *v.* Florida (117 So. 3d 419); White *v.* Florida (99 So. 3d 958); Williams *v.* Florida (117 So. 3d 419); Wright *v.* Florida (98 So. 3d 579); Wright *v.* Florida (99 So. 3d 958); and Wright *v.* Florida (97 So. 3d 840). Dist. Ct. App. Fla., 2d Dist. Certiorari denied.

No. 12–7764. Williams *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 840.

No. 12–7802. Nowling *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 104 So. 3d 1098.

No. 12–7817. Missud *v.* Superior Court of California, San Francisco County, et al. C. A. 9th Cir. Certiorari denied.

No. 12–7893. Bedard *v.* Baker, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 12–7907. DELGADO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 102741–U.

No. 12–7910. DILBOY *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 163 N. H. 760, 48 A. 3d 983.

No. 12–8013. BLANCO *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 688 F. 3d 1211.

No. 12–8038. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 692.

No. 12–8043. BROWN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 3d 261.

No. 12–8081. DIVERS *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 698 F. 3d 211.

No. 12–8110. CUSTODIO *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 97 So. 3d 832.

No. 12–8115. LAWRENCE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 700 F. 3d 464.

No. 12–8144. JOHNSON *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 95 So. 3d 244.

No. 12–8149. DUNN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 36 A. 3d 839.

No. 12–8162. CEPERO *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 97 So. 3d 237.

No. 12–8191. MISSUD *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8217. J. C. B. *v.* PENNSYLVANIA STATE POLICE. Super. Ct. Pa. Certiorari denied. Reported below: 35 A. 3d 792.

No. 12–8251. ESCOBEDO-ZAPATA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 766.

No. 12–8273. BROWN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 134 So. 3d 962.

No. 12–8293. IRICK *v.* SCHOFIELD, COMMISSIONER, TENNESSEE DEPARTMENT OF CORRECTION, ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 380 S. W. 3d 105.

No. 12–8308. GOBBLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 104 So. 3d 920.

No. 12–8321. BOUCHAT *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 429 Md. 301, 55 A. 3d 713.

No. 12–8348. JONES *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 99 So. 3d 998.

No. 12–8374. FLAGG *v.* FLORIDA (Reported below: 74 So. 3d 138); BONOW *v.* FLORIDA (78 So. 3d 74); BROWN *v.* FLORIDA (80 So. 3d 459); FORD *v.* FLORIDA (75 So. 3d 875); MASSELINO *v.* FLORIDA (86 So. 3d 1289); PRINCE *v.* FLORIDA (85 So. 3d 1228); and PTOMY *v.* FLORIDA (82 So. 3d 1229). Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 12–8445. WAHKELEH *v.* FLORIDA (Reported below: 85 So. 3d 1229); and BLACK *v.* FLORIDA (77 So. 3d 913). Dist. Ct. App. Fla., 1st Dist. Certiorari denied.

No. 12–8481. CAMPBELL *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 99 So. 3d 950.

No. 12–8508. HANNIGAN *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 84 So. 3d 450.

No. 12–8522. SALOMON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 104 So. 3d 1107.

No. 12–8537. CARDENAS MACHADO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 12–8544. YORK *v.* HARRIS, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8545. NICHOLS *v.* TEXAS. Sup. Ct. Tex. Certiorari denied.

No. 12–8547. JACKSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 12–8555. DANIELS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 519.

No. 12–8556. BLANCO *v.* VALENZUELA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8564. LEWIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8568. JACKSON *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 781.

No. 12–8574. HALL *v.* COLSON, WARDEN, ET AL. Ct. Crim. App. Tenn. Certiorari denied.

No. 12–8583. TIRAN *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8585. HAGBERG *v.* LAKES BROADCASTING GROUP, INC., ET AL. Ct. App. Minn. Certiorari denied.

No. 12–8586. MCCREA *v.* MCCABE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 825.

No. 12–8587. PEREZ *v.* GONZALES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8590. GARCIA RODRIGUEZ *v.* PEARSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 728.

No. 12–8592. JEMISON *v.* NUNN. C. A. 11th Cir. Certiorari denied.

No. 12–8593. LANE *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 521.

No. 12–8595. OLIC *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 12–8597. DESSAURE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8601. HONESTO *v.* HARTLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8603. HOLLAND *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 478 Fed. Appx. 778.

No. 12–8605. GLASS *v.* TENNESSEE ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8607. GREENE *v.* SHEARIN, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 226.

No. 12–8615. MARTIN *v.* HOWES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8618. ANDERSON *v.* CHAPDELAINE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 12–8623. ROY *v.* BOARD OF COUNTY COMMISSIONERS FOR WALTON COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8625. REEDOM *v.* CRAPPELL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 493 Fed. Appx. 113.

No. 12–8628. TODD *v.* BRIESENICK ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8630. SUPANICH, INDIVIDUALLY AND AS GUARDIAN FOR S. S., A MINOR CHILD *v.* RUNDLE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 688.

No. 12–8633. COMER *v.* PERSSON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 12–8634. DOE *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–8635. COOPER *v.* GRAMIAK, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 12–8637. SANCHEZ *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8639. COLEMAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8645. CLARK *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8647. CHESTANG *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–8650. LOWE *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 694.

No. 12–8651. AJAJ *v.* FRITZ. C. A. 2d Cir. Certiorari denied.

No. 12–8652. CARUTHERS *v.* CORRECTIONAL MEDICAL SERVICES, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8653. DELANCY *v.* FLORIDA (Reported below: 105 So. 3d 519); BALDWIN *v.* FLORIDA (105 So. 3d 518); CALLAHAN *v.* FLORIDA (105 So. 3d 518); GOODWIN *v.* FLORIDA (105 So. 3d 520); HENRY *v.* FLORIDA (105 So. 3d 520); LENHARDT *v.* FLORIDA (105 So. 3d 521); MCEADY *v.* FLORIDA (105 So. 3d 521); NEZOVICH *v.* FLORIDA (105 So. 3d 521); and TORRES *v.* FLORIDA (105 So. 3d 523). Sup. Ct. Fla. Certiorari denied.

No. 12–8654. BENTLEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 1–2807–U.

No. 12–8658. EMERSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 134 Ohio St. 3d 191, 2012-Ohio-5047, 981 N. E. 2d 787.

No. 12–8659. MANLEY *v.* ROSE. C. A. 6th Cir. Certiorari denied.

No. 12–8666. MARTINEZ VARGAS *v.* VIRGA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8668. REED *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 843.

No. 12–8669. BEATON *v.* VALVERDE ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8671. JONES *v.* HOKE, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 12–8673. GOMEZ LOPEZ *v.* MCDONALD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 855.

No. 12–8679. CHAVEZ *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 248 Ore. App. 260, 272 P. 3d 167.

No. 12–8681. ORYEM *v.* RICHARDSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 778.

No. 12–8690. FLUKER *v.* COCHRAN ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–8691. TATE *v.* ROCKFORD ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 921.

No. 12–8699. GRAVEN *v.* SIENICKI ET AL. Ct. App. Ariz. Certiorari denied.

No. 12–8700. HUMINSKI *v.* MERCY GILBERT MEDICAL CENTER ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8701. RILEY ET AL. *v.* WASHINGTON. C. A. 5th Cir. Certiorari denied.

No. 12–8703. CUELLAR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 208 Cal. App. 4th 1067, 145 Cal. Rptr. 3d 898.

No. 12–8706. ACKERMAN *v.* MORELAND. C. A. 11th Cir. Certiorari denied.

No. 12–8707. BLANTON *v.* CARUSO ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8708. WHITSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 700.

No. 12–8710. WOODS *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 106 So. 3d 942.

No. 12–8712. TINSLEY *v.* YATAURO, ADMINISTRATOR, ADULT DIAGNOSTIC AND TREATMENT CENTER. C. A. 3d Cir. Certiorari denied.

No. 12–8713. MOORE *v.* UNKNOWN UNITED STATES MARSHAL. C. A. 5th Cir. Certiorari denied.

No. 12–8715. MULLINS *v.* ASTRUE, COMMISSIONER OF SOCIAL SECURITY. C. A. 6th Cir. Certiorari denied.

No. 12–8721. PEACOCK *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–8725. ALEXANDER *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied.

No. 12–8730. THOMPSON *v.* DOERING ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–8733. NEAL *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 12–8734. NEELY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 521.

No. 12–8737. JIGGETTS *v.* SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ, ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–8739. KARR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 520.

No. 12–8744. SEWELL *v.* VATTEROTT EDUCATIONAL CENTERS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 470 Fed. Appx. 523.

No. 12–8750. AUSTIN *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8752. SUAREZ *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8754. BROWN *v.* PERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8757. DAVIS *v.* FLORIDA (Reported below: 105 So. 3d 519); and NETTLES *v.* FLORIDA (105 So. 3d 521). Sup. Ct. Fla. Certiorari denied.

No. 12–8760. HUGHES *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 12–8772. CRENSHAW *v.* STEWARD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 491.

No. 12–8779. GARDNER *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8784. SWIFT *v.* EAST BATON ROUGE JUVENILE COURT ET AL. Sup. Ct. La. Certiorari denied. Reported below: 2012–2660 (La. 2/8/13), 108 So. 3d 86.

No. 12–8789. HAM *v.* PATTERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 386.

No. 12–8792. HOTCHKISS *v.* CLAY TOWNSHIP BOARD ET AL. Ct. App. Mich. Certiorari denied.

No. 12–8793. George *v.* Mabus, Secretary of the Navy. C. A. 4th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 159.

No. 12–8798. Gutierrez *v.* Premo, Superintendent, Oregon State Penitentiary, et al. C. A. 9th Cir. Certiorari denied.

No. 12–8806. Cooper *v.* Beard, Secretary, California Department of Corrections and Rehabilitation. C. A. 9th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 734.

No. 12–8815. Brown *v.* Greene et al. C. A. 2d Cir. Certiorari denied.

No. 12–8816. Zhu *v.* Warren, Administrator, New Jersey State Prison, et al. C. A. 3d Cir. Certiorari denied.

No. 12–8855. Donelson *v.* Atchison, Warden. C. A. 7th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 315.

No. 12–8863. Lang *v.* Curtin, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–8873. Arita *v.* Cain, Warden. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 352.

No. 12–8875. Jackson *v.* New Mexico. Ct. App. N. M. Certiorari denied.

No. 12–8877. Parker *v.* Illinois. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2012 IL App (3d) 110140–U.

No. 12–8882. Townsley *v.* New York. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 294, 982 N. E. 2d 1227.

No. 12–8889. Gallo *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 12–8914. Green *v.* Pennsylvania. Super. Ct. Pa. Certiorari denied. Reported below: 50 A. 3d 238.

No. 12–8917. Heard *v.* Yurkovich, Warden. C. A. 7th Cir. Certiorari denied.

No. 12–8930. Plotkin *v.* Commissioner of Internal Revenue. C. A. 11th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 954.

No. 12–8933. McKenzie *v.* Raines et al. C. A. 4th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 640.

No. 12–8934. White *v.* Hobbs, Director, Arkansas Department of Correction. C. A. 8th Cir. Certiorari denied.

No. 12–8935. Woodard *v.* Turnbull, Superintendent, Spring Creek Correctional Center. C. A. 9th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 173.

No. 12–8936. Valdez *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 12–8938. Smith *v.* Hedgpeth, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 706 F. 3d 1099.

No. 12–8948. Wheeler *v.* Morgan et al. C. A. 3d Cir. Certiorari denied.

No. 12–8949. Tatum *v.* Orleans Parish School Board. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2011–1051 (La. App. 4 Cir. 2/22/12), 87 So. 3d 400.

No. 12–8950. Niemiec *v.* Michigan et al. Sup. Ct. Mich. Certiorari denied. Reported below: 493 Mich. 890, 822 N. W. 2d 567.

No. 12–8956. Eden *v.* Holder, Attorney General. C. A. 11th Cir. Certiorari denied.

No. 12–8974. Shapard *v.* Graham, Superintendent, Auburn Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 12–8983. Gravely *v.* Macy's et al. Sup. Ct. App. W. Va. Certiorari denied.

No. 12–8984. Hamilton *v.* Crews, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 12–8985. Gibson *v.* Oliver, Warden. C. A. 7th Cir. Certiorari denied.

No. 12–8996. Hellstrom *v.* Florida. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 79 So. 3d 39.

No. 12–9008. Farner *v.* Sexton, Warden, et al. Ct. Crim. App. Tenn. Certiorari denied.

No. 12–9011. SMITHERS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 906.

No. 12–9014. RODRIGUEZ-RIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9018. KROESEN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 121 So. 3d 1046.

No. 12–9023. TATE *v.* EASTERLING, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9028. CHICO *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 103292–U.

No. 12–9035. MARKS *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 383.

No. 12–9039. BERRY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9045. TERRELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 3d 755.

No. 12–9047. JEMISON *v.* ALLEN ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9051. MINATEE *v.* PHILADELPHIA POLICE DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 225.

No. 12–9052. AUSLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9058. ALMLY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 384.

No. 12–9060. LOMAX *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 103016, 975 N. E. 2d 115.

No. 12–9061. BRAVO-MENDOZA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 589.

No. 12–9068. MALDONADO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 696 F. 3d 1095.

No. 12–9071. CROCKETT *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 12–9072. DOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 698 F. 3d 1284.

No. 12–9085. WARE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 694 F. 3d 527.

No. 12–9089. RICHARDSON *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 128 Nev. 929, 381 P. 3d 656.

No. 12–9092. COOKSEY *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 366 Mont. 346, 286 P. 3d 1174.

No. 12–9097. ANDERSON *v.* OBENLAND, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied.

No. 12–9098. ESPINAL-ALMEIDA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 3d 588.

No. 12–9099. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9100. INGRAM *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 520.

No. 12–9102. MERTENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9105. IZAGUIRRE CABRERA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9106. DESAN *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9109. DENNIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–9110. HOUGH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9111. HAMILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 3d 404.

No. 12–9113. TERAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 287.

No. 12–9115. HAYNES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9117. LIPPITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 368.

No. 12–9124. COWAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9128. HILTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 3d 959.

No. 12–9131. ROSA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 358.

No. 12–9132. MELO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–9136. BLANK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 3d 1084.

No. 12–9138. BABB *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 641.

No. 12–9145. STIMUS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9149. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 355.

No. 12–9150. BATTS *v.* GIORLA ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9152. GUTIERREZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 786.

No. 12–9154. AVALOS BANDERAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9155. LEON *v.* MCDONALD, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 573.

No. 12–9156. LOPEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 824.

No. 12–9157. KNIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9159. DAVIS, AKA HEALY, AKA MARTIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 18.

No. 12–9162. BAILEY *v.* VALENZUELA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 588.

No. 12–9172. POMPOSELLO *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 105 So. 3d 540.

No. 12–9175. SEGUIN *v.* JESSUP & CONROY, P. C. Sup. Ct. R. I. Certiorari denied. Reported below: 46 A. 3d 835.

No. 12–9177. BARKSDALE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 437.

No. 12–9179. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 249.

No. 12–9181. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9188. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 819.

No. 12–9189. BURTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–9190. GUERRERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 263.

No. 12–9191. KANG HE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 398.

No. 12–9193. PETERSON *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 101 So. 3d 860.

No. 12–9195. PERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 3d 906.

No. 12–9199. PICO RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 904.

No. 12–9200. SLAGG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9202. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 3d 226.

No. 12–9203. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 504 Fed. Appx. 207.

No. 12–9210. MARTELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 677.

No. 12–9212. HILL *v.* DANIELS, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 683.

No. 12–9214. DAVIS *v.* TRAMMELL, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 695 F. 3d 1060.

No. 12–9215. CAMERON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 3d 621.

No. 12–9217. KIMBALL *v.* COAKLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9219. OLBEL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9224. WASHINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 647.

No. 12–9226. GUADALUPE, AKA SANTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 493 Fed. Appx. 146.

No. 12–9227. ANDREWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 257.

No. 12–9229. BLANKENSHIP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 427.

No. 12–9233. JOSLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 139.

No. 12–9234. MARTINEZ-MUNOZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 474.

No. 12–9236. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 452.

No. 12–9247. KNOX *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9248. JACKSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 513 Fed. Appx. 51.

No. 12–9252. SALAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 484 Fed. Appx. 349.

No. 12–9255. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 814.

No. 12–9256. LAUREANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9262. COOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 325.

No. 12–9264. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–9266. TYERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 3d 552.

No. 12–9269. NEWSOME *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 463.

No. 12–9274. NDURIBE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 3d 1049.

No. 12–9276. GARCIA-OCAMPO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 861.

No. 12–9277. BATTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 809.

No. 12–9282. MITCHELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 628.

No. 12–9283. MORALES-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 359.

No. 12–9287. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9290. CURIEL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9299. EDWARDS *v.* CHAPMAN, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 12–9301. GUTHRIE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9304. LAWING *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 703 F. 3d 229.

No. 12–9306. DESIRE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 818.

No. 12–9307. CALDERA-PINA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 349.

No. 12–9308. DEHERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 707.

No. 12–9312. PARRALES-ZUNIGA *v.* UNITED STATES (Reported below: 501 Fed. Appx. 344); HERNANDEZ-MATEOS *v.* UNITED STATES (501 Fed. Appx. 342); SANCHEZ-GARCIA *v.* UNITED STATES (501 Fed. Appx. 340); SAAVEDRA-MORENO *v.* UNITED STATES (544 Fed. Appx. 251); ZUNIGA-MARTINEZ *v.* UNITED STATES (512 Fed. Appx. 428); MONTOYA-JIMENEZ *v.* UNITED STATES (513 Fed. Appx. 369); MUNOZ *v.* UNITED STATES (513 Fed. Appx. 379); SALDANA-TOVAR *v.* UNITED STATES (512 Fed. Appx. 441); MATA *v.* UNITED STATES (513 Fed. Appx. 401); and VEGA-MILIAN *v.* UNITED STATES (514 Fed. Appx. 468). C. A. 5th Cir. Certiorari denied.

No. 12–9314. NEAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 755.

No. 12–9315. BRAME *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 247.

No. 12–9320. EDWARDS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 262.

No. 12–9325. YU SUNG PARK ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 706.

No. 12–9327. ZEHRINGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 980.

No. 12–9332. TOOHEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 334.

No. 12–9334. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 262.

No. 12–9335. OLVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 119.

No. 12–9368. ROGERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 12–456. FERNANDES *v.* CARNIVAL CORP., DBA CARNIVAL CRUISE LINES, INC. C. A. 11th Cir. Motion of Port Ministries International for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 484 Fed. Appx. 361.

No. 12–627. MOLONEY ET AL. *v.* UNITED STATES ET AL. C. A. 1st Cir. Motion of petitioners to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 685 F. 3d 1.

No. 12–723. ILAGAN ET UX. *v.* UNGACTA ET AL. Sup. Ct. Guam. Motion of National Federation of Independent Business Small Business Legal Center et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 2011 Guam 17.

No. 12–965. GREENSPAN *v.* RANDOM HOUSE, INC., ET AL. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 12–990. HOME BUYERS WARRANTY CORP. ET AL. *v.* FRUMER ET UX. Super. Ct. N. J., App. Div. Motion of National Risk Retention Association for leave to file brief as *amicus curiae* granted. Certiorari denied.

No. 12–997. CONOCOPHILLIPS CO. *v.* ABRAHAMSEN ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 503 Fed. Appx. 157.

No. 12–1003. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. *v.* CELAYA. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 497 Fed. Appx. 744.

No. 12–7166. GONZALEZ *v.* MASSACHUSETTS. App. Ct. Mass. Motion of Committee for Public Counsel Services for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 81 Mass. App. 1138, 967 N. E. 2d 650.

No. 12–9010. HOWARD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 12–9166. RICHARDSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 12–9232. KALILIKANE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9275. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 479 Fed. Appx. 474.

Rehearing Denied

No. 11–465. JOHNSON, ACTING WARDEN *v.* WILLIAMS, 568 U. S. 289;

No. 12–669. BERMAN *v.* EVERY ET AL., 568 U. S. 1158;

No. 12–732. RAMON OCHOA *v.* RUBIN, AKA RUBIN OCHOA, 568 U. S. 1160;

No. 12–752. HYMAN *v.* CORNELL UNIVERSITY ET AL., 568 U. S. 1161;

No. 12–810. BRENNAN *v.* ILLINOIS, 568 U. S. 1162;

No. 12–6242. SADLOWSKI *v.* MICHALSKY, 568 U. S. 1015;

No. 12–7395. JACKSON *v.* FELKER, WARDEN, 568 U. S. 1165;

No. 12–7432. JOHNSON *v.* CALIFORNIA, 568 U. S. 1165;

No. 12–7469. MARSHALL *v.* KEFFER, WARDEN, 568 U. S. 1166;

No. 12–7480. AMENUVOR *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, 568 U. S. 1166;

No. 12–7598. WILKINSON *v.* COMMISSION FOR LAWYER DISCIPLINE OF THE STATE BAR OF TEXAS, 568 U. S. 1169;

No. 12–7693. LAMB *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 568 U. S. 1170;

No. 12–7704. RUFFIN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL., 568 U. S. 1171;

No. 12–7709. DOBBS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 568 U. S. 1171;

No. 12–7747. GILLESPIE *v.* THIRTEENTH JUDICIAL CIRCUIT OF FLORIDA ET AL. (two judgments), 568 U. S. 1172;

No. 12–7757. KRISTON *v.* PEROULIS ET AL., 568 U. S. 1172;

No. 12–7776. JOHNSON *v.* VARGA, WARDEN, 568 U. S. 1173;

No. 12–7838. WILEY *v.* GEITHNER, SECRETARY OF THE TREASURY, 568 U. S. 1175;

No. 12–7927. SAMUEL *v.* BLOOMBERG, MAYOR OF THE CITY OF NEW YORK, NEW YORK, ET AL., 568 U. S. 1199;

No. 12–7930. IN RE ROBINSON, 568 U. S. 1156;

No. 12–8113. BOSTIC *v.* UNITED STATES, 568 U. S. 1183;

No. 12–8166. CRUZ *v.* UNITED STATES, 568 U. S. 1184;

No. 12–8221. PANTOLIANO *v.* UNITED STATES, 568 U. S. 1185; and

No. 12–8248. MILLSAPS *v.* UNITED STATES, 568 U. S. 1185. Petitions for rehearing denied.

No. 12–7435. RUTLEDGE *v.* MCDONALD, WARDEN, 568 U. S. 1187. Petition for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

No. 12–5106. JONES *v.* CITIMORTGAGE, INC., ET AL., 568 U. S. 895; and

No. 12–5835. DEWITT *v.* DISTRICT OF COLUMBIA ET AL., 568 U. S. 951. Motions for leave to file petitions for rehearing denied.

APRIL 16, 2013

Dismissal Under Rule 46

No. 12–1177. VITRO, S. A. B. DE C. V., ET AL. *v.* AD HOC GROUP OF VITRO NOTEHOLDERS ET AL. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 701 F. 3d 1031.

Miscellaneous Orders. (For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post,* p. 1127; amendments to the Federal Rules of Bankruptcy Procedure, see *post,* p. 1143; amendments to the Federal Rules of Civil Procedure, see *post,* p. 1151; amendments to the Federal Rules of Criminal Procedure, see *post,* p. 1163; and an amendment to the Federal Rules of Evidence, see *post,* p. 1169.)

Certiorari Denied

No. 12–9721 (12A983). THREADGILL *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: 522 Fed. Appx. 236.

APRIL 19, 2013

Dismissal Under Rule 46

No. 12–9127. HARGROVE *v.* UNITED STATES. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 701 F. 3d 156.

Miscellaneous Order. (For the Court's order approving revisions to the Rules of this Court, see *post*, p. 1042.)

APRIL 22, 2013

Certiorari Granted—Vacated and Remanded

No. 11–649. RIO TINTO PLC ET AL. *v.* SAREI ET AL. C. A. 9th Cir. Motions of Government of Australia et al.; Professors of International Law, Foreign Relations Law and Federal Jurisdiction; Washington Legal Foundation et al.; Chamber of Commerce of the United States of America; and National Foreign Trade Council et al. for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Kiobel* v. *Royal Dutch Petroleum Co.*, *ante*, p. 108. JUSTICE KAGAN took no part in the consideration or decision of these motions and this petition. Reported below: 671 F. 3d 736.

No. 12–240. CGI TECHNOLOGIES & SOLUTIONS, INC. *v.* ROSE ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *US Airways, Inc.* v. *McCutchen*, *ante*, p. 88. Reported below: 683 F. 3d 1113.

No. 12–478. BROOKS *v.* MINNESOTA (two judgments). Ct. App. Minn. Certiorari granted, judgments vacated, and case remanded for further consideration in light of *Missouri* v. *McNeely*, *ante*, p. 141.

Certiorari Dismissed

No. 12–9331. MITCHELL *v.* UNITED STATES. 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. 12A886. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 12M109. HAMILTON *v.* COLORADO MEDICAL BOARD; and
No. 12M110. JETT *v.* UNITED STATES POSTAL SERVICE ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 12M111. HILL *v.* SCHILLING ET AL. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 12–8513. RICH *v.* TAMEZ, WARDEN. C. A. 5th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1210] denied.

No. 12–8724. IN RE COX. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1227] denied.

No. 12–8783. ISAACSON *v.* BERRIGAN ET AL. C. A. 9th Cir.;
No. 12–8902. SPRIGGS *v.* SENIOR SERVICES OF SOUTHEASTERN VIRGINIA ET AL. C. A. 4th Cir.; and
No. 12–8945. CASEY *v.* CASEY. Sup. Ct. N. H. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 13, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9514. IN RE GLASER; and
No. 12–9522. IN RE GENT. Petitions for writs of habeas corpus denied.

No. 12–9370. IN RE REYES. Petition for writ of mandamus denied.

Certiorari Granted

No. 11–965. DAIMLER AG *v.* BAUMAN ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 644 F. 3d 909.

Certiorari Denied

No. 12–385. OCCIDENTAL PETROLEUM CORP. ET AL. *v.* MAYNAS CARIJANO ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 643 F. 3d 1216.

No. 12–521. AMERICAN SNUFF CO., LLC, FKA CONWOOD CO., LLC, ET AL. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 674 F. 3d 509.

No. 12–558. Bunch *v.* Bobby, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 685 F. 3d 546.

No. 12–801. United States *v.* Beer et al. C. A. Fed. Cir. Certiorari denied. Reported below: 696 F. 3d 1174.

No. 12–869. Caviezel et vir, Individually and as Parents and Natural Guardians of CC *v.* Great Neck Public Schools, aka Great Neck Union Free School District, et al. C. A. 2d Cir. Certiorari denied. Reported below: 500 Fed. Appx. 16.

No. 12–871. University of Oregon *v.* Emeldi. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 3d 715.

No. 12–919. Simon *v.* Keyspan Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 3d 196.

No. 12–972. Escobal *v.* Celebration Cruise Operator, Inc., et al. C. A. 11th Cir. Certiorari denied. Reported below: 482 Fed. Appx. 475.

No. 12–1004. Smith *v.* Friedman et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 168 Md. App. 767 and 777.

No. 12–1011. Rupert et al. *v.* Jones et al. C. A. 9th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 660.

No. 12–1012. SSC Odin Operating Co., LLC, dba Odin Healthcare Center *v.* Carter, Special Administrator of the Estate of Gott, Deceased. Sup. Ct. Ill. Certiorari denied. Reported below: 2012 IL 113204, 976 N. E. 2d 344.

No. 12–1015. Hearts Bluff Game Ranch, Inc. *v.* Texas et al. Sup. Ct. Tex. Certiorari denied. Reported below: 381 S. W. 3d 468.

No. 12–1022. Morris et al. *v.* George Mason University Foundation. C. A. 4th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 450.

No. 12–1024. Maupin *v.* Howard County Board of Education et al. C. A. 4th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 377.

No. 12–1026. New York *v.* Alvarez. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 75, 979 N. E. 2d 1173.

No. 12–1030. WEEKS *v.* BROWN, WARDEN. Super. Ct. Dodge County, Ga. Certiorari denied.

No. 12–1037. INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION ET AL. *v.* BONTRAGER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 7th Cir. Certiorari denied. Reported below: 697 F. 3d 604.

No. 12–1042. DOMINGUEZ *v.* CHANG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 677.

No. 12–1089. PPG INDUSTRIES, INC., ET AL. *v.* AMOS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 699 F. 3d 448.

No. 12–1091. DEWS ET AL. *v.* MILLER ET AL. C. A. 5th Cir. Certiorari denied.

No. 12–1106. MARLTON PLAZA ASSOCIATES, L. P., ET AL. *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 426 N. J. Super. 337, 44 A. 3d 626.

No. 12–1112. HANCOCK ET AL. *v.* AT&T, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 701 F. 3d 1248.

No. 12–1136. WIDEX A/S ET AL. *v.* ENERGY TRANSPORTATION GROUP, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 697 F. 3d 1342.

No. 12–1144. DAY *v.* SBC (AT&T) DISABILITY INCOME PLAN. C. A. 9th Cir. Certiorari denied. Reported below: 698 F. 3d 1091.

No. 12–7611. CASTILLO *v.* NEW YORK. Sup. Ct., Crim. Term, Kings County, N. Y. Certiorari denied. Reported below: 35 Misc. 3d 1220(A), 953 N. Y. S. 2d 552.

No. 12–7841. FIELDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–8332. VALDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 82, 281 P. 3d 924.

No. 12–8346. SOCHOR *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 685 F. 3d 1016.

No. 12–8747. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 12–8748. SHARPLES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 093363–U.

No. 12–8753. RALSTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8758. HUNT *v.* MICHIGAN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 482 Fed. Appx. 20.

No. 12–8762. STEPHENS, AKA STEVENS *v.* TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 287.

No. 12–8766. WOODS *v.* PUBLIC EMPLOYMENT RELATIONS BOARD. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–8771. MURCHISON *v.* RUSSELL. C. A. 8th Cir. Certiorari denied.

No. 12–8773. TILLEY *v.* CHOATE, SHERIFF, OKFUSKEE COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 760.

No. 12–8774. WILLIAMS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8776. REEDOM *v.* CRAPPELL ET AL. C. A. 7th Cir. Certiorari denied.

No. 12–8780. GILMORE *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 12–8782. HAWKINS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 12–8787. CORDELL *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–8790. LAN THI HOANG *v.* WEINTRAUB. Sup. Ct. Cal. Certiorari denied.

No. 12–8794. HILL *v.* STUMBO ET AL. Ct. App. Ohio, Franklin County. Certiorari denied. Reported below: 2012-Ohio-65.

No. 12–8795. GONSALEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8797. HAMILTON *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8801. LIU *v.* SPENCER. App. Ct. Mass. Certiorari denied. Reported below: 81 Mass. App. 1123, 964 N. E. 2d 368.

No. 12–8802. LEATHERWOOD *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8809. SEAMAN *v.* WASHINGTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 349.

No. 12–8812. BROWN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 12–8822. WALKER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8824. SYLVESTER *v.* BENARD. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 12–8829. GORE *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–8830. JOHNSON *v.* JONES, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS. C. A. 10th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 807.

No. 12–8831. JACKSON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8836. PLOUFFE *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA. C. A. 3d Cir. Certiorari denied.

No. 12–8837. SMITH *v.* ADAMS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 561.

No. 12–8838. PURIFOY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–8839. GONZALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–8842. HAWKINS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. Reported below: 491 Mich. 945, 815 N. W. 2d 434.

No. 12–8843. H. M. *v.* Superior Court of California, Los Angeles County, et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–8845. Wilkinson *v.* Timme, Warden, et al. C. A. 10th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 556.

No. 12–8846. Whaley et al. *v.* Brust et al. C. A. 2d Cir. Certiorari denied.

No. 12–8847. Jones *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 12–8850. Gabbard *v.* Tennessee Elections Commission et al. C. A. 6th Cir. Certiorari denied.

No. 12–8856. Edwards *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 121 So. 3d 1044.

No. 12–8860. Carter *v.* Louisiana. Sup. Ct. La. Certiorari denied. Reported below: 2012–1357 (La. 10/8/12), 98 So. 3d 853.

No. 12–8862. Solernorona *v.* Michigan. Ct. App. Mich. Certiorari denied.

No. 12–8871. Brown *v.* Valdez et al. C. A. 9th Cir. Certiorari denied.

No. 12–8896. Hamilton *v.* Illinois. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2011 IL App (2d) 100739, 962 N. E. 2d 1105.

No. 12–8899. Martinez Magana *v.* California. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 12–8946. Wright *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 12–8957. Drake *v.* Louisiana. Ct. App. La., 2d Cir. Certiorari denied.

No. 12–8959. Anderson *v.* Lockheed Martin Corp., dba Lockheed Martin Information Systems & Global Solutions. C. A. 4th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 454.

No. 12–8991. Robertson *v.* Williams et al. C. A. 10th Cir. Certiorari denied.

No. 12–9048. PARKER *v.* FORTNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 359.

No. 12–9056. EVANS *v.* PHELPS, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9063. RICHARDS *v.* WHITE ET AL. Ct. App. Wis. Certiorari denied.

No. 12–9065. BORRERO *v.* NEW YORK. Sup. Ct., Crim. Term, Kings County, N. Y. Certiorari denied.

No. 12–9066. KWONG *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 307 Conn. 904, 53 A. 3d 219.

No. 12–9096. LEE *v.* YOUNG. Ct. App. Idaho. Certiorari denied.

No. 12–9103. MCILVOY *v.* NORMAN, SUPERINTENDENT, JEFFERSON CITY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 12–9140. WILLIAMS *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 205 Md. App. 779.

No. 12–9160. COLVIN *v.* MEDINA, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 800.

No. 12–9239. WADSWORTH *v.* UTAH. Ct. App. Utah. Certiorari denied. Reported below: 2012 UT App 175, 282 P. 3d 1037.

No. 12–9260. SILVERSKY *v.* FRINK, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 625.

No. 12–9268. WHITLEY *v.* STRADA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 755.

No. 12–9278. ALLEN *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 222 N. C. App. 707, 731 S. E. 2d 510.

No. 12–9286. WHITAKER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 222 N. C. App. 585, 730 S. E. 2d 834.

No. 12–9292. NEVES *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–9302. Plouffe *v.* Pennsylvania Labor Relations Board. Sup. Ct. Pa. Certiorari denied.

No. 12–9316. Butler *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 12–9343. Lagunas-Baltazar *v.* United States (Reported below: 502 Fed. Appx. 402); Acevedo-Gallegos *v.* United States (508 Fed. Appx. 312); Carter *v.* United States (513 Fed. Appx. 397); and Gomez *v.* United States (513 Fed. Appx. 374). C. A. 5th Cir. Certiorari denied.

No. 12–9345. Vasquez *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 12–9346. Thompson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 513 Fed. Appx. 138.

No. 12–9349. Minor *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 326.

No. 12–9352. Murphy *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 506 Fed. Appx. 2.

No. 12–9356. Rodgers *v.* Kirkland, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9360. Anderson-Bagshaw *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 396.

No. 12–9361. Bugh *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 3d 888.

No. 12–9363. Wolfe *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 472 Fed. Appx. 141.

No. 12–9374. Moody *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 269.

No. 12–9375. Nematuth *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 255.

No. 12–9383. Webster *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 12–9384. Young *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 3d 1235.

No. 12–9389. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9395. CROW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 285.

No. 12–9405. SHANNON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 487.

No. 12–9406. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 697 F. 3d 1190.

No. 12–9408. FORD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 248.

No. 12–9409. HUGHES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9411. DIAZ-GARCIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 683.

No. 12–9417. NOEL *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 103 So. 3d 252.

No. 12–140. KENTUCKY *v.* KING. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 386 S. W. 3d 119.

No. 12–652. BEVERLY ENTERPRISES, INC., ET AL. *v.* PING, EXECUTRIX OF THE ESTATE OF DUNCAN, DECEASED. Sup. Ct. Ky. Motion of Extendicare Health Services, Inc., et al. for leave to file brief as *amici curiae* granted. Certiorari denied. Reported below: 376 S. W. 3d 581.

No. 12–8852. SABER ET AL. *v.* SABER ET AL. (two judgments). Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 12–9377. ROBERTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9380. RINALDI *v.* RIOS, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9388. BARNES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consid-

eration or decision of this petition. Reported below: 488 Fed. Appx. 739.

No. 12–9393. SHELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–6575. GUESS *v.* UNITED STATES, 568 U. S. 1093;

No. 12–6747. MARSHALL ET UX. *v.* COLLIER COUNTY, FLORIDA, ET AL., 568 U. S. 1196;

No. 12–7718. WOODS *v.* STEVENSON, WARDEN, 568 U. S. 1171;

No. 12–7735. SEALE *v.* HOLDER, ATTORNEY GENERAL, 568 U. S. 1171;

No. 12–7741. IN RE WILLIAMS, 568 U. S. 1156;

No. 12–7858. GUY ET AL. *v.* CITY OF INGLEWOOD, CALIFORNIA, ET AL., 568 U. S. 1197;

No. 12–7940. YOUNG *v.* FRAKER, SUPERINTENDENT, CLALLAM BAY CORRECTIONS CENTER, 568 U. S. 1199;

No. 12–7951. SOMERVILLE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 568 U. S. 1215;

No. 12–7952. K. W. *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES, 568 U. S. 1215;

No. 12–8018. WILSON *v.* UNITED STATES AIR FORCE, 568 U. S. 1199;

No. 12–8137. KRISTON *v.* PEROULIS ET AL., 568 U. S. 1235;

No. 12–8347. MOTHERSHED *v.* OKLAHOMA EX REL. OKLAHOMA BAR ASSN. ET AL., 568 U. S. 1202;

No. 12–8389. WOODS *v.* MARYLAND (two judgments), 568 U. S. 1218; and

No. 12–8394. BARNETT *v.* UNITED STATES, 568 U. S. 1204. Petitions for rehearing denied.

APRIL 25, 2013

Certiorari Denied

No. 12–9866 (12A1024). COBB *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 29, 2013

Certiorari Granted—Vacated and Remanded

No. 11–79. Garcia *v.* Holder, Attorney General. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Moncrieffe* v. *Holder*, *ante*, p. 184. Reported below: 638 F. 3d 511.

Certiorari Dismissed

No. 12–8887. Cobble *v.* Williams, Warden, et al. Super. Ct. Tattnall County, Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 12–8892. Garcia *v.* Bradt, Superintendent, Attica Correctional Facility. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 96 App. Div. 3d 1516, 945 N. Y. S. 2d 919.

No. 12–8894. Hall *v.* Florida. Sup. Ct. Fla. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*). Reported below: 104 So. 3d 1084.

No. 12–9183. Cutaia *v.* Florida 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. 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. 12M112. Harvey *v.* U. S. Bank N. A. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 12M113. ANDERSON *v.* PRIVATE CAPITAL GROUP ET AL. Motion for leave to proceed as a veteran denied.

No. 12M114. WILLIAMS *v.* CAIN, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 12–414. BURT, WARDEN *v.* TITLOW. C. A. 6th Cir. [Certiorari granted, 568 U. S. 1191.] Motion of respondent for appointment of counsel granted. Valerie Newman, Esq., of Detroit, Mich., is appointed to serve as counsel for respondent in this case.

No. 12–8969. RYE *v.* STATE PERSONNEL BOARD ET AL. Ct. App. Cal., 3d App. Dist.; and

No. 12–9500. MCCONNEL *v.* UNITED STATES. C. A. 10th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until May 20, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9578. IN RE RITCHIE; and

No. 12–9595. IN RE HEXIMER. Petitions for writs of habeas corpus denied.

No. 12–8874. IN RE BOYD; and

No. 12–9421. IN RE VAKSMAN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 12–7515. BURRAGE *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 2 presented by the petition. Reported below: 687 F. 3d 1015.

Certiorari Denied

No. 12–635. LEVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 488 Fed. Appx. 481.

No. 12–758. SOFFAR *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 12–893. MAXIM CRANE WORKS, L. P. *v.* DILTS, ADMINISTRATRIX OF THE ESTATE OF DILTS, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 440.

No. 12–907. PRESBYTERY OF OHIO VALLEY, INC., ET AL. *v.* OPC, INC., ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 973 N. E. 2d 1099.

No. 12–932. BRYANT, INDIVIDUALLY AND AS NEXT FRIEND AND GUARDIAN OF D. B., ET AL. *v.* NEW YORK STATE EDUCATION DEPARTMENT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 692 F. 3d 202.

No. 12–937. STONE ET VIR, PARENTS AND NEXT FRIENDS OF STONE, A MINOR, ET AL. *v.* SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 676 F. 3d 1373.

No. 12–1021. PIERCE *v.* WOLDENBERG. C. A. 2d Cir. Certiorari denied. Reported below: 498 Fed. Appx. 96.

No. 12–1023. DUFRIES *v.* STANDIFIRD, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 468.

No. 12–1031. KOMAR *v.* CASSESE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 503 Fed. Appx. 55.

No. 12–1034. OWENS *v.* SEABOLT, WARDEN. Super. Ct. Habersham County, Ga. Certiorari denied.

No. 12–1041. DAVID *v.* MONSANTO CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 484 Fed. Appx. 570.

No. 12–1045. EATON CORP. *v.* ZF MERITOR LLC ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 696 F. 3d 254.

No. 12–1047. YEAGER ET AL. *v.* BOWLIN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 693 F. 3d 1076 and 495 Fed. Appx. 780.

No. 12–1050. BRYANT *v.* HUTCHINSON AUTO MALL. C. A. 11th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 347.

No. 12–1058. BROOKS *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 164 N. H. 272, 56 A. 3d 1245.

No. 12–1059. HUERTA *v.* SHEIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 422.

No. 12–1105. FOURNIER ET AL. *v.* UNITED STATES; DAHLBERG ET AL. *v.* UNITED STATES; KETTLE ET AL. *v.* UNITED STATES;

GLASS ET AL. *v.* UNITED STATES; and MCCANN ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied.

No. 12–1121. FIELDS *v.* HENRY COUNTY, TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 701 F. 3d 180.

No. 12–1135. SUNNY HSAIO SHIN TING *v.* HOLLAND, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–1141. MCRAE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 702 F. 3d 806.

No. 12–1154. STANLEY *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 993.

No. 12–1155. DAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 700 F. 3d 713.

No. 12–1161. ASHMORE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 510 Fed. Appx. 47.

No. 12–1165. GILLION *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 F. 3d 284.

No. 12–1179. GONZALES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 762.

No. 12–1180. DUBEY ET VIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 473 Fed. Appx. 691.

No. 12–1186. MCAULIFFE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 542.

No. 12–1192. KEATS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–1194. BUNCH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 685 F. 3d 745.

No. 12–5890. PHILLIPS *v.* CHAPPELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 673 F. 3d 1168.

No. 12–7388. MOHAMADI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–7874. MARQUEZ-LOBOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 697 F. 3d 759.

No. 12–7894. BLANCHARD *v.* STEPHENS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8185. PARKS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 698 F. 3d 1.

No. 12–8379. PARRA DUENAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 1, 281 P. 3d 887.

No. 12–8439. OWEN *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 686 F. 3d 1181.

No. 12–8746. BROWN *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 2012 WI App 62, 341 Wis. 2d 491, 815 N. W. 2d 407.

No. 12–8859. CEDILLO *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8864. LEWIS *v.* DORSEY ET AL. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 2011–2308 (La. App. 1 Cir. 11/2/12).

No. 12–8872. BRZOWSKI *v.* ILLINOIS DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 12–8876. HARVEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 12–8881. THOMAS *v.* ILLINOIS DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied.

No. 12–8884. JACQUES *v.* PUGH, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 12–8885. JACKSON *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 129.

No. 12–8886. KINNEY *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 12–8888. CHAPMAN *v.* TROUTT ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8890. HUNT *v.* KRAMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8893. FLOWERS *v.* RICH ET AL. C. A. 5th Cir. Certiorari denied.

No. 12–8900. JIMENEZ *v.* SIMPSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 12–8904. REESE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 12–8909. GASTON *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8911. HIGGS *v.* CREWS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8916. HUNT *v.* BARROW, WARDEN. Super. Ct. Telfair County, Ga. Certiorari denied.

No. 12–8921. DAILEY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–8922. CONLEY *v.* PRELESNIK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8923. HAMPTON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 103 So. 3d 98.

No. 12–8925. GOBERT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 2012–1968 (La. 1/11/13), 106 So. 3d 552.

No. 12–8926. HUGHES *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 12–8927. FIRTH *v.* SHOEMAKER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 778.

No. 12–8928. GLOVER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 100227–U.

No. 12–8929. HARRIS *v.* HAGEMAN ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–8940. R. G. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 103 So. 3d 165.

No. 12–8941. SKAGGS *v.* SHEETS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8943. BEY *v.* PICTRUS K. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 457.

No. 12–8944. ALVAREZ *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 346 Fed. Appx. 562.

No. 12–8947. QIUJING WANG *v.* CRUMPACKER. Sup. Ct. Va. Certiorari denied.

No. 12–8953. GWIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–8958. BEHIS *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 12–8962. DESPER *v.* BASS ET AL. Sup. Ct. Va. Certiorari denied.

No. 12–8970. BAKHTIARI *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8972. BARNETT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 12–8976. KINNEY *v.* COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–8978. FITZGERALD *v.* HOLDER, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 269.

No. 12–8981. GAMEZ *v.* GONZALES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 310.

No. 12–8982. HALL *v.* WARREN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8990. SMITH *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–8992. HOLMAN *v.* DENNEY, WARDEN. Sup. Ct. Mo. Certiorari denied.

No. 12–8994. FRASIER *v.* MCEWEN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–8997. FUTCH *v.* FEDERAL BUREAU OF PRISONS. C. A. 6th Cir. Certiorari denied.

No. 12–8999. QUINN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 12–9000. ESCUTIA MENDOZA *v.* VALENZUELA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9002. GANT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 478 Fed. Appx. 770.

No. 12–9005. MOSLEY *v.* ANDERSON, SHERIFF, TARRANT COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 272.

No. 12–9007. GOODIN *v.* MCQUIGGIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9009. FRANCIS *v.* KENTUCKY RIVER COAL CORP. Ct. App. Ky. Certiorari denied.

No. 12–9015. HOLMES *v.* LUDWICK, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 12–9016. KITT *v.* COHEN, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 343.

No. 12–9017. MANDEVILLE-ANTHONY *v.* WALT DISNEY CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 651.

No. 12–9019. JOHNSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 12–9024. HIEU DOAN TRUONG *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 249 Ore. App. 70, 274 P. 3d 873.

No. 12–9025. WIIG *v.* ULRICH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 295.

No. 12–9026. WILLIAMS *v.* NEW ORLEANS ERNEST N. MORIAL CONVENTION CENTER. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 2011–1412 (La. App. 4 Cir. 5/11/12), 92 So. 3d 572.

No. 12–9033. WASHINGTON *v.* NATIONAL EDUCATION ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 436.

No. 12–9038. ALARHABI *v.* HORCHEL ET AL. Sup. Ct. Va. Certiorari denied.

No. 12–9040. ARUANNO *v.* ALLEN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 498 Fed. Appx. 160.

No. 12–9049. SCHAFFER *v.* CAMERON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT CRESSON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9067. JENNINGS *v.* HAGEL, SECRETARY OF DEFENSE. C. A. 7th Cir. Certiorari denied.

No. 12–9074. DANIELS *v.* WRIGHT, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 490 Fed. Appx. 569.

No. 12–9112. GONZALEZ ET AL. *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 84 So. 3d 377.

No. 12–9120. BERRY *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2012 IL App (3d) 091048–U.

No. 12–9121. HATCHETT *v.* COURSEY, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 12–9123. BROCKBANK *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 96 So. 3d 911.

No. 12–9134. MOSELEY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9153. BARRETT *v.* CHAPPIUS, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9158. MARSHALL *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied.

No. 12–9198. STRAND ET AL. *v.* DAWSON. C. A. 10th Cir. Certiorari denied. Reported below: 468 Fed. Appx. 910.

No. 12–9225. MCMILLER *v.* SALAZAR, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9238. YOUNG *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 497 Fed. Appx. 53.

No. 12–9246. CHO LEE LIN *v.* WARREN, ADMINISTRATOR, NEW JERSEY STATE PRISON. C. A. 3d Cir. Certiorari denied.

No. 12–9251. PIERRE *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 12–9263. DITTO *v.* PATENT AND TRADEMARK OFFICE, BOARD OF PATENT APPEALS AND INTERFERENCES. C. A. Fed. Cir. Certiorari denied. Reported below: 499 Fed. Appx. 1.

No. 12–9297. SANDEFUR *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 103 So. 3d 151.

No. 12–9305. COLLINS *v.* SHINSEKI, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 494 Fed. Appx. 88.

No. 12–9350. PARMELEE *v.* FRANKLIN COUNTY SHERIFF'S OFFICE ET AL. Sup. Ct. Wash. Certiorari denied. Reported below: 175 Wash. 2d 476, 285 P. 3d 67.

No. 12–9376. SANTANA *v.* MUSCOGEE (CREEK) NATION. C. A. 10th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 821.

No. 12–9379. ROBINSON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–9402. BUTTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 417.

No. 12–9403. CEPARANO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 3d 774, 945 N. Y. S. 2d 421.

No. 12–9404. CARRERA *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 3d 1104 and 502 Fed. Appx. 643.

No. 12–9422. CARVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9423. CABELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 318.

No. 12–9425. CORONA-RIVERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 500.

No. 12–9439. ALI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9442. FRANKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 330.

No. 12–9443. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9444. MINERD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9446. GONZALES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 513 Fed. Appx. 141.

No. 12–9449. KING *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 503 Fed. Appx. 133.

No. 12–9451. KEMACHE-WEBSTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 339.

No. 12–9452. THORPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 324.

No. 12–9454. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 702 F. 3d 886.

No. 12–9457. DOUGLAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9460. SMITH *v.* ROAL, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 663.

No. 12–9463. RODRIGUEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9465. LOPEZ-POMPA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9466. HARDIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 984.

No. 12–9468. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 359.

No. 12–9469. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–9471. WHEELER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 103.

No. 12–9472. MARIMON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 Fed. Appx. 5.

No. 12–9476. BLISS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 491.

No. 12–9478. CLARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9481. MOHAMMED *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 431.

No. 12–9483. RODRIGUEZ-ESCARENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 3d 751.

No. 12–9484. CLECKLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9487. MOBLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 403.

No. 12–9491. MEMBRENO-ORELLANA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 926.

No. 12–9493. GARIBAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 692.

No. 12–9497. MARTINEZ VALLEJO *v.* UNITED STATES (Reported below: 507 Fed. Appx. 384); and NAVARRETE-REMBAO *v.* UNITED STATES (508 Fed. Appx. 345). C. A. 5th Cir. Certiorari denied.

No. 12–9498. HERNANDEZ-SALAZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 544 Fed. Appx. 254.

No. 12–9501. GONZALEZ MEDINA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 287.

No. 12–9503. SIMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 614.

No. 12–9507. GHALI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 3d 845.

No. 12–9508. BEADLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 807.

No. 12–9509. ADIGUN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 3d 1014.

No. 12–9510. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9511. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 864.

No. 12–9512. CAMPOS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 292.

No. 12–9517. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 506 Fed. Appx. 128.

No. 12–9518. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 785.

No. 12–9526. PAVULAK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 700 F. 3d 651.

No. 12–544. CHAPPELL, WARDEN *v.* PHILLIPS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 673 F. 3d 1168.

No. 12–780. D'AMELIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 683 F. 3d 412.

No. 12–847. LAW DEBENTURE TRUST COMPANY OF NEW YORK ET AL. *v.* CHARTER COMMUNICATIONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 691 F. 3d 476.

No. 12–884. ALABAMA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE SCALIA dissents. Reported below: 691 F. 3d 1269.

No. 12–1160. VAVRA ET AL. *v.* BAKALAR. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 500 Fed. Appx. 6.

No. 12–7716. VELEZ *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied.

No. 12–8939. SMITH *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO. C. A. 10th Cir. Certiorari denied.

JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 500 Fed. Appx. 786.

No. 12–9440. YEPEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 704 F. 3d 1087.

No. 12–9467. SALLEY *v.* APKER, WARDEN. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9485. DANIELS *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. 12–791. CLANTON *v.* COMMISSIONER OF INTERNAL REVENUE, 568 U. S. 1162;

No. 12–844. SLEDGE *v.* BELLWOOD SCHOOL DISTRICT 88, 568 U. S. 1213;

No. 12–874. ASHBAUGH *v.* CORPORATION OF BOLIVAR, WEST VIRGINIA, ET AL., 568 U. S. 1230;

No. 12–7774. LEE *v.* CITY OF ST. LOUIS, MISSOURI, ET AL., 568 U. S. 1173;

No. 12–7830. COBBLE *v.* MCLAUGHLIN, WARDEN, 568 U. S. 1175;

No. 12–7832. WILLIAMS *v.* CITY OF NATCHITOCHES, LOUISIANA, ET AL., 568 U. S. 1197;

No. 12–7843. HILL *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL., 568 U. S. 1197;

No. 12–7912. HAMMOUD, AKA ABOUSALEH, AKA ALBOUSALEH *v.* UNITED STATES, 568 U. S. 1177;

No. 12–7926. DUBOC *v.* UNITED STATES, 568 U. S. 1177;

No. 12–7960. ROWLS *v.* MICHIGAN, 568 U. S. 1215;

No. 12–7965. PUGH *v.* HUGGINS, 568 U. S. 1215;

No. 12–7976. TAGLIAFERRI ET AL. *v.* WINTER PARK HOUSING AUTHORITY ET AL., 568 U. S. 1215;

No. 12–8122. BIBBS *v.* TEXAS, 568 U. S. 1234;

No. 12–8152. COMBS *v.* UNITED STATES, 568 U. S. 1183; and

No. 12–8222. PEARSON *v.* SMITH, WARDEN, 568 U. S. 1217. Petitions for rehearing denied.

MAY 13, 2013

Certiorari Dismissed

No. 12–9170. TIERNEY *v.* HAWAII. Sup. Ct. Haw. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 12–9668. BROWN *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. D–2637. IN RE DISBARMENT OF RASMUSSEN. Disbarment entered. [For earlier order herein, see 566 U. S. 932.]

No. 12M115. BISHAY *v.* MASSACHUSETTS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 12M116. HEREDIA SANTA CRUZ *v.* CALIFORNIA. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 12M117. IN RE TRAYLOR; and
No. 12M118. IN RE ALBERTSON. Motions for leave to proceed as veterans denied.

No. 12M119. CINTAS CORP. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 12–1086. SONY COMPUTER ENTERTAINMENT AMERICA LLC ET AL. *v.* 1ST MEDIA, LLC. C. A. Fed. Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 12–8286. DAVIS *v.* HUDSON REFINERY ET AL. C. A. 10th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1247] denied.

No. 12–8905. IN RE ROBINSON. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1227] denied.

No. 12–9173. PERA *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev.;

No. 12–9437. HARRISON-JENKINS *v.* MEDICAL UNIVERSITY OF SOUTH CAROLINA ET AL. C. A. 4th Cir.;

No. 12–9490. PRADO NAVARETTE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist.; and

No. 12–9524. SINGLETARY *v.* NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES/INFANT TODDLER PROGRAM. C. A. 4th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 3, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–1214. IN RE KWASNIK; and

No. 12–9728. IN RE WELLS. Petitions for writs of habeas corpus denied.

No. 12–9218. IN RE PUCCI; and

No. 12–9606. IN RE SNOW. Petitions for writs of mandamus denied.

No. 12–9122. IN RE BUSH; and

No. 12–9337. IN RE PRESLEY, AKA YOUNG. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

No. 12–9576. IN RE SHEMONSKY. 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 12–9656. IN RE KISSI. Petition for writ of prohibition denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Certiorari Granted

No. 12–7892. BURNSIDE *v.* WALTERS ET AL. C. A. 6th Cir. Motion of American Friends Service Committee et al. for leave

to file brief as *amici curiae* granted. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 11–1407. ALLSHOUSE *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 614 Pa. 229, 36 A. 3d 163.

No. 12–411. CHHABRA *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 444 Fed. Appx. 493.

No. 12–522. MIRMEHDI ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 689 F. 3d 975.

No. 12–744. CONVERGENT OUTSOURCING, INC., FKA ER SOLUTIONS, INC. *v.* ZINNI. C. A. 11th Cir. Certiorari denied. Reported below: 692 F. 3d 1162.

No. 12–747. CERDANT, INC., ET AL. *v.* DHL EXPRESS (USA), INC. C. A. 6th Cir. Certiorari denied.

No. 12–797. UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 1st Cir. Certiorari denied. Reported below: 690 F. 3d 9.

No. 12–805. ALI *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 71 M. J. 256.

No. 12–843. GREGG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 683 F. 3d 941.

No. 12–852. LOUISIANA PUBLIC SERVICE COMMISSION ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 692 F. 3d 172.

No. 12–853. T. W. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 691 F. 3d 903.

No. 12–940. INTERNATIONAL SECURITIES EXCHANGE, L. L. C. *v.* CHICAGO BOARD OPTIONS EXCHANGE, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 102228, 973 N. E. 2d 390.

No. 12–978. SUGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 3d 279.

No. 12–1063. CHARLES ET AL. *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 697 F. 3d 1146.

No. 12–1066. SMITH *v.* WRIGHT ET VIR. Ct. Sp. App. Md. Certiorari denied. Reported below: 203 Md. App. 763 and 767.

No. 12–1068. WRIGHT *v.* WASHINGTON, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–1070. SMITH *v.* ROWELL. Sup. Ct. Ohio. Certiorari denied. Reported below: 133 Ohio St. 3d 288, 2012-Ohio-4313, 978 N. E. 2d 146.

No. 12–1071. SPECTRUM SCAN, LLC *v.* VALLEY BANK & TRUST CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 696 F. 3d 1051.

No. 12–1074. BERGHUIS, WARDEN *v.* MOORE. C. A. 6th Cir. Certiorari denied. Reported below: 700 F. 3d 882.

No. 12–1079. WILLIAMS *v.* COLUMBUS REGIONAL HEALTHCARE SYSTEM, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 928.

No. 12–1081. KARBIN *v.* KARBIN. Sup. Ct. Ill. Certiorari denied. Reported below: 2012 IL 112815, 977 N. E. 2d 154.

No. 12–1083. EARL *v.* MENU FOODS INCOME FUND, INC., ET AL. Ct. App. Wash. Certiorari denied. Reported below: 169 Wash. App. 1005.

No. 12–1087. SCHIBEL ET UX. *v.* JOHNSON. Ct. App. Wash. Certiorari denied. Reported below: 168 Wash. App. 1046.

No. 12–1088. SINGLETARY ET UX. *v.* CITY OF NORTH CHARLESTON, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 479 Fed. Appx. 456.

No. 12–1095. KIVISTO *v.* EXECUTIVE COMMITTEE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 762.

No. 12–1096. MITCHELL *v.* BENTLEY, GOVERNOR OF ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 854.

No. 12–1097. Moore *v.* Williamsburg County School District et al. C. A. 4th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 249.

No. 12–1099. Scott *v.* Lender Processing Services, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 478 Fed. Appx. 775.

No. 12–1101. Pierce *v.* Florida Bar. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 523.

No. 12–1103. Greene *v.* Gassman et al. C. A. 8th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 997.

No. 12–1104. Hidalgo *v.* Nevada (two judgments). Sup. Ct. Nev. Certiorari denied. Reported below: 128 Nev. 902, 381 P. 3d 620 (both judgments).

No. 12–1109. Bosch *v.* Frost National Bank et al. C. A. 5th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 463.

No. 12–1110. Merrill *v.* Municipality of Anchorage, Alaska. Sup. Ct. Alaska. Certiorari denied.

No. 12–1119. Easton, LLC, dba Shillelagh Holdings LLC *v.* Incorporated Village of Muttontown. C. A. 2d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 66.

No. 12–1122. Gallagher *v.* City of Clayton, Missouri, et al. C. A. 8th Cir. Certiorari denied. Reported below: 699 F. 3d 1013.

No. 12–1124. Holkesvig *v.* Welte et al. Sup. Ct. N. D. Certiorari denied. Reported below: 2012 ND 236, 823 N. W. 2d 786.

No. 12–1125. Lang et al. *v.* Director, Ohio Department of Job and Family Services. Sup. Ct. Ohio. Certiorari denied. Reported below: 134 Ohio St. 3d 296, 2012-Ohio-5366, 982 N. E. 2d 636.

No. 12–1131. Biendara et al. *v.* RCI, LLC, fka Resort Condominiums International, LLC, et al. C. A. 3d Cir. Certiorari denied.

No. 12–1138. Anderson et al. *v.* Cox et al. C. A. 9th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 495.

No. 12–1147. GJURA *v.* HOLDER, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 91.

No. 12–1148. MURPHY ET AL. *v.* AURORA LOAN SERVICES LLC ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 699 F. 3d 1027.

No. 12–1157. MEDINA *v.* CALIFORNIA. App. Div., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 12–1166. BLIZZARD *v.* MARION TECHNICAL COLLEGE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 3d 275.

No. 12–1169. RODRIQUEZ *v.* CITY OF NEW YORK, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 484 Fed. Appx. 637.

No. 12–1199. PORTFOLIO RECOVERY ASSOCIATES, LLC, ET AL. *v.* MEYER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 3d 1036.

No. 12–1206. RICHARDS *v.* DONAHOE, POSTMASTER GENERAL. C. A. 1st Cir. Certiorari denied.

No. 12–1216. BOYLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 700 F. 3d 1138.

No. 12–1223. MORO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 113.

No. 12–1235. SMITH *v.* DAVIS. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 359.

No. 12–1243. FIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–5747. CASSIDY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–5813. CANO *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied. Reported below: 369 S. W. 3d 532.

No. 12–6111. HARRIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–7211. HYPOLITE *v.* KNOWLES, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–7537. DE VAUGHN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 694 F. 3d 1141.

No. 12–7545. PERELMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 3d 866.

No. 12–7634. ABDULLAH *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 498 Fed. Appx. 122.

No. 12–8184. DOYLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 981.

No. 12–8253. DAUGHERTY *v.* THE HEIGHTS ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 407.

No. 12–8303. HAWTHORNE *v.* SCHNEIDERMAN, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 695 F. 3d 192.

No. 12–8611. GOMEZ *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 231 Ariz. 219, 293 P. 3d 495.

No. 12–8674. COOPER *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied. Reported below: 386 S. C. 210, 687 S. E. 2d 62.

No. 12–8913. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9050. NELSON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 12–9054. VINSON *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 12–9055. SANDLES *v.* MILLER. C. A. 6th Cir. Certiorari denied.

No. 12–9059. MAILO *v.* CRAIL ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9064. ROCKMORE *v.* HARRISBURG PROPERTY SERVICE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 501 Fed. Appx. 161.

No. 12–9069. JENNINGS *v.* CITY OF INDIANAPOLIS, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied.

No. 12–9073. EVERTS *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9078. TODD *v.* BEVINS ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9079. TODD *v.* LAN WANG ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9080. TURUC *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2012 IL App (2d) 100846–U.

No. 12–9082. WHITESIDE *v.* POLLARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 270.

No. 12–9083. WILLIAMS *v.* PERDUE ET AL. C. A. 4th Cir. Certiorari denied.

No. 12–9084. WALTON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 12–9088. YOUNG *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 75 So. 3d 351.

No. 12–9090. PUMPHREY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9091. MOSLEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 12–9094. LOPEZ *v.* CONTINENTAL AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 363.

No. 12–9095. MAY *v.* CULLIVER. C. A. 11th Cir. Certiorari denied.

No. 12–9101. AVERNA *v.* TAMPKINS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9104. PARMS *v.* HARLOW, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 492 Fed. Appx. 281.

No. 12–9107. FLORES *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 12–9108. Oberwise *v.* Crews, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied.

No. 12–9114. Reno *v.* California. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 428, 283 P. 3d 1181.

No. 12–9116. Jackson *v.* McCallum, Warden. C. A. 10th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 623.

No. 12–9119. Bartlett *v.* Robeson et al. C. A. 4th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 743.

No. 12–9126. Hays *v.* Iowa. Ct. App. Iowa. Certiorari denied. Reported below: 822 N. W. 2d 746.

No. 12–9130. Strawbridge *v.* Lord. C. A. 2d Cir. Certiorari denied.

No. 12–9133. Patterson *v.* Texas. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 12–9135. Castro *v.* California. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 12–9139. Anderson et al. *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 12–9141. Calhoun *v.* Murray et al. C. A. 3d Cir. Certiorari denied. Reported below: 507 Fed. Appx. 251.

No. 12–9142. Daniels *v.* Pennywell, Acting Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9143. Hanneman *v.* Cortez Masto, Attorney General of Nevada, et al. C. A. 9th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 189.

No. 12–9144. Smiles *v.* City of Grand Rapids, Michigan, et al. C. A. 6th Cir. Certiorari denied.

No. 12–9146. Simmons *v.* Wallace et al. C. A. 9th Cir. Certiorari denied. Reported below: 477 Fed. Appx. 457.

No. 12–9147. Shaw *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 101548–U.

No. 12–9151. BETETA *v.* DIAZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9163. ATKINS *v.* LASSITER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 244.

No. 12–9164. SANDERS *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 12–9165. STENSON *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9167. RAMBO *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 482 Fed. Appx. 866.

No. 12–9168. RADEMACHER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 12–9171. WEST *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 12–9176. PETRICKA *v.* BRAZELTON, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9178. ROMAN *v.* JEFFERSON AT HOLLYWOOD LP, DBA JEFFERSON AT HOLLYWOOD APARTMENTS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 804.

No. 12–9180. LEON *v.* DANAHER CORP. ET AL. Ct. App. Ariz. Certiorari denied.

No. 12–9182. JACKMAN *v.* LAPPIN ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–9184. CASEY *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 106 So. 3d 936.

No. 12–9185. CLEMENTS *v.* FRANKLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 333.

No. 12–9187. WOJTANEK *v.* PACTIV LLC, FKA PACTIV CORP. C. A. 7th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 650.

No. 12–9192. PACHECKER *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 523.

No. 12–9196. PERSON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 12–9197. SANTAMARIA-CANO *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 378.

No. 12–9201. GRIZZLE *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 359.

No. 12–9204. WHEELER *v.* BITER, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9205. WILLIAMS *v.* PEEL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 476 Fed. Appx. 146.

No. 12–9206. VAZQUEZ *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9207. LYNCH *v.* BARRETT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 703 F. 3d 1153.

No. 12–9208. JEFFERSON *v.* BURGER KING CORP. C. A. 11th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 830.

No. 12–9209. MATTHEWS *v.* DONAHOE, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 796.

No. 12–9211. ROLLE *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–9213. COWART *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–9216. DAVIS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9221. NICKERSON *v.* SWEETIN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied.

No. 12–9222. MANUEL VILLARRUEL *v.* HOLLAND, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9228. BEATON *v.* BLUE ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9231. PATTERSON *v.* OATES, SUPERINTENDENT, PENDER CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 197.

No. 12–9258. LAUBLY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 649.

No. 12–9267. TURNER *v.* WOODS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 587.

No. 12–9284. WILLIAMS *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 103 So. 3d 153.

No. 12–9294. CASTANON *v.* JOHNSON. C. A. 6th Cir. Certiorari denied.

No. 12–9313. OBANDO *v.* DONAT ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9321. CELESTINE *v.* SOCIAL SECURITY ADMINISTRATION. C. A. 5th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 418.

No. 12–9322. SCOTT *v.* PANCAKE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9324. LAVOIE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 464 Mass. 83, 981 N. E. 2d 192.

No. 12–9326. MONSCHKE *v.* CROSS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9328. TAYLOR *v.* OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 831.

No. 12–9329. WILLIAMS *v.* BAUMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9333. WIGNER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 105 So. 3d 646.

No. 12–9342. GUTIERREZ *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 82 Mass. App. 1118, 977 N. E. 2d 105.

No. 12–9344. WOODMORE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–9348. PENNINGTON *v.* BICKELL, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9351. MCNEIECE *v.* LATTIMORE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 634.

No. 12–9365. SALAZAR *v.* SEARS, ROEBUCK & CO. C. A. 5th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 505.

No. 12–9366. SKY *v.* STOLC, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 696.

No. 12–9372. SEAGROVES *v.* BURRELL ET AL. Ct. Civ. App. Ala. Certiorari denied.

No. 12–9394. SMITH *v.* REBSTOCK ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 477 Fed. Appx. 884.

No. 12–9396. ELLIOTT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 3d 378.

No. 12–9410. SMITH *v.* BRYSON, SECRETARY OF COMMERCE. C. A. 11th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 10.

No. 12–9415. GALLOWAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 297.

No. 12–9427. MAGALLANES *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 284 Neb. 871, 824 N. W. 2d 696.

No. 12–9435. GRAY *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–9455. CLARK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 12–9458. SEDA *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 505 Fed. Appx. 940.

No. 12–9459. SHOTTS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2012 IL App (4th) 110270–U.

No. 12–9486. CHAE *v.* HOUSTON. Ct. App. Neb. Certiorari denied. Reported below: 20 Neb. App. xxvii.

No. 12–9496. CANNEDY *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–9502. SMITH *v.* HOWERTON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 476.

No. 12–9519. JOHNSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 487.

No. 12–9520. MAPP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 643.

No. 12–9521. POTTS *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–9531. FRANCIS, AKA BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 482 Fed. Appx. 850.

No. 12–9532. HARDIMON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 3d 940.

No. 12–9539. PITTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 271.

No. 12–9541. GUTIERREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9545. GATHINGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9550. GRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9551. FEAGAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 472 Fed. Appx. 382.

No. 12–9557. ISABEL *v.* RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9558. HARPER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9559. GONZALEZ-BUENO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 718.

No. 12–9560. GRICCO *v.* CASTILLO, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 12–9562. NANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 318.

No. 12–9566. HAYNES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–9568. GARRETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 409.

No. 12–9572. STROMBERG *v.* VARANO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9581. FLUKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 580.

No. 12–9582. FOBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 259.

No. 12–9584. GONZALEZ-ARENAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 866.

No. 12–9586. BRYSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 53 A. 3d 1105.

No. 12–9587. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9588. SCHUTTPELZ *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 467 Fed. Appx. 349.

No. 12–9590. HERNANDEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 310.

No. 12–9592. GSSIME *v.* PIZZOTTO ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–9593. HENDRICKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 12–9596. WALLACE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 264.

No. 12–9599. WANG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 707 F. 3d 911.

No. 12–9600. MONTANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 299.

No. 12–9601. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 232.

No. 12–9607. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 823.

No. 12–9611. WAMPLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 3d 815.

No. 12–9612. VERDUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 262.

No. 12–9613. VELEZ-RIVAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 383.

No. 12–9614. ARGUELLES-CARBALLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 312.

No. 12–9615. KNOX *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 3d 755.

No. 12–9616. PICKETT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 294.

No. 12–9619. STONE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 F. 3d 1145.

No. 12–9621. STAFFORD *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 59 A. 3d 1223.

No. 12–9622. VADNAIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9623. TILLERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 702 F. 3d 170.

No. 12–9624. WAVER *v.* TIBBALS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9625. MCKOY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 485 Fed. Appx. 852.

No. 12–9627. OBREGON-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 413.

No. 12–9628. COLEMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 700 F. 3d 329.

No. 12–9632. CHERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 222.

No. 12–9639. DRAKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9642. ROUNDTREE *v.* KIRKPATRICK, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9645. MONTGOMERY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 815.

No. 12–9647. STALLINGS *v.* CROSS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 12–9649. EDWARDS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 50 A. 3d 508.

No. 12–9651. SIDDIQUI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 501 Fed. Appx. 56.

No. 12–9654. JONES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 705 F. 3d 4.

No. 12–9655. SIMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 429.

No. 12–9657. BONNEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 398.

No. 12–9658. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 155.

No. 12–9660. CHAVEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 501 Fed. Appx. 70.

No. 12–9661. COOPER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9662. MAMALIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 240.

No. 12–9663. MONTOYA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 384.

No. 12–9664. SANTOS-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–9669. ACOSTA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 471 Fed. Appx. 543.

No. 12–9670. SALINAS BRITO *v.* MARTIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 461.

No. 12–9673. MORTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 310.

No. 12–9674. PRINCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 407.

No. 12–9675. PATRICK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 224.

No. 12–9676. MORALES-MOTA *v.* UNITED STATES (Reported below: 704 F. 3d 410); CARDENA GONZALES, AKA MARTINEZ ESPINOZA, AKA GONZALEZ CARDENAS, AKA CARDENAS-GONZALEZ, AKA SANTANA CARDENAS *v.* UNITED STATES (508 Fed. Appx. 304); CAMPOS-CONTRERAS *v.* UNITED STATES (514 Fed. Appx. 490); AVILA AVELLANEDA, AKA AVILA, AKA AVILA-AVELLANDA *v.* UNITED STATES (532 Fed. Appx. 473); SILVA GOMEZ, AKA SILVA, AKA SILVA-GOMEZ, AKA GOMEZ *v.* UNITED STATES (516 Fed. Appx. 348); ANTONIO SUAZO, AKA SUAZO *v.* UNITED STATES (516 Fed. Appx. 399); and GONZALES, AKA CASTRO *v.* UNITED STATES (534 Fed. Appx. 230). C. A. 5th Cir. Certiorari denied.

No. 12–9679. LARA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9680. TAYLOR *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 53 A. 3d 1104.

No. 12–9682. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 343.

No. 12–9683. MORRISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 247.

No. 12–9684. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9686. CANNON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 703 F. 3d 407.

No. 12–9689. MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–9691. ROLON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 445 Fed. Appx. 314.

No. 12–9695. O'BRIEN *v.* NOWICKI ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 490 Fed. Appx. 506.

No. 12–9704. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 698 F. 3d 1048.

No. 12–9707. CONDREY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 292.

No. 12–9709. RUSSELL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 501 Fed. Appx. 67.

No. 12–9710. REED *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 194.

No. 12–9716. MORELAND ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 703 F. 3d 976.

No. 12–9726. FRIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 547.

No. 12–9743. BURTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 320.

No. 12–9750. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–9752. JORDAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 554.

No. 12–9754. ESPINOSA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9755. TREJOS ORTIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 950.

No. 12–9756. SANTIAGO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9757. SANCHEZ-REBOLLAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 346.

No. 12–9766. BONDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 426.

No. 12–9767. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 895.

No. 12–9768. ANEKWU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 695 F. 3d 967.

No. 12–9772. GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 3d 442.

No. 12–9777. MCBRIDE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 640.

No. 12–9781. SHERMAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–352. NEVEN, WARDEN, ET AL. *v.* WENTZELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 674 F. 3d 1124.

No. 12–783. MICHIGAN *v.* MCCAULEY. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 493 Mich. 872, 821 N. W. 2d 569.

No. 12–9161. COCHRAN *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 506 Fed. Appx. 572.

No. 12–9525. PELULLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9528. CHAUDHRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9542. GUNTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9544. GARIBAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9640. EDGECOMB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9693. SETTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 498 Fed. Appx. 665.

No. 12–9706. DORVILUS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9729. KERNS *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. 11–8643. THAI HONG DOAN *v.* UNITED STATES, 568 U. S. 1192;

No. 12–466. SMALLEY *v.* NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, 568 U. S. 1249;

No. 12–983. MYMAIL, LTD. *v.* COMMISSIONER OF INTERNAL REVENUE, 568 U. S. 1251;

No. 12–6169. MAEHR *v.* COMMISSIONER OF INTERNAL REVENUE, 568 U. S. 1232;

No. 12–7417. LEWIS *v.* WALTERS, SECRETARY, FLORIDA DEPARTMENT OF JUVENILE JUSTICE, ET AL., 568 U. S. 1165;

No. 12–7460. PERRY *v.* YELICH, SUPERINTENDENT, BARE HILL CORRECTIONAL FACILITY, 568 U. S. 1166;

No. 12–7553. LOW *v.* CALIFORNIA, 568 U. S. 1232;

No. 12–7596. TODD *v.* BIGELOW ET AL., 568 U. S. 1168;

No. 12–7630. WEEKLEY *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 568 U. S. 1169;

No. 12–7705. NORINGTON *v.* LEVENHAGEN, SUPERINTENDENT, WESTVILLE CORRECTIONAL FACILITY, 568 U. S. 1171;

No. 12–7771. VANG *v.* VIRGA, WARDEN, 568 U. S. 1173;

No. 12–7812. STEPHENS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 568 U. S. 1174;

No. 12–7978. MOLYNEAUX *v.* FLORIDA DEPARTMENT OF CORRECTIONS, 568 U. S. 1215;

No. 12–7991. IN RE THOMPSON, 568 U. S. 1156;

No. 12–8161. D'ANTUONO *v.* NEW YORK, 568 U. S. 1236;

No. 12–8285. CRAIG *v.* CRAIG, 568 U. S. 1238;

No. 12–8483. COOPER *v.* MISSOURI ET AL., *ante*, p. 908;

No. 12–8516. SHAKUR *v.* UNITED STATES, 568 U. S. 1219;

No. 12–8548. RAMSEY *v.* RUNION, DIRECTOR, VIRGINIA CENTER FOR BEHAVIORAL REHABILITATION, 568 U. S. 1239;

No. 12–8599. FUNES *v.* UNITED STATES, 568 U. S. 1239;

No. 12–8638. DIVER *v.* SMITH, ADMINISTRATOR, ALBEMARLE CORRECTIONAL INSTITUTION, 568 U. S. 1240; and

No. 12–8908. SMITH *v.* UNITED STATES, 568 U. S. 1258. Petitions for rehearing denied.

No. 12–716. DALAL *v.* KRANTZ & BERMAN LLP, 568 U. S. 1245. Petition for rehearing denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition.

No. 12–6925. JONES *v.* CASTILLO, WARDEN, 568 U. S. 1258. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

MAY 15, 2013

Certiorari Denied

No. 12–10231 (12A1087). WILLIAMS *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: 524 Fed. Appx. 960.

MAY 20, 2013

Affirmed on Appeal

No. 12–1019. MISSISSIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* BRYANT, GOVERNOR OF MISSISSIPPI, ET AL.; and

No. 12–1132. STANDING JOINT LEGISLATIVE COMMITTEE ON REAPPORTIONMENT OF THE MISSISSIPPI LEGISLATURE *v.* MISSIS-

SIPPI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. Affirmed on appeals from D. C. S. D. Miss.

Certiorari Dismissed

No. 12–9285. BIRDETTE *v.* ASHWORTH COLLEGE 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. JUSTICE ALITO took no part in the consideration or decision of this motion and this petition.

No. 12–9300. BIRDETTE *v.* USCB CORP. 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. 12–9317. COBBLE *v.* OWENS, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 12–9318. COBBLE *v.* FIELDS 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. 12–9470. TRUESDALE *v.* DEPARTMENT OF JUSTICE 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. 12–9824. CARDONA *v.* THOMAS, WARDEN. 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. 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. 12M120. RAWLINGS *v.* CITY OF BALTIMORE, MARYLAND, ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 12–9494. MATHIS *v.* TENNESSEE. Ct. Crim. App. Tenn.;
No. 12–9730. NOBLE *v.* DEPARTMENT OF JUSTICE. C. A. Fed. Cir.;
No. 12–9771. FENTON *v.* UNITED STATES. C. A. 4th Cir.; and
No. 12–9776. JONES *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 10, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9235. IN RE REIGLE. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 12–3. LAWSON ET AL. *v.* FMR LLC ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 670 F. 3d 61.

No. 12–462. NORTHWEST, INC., ET AL. *v.* GINSBERG. C. A. 9th Cir. Certiorari granted. Reported below: 695 F. 3d 873.

No. 12–696. TOWN OF GREECE, NEW YORK *v.* GALLOWAY ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 681 F. 3d 20.

No. 12–1128. MEDTRONIC, INC. *v.* MIROWSKI FAMILY VENTURES, LLC. C. A. Fed. Cir. Certiorari granted. Reported below: 695 F. 3d 1266.

No. 12–7822. FERNANDEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 208 Cal. App. 4th 100, 145 Cal. Rptr. 3d 51.

Certiorari Denied

No. 12–726. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, CHILD PROTECTIVE SERVICES DIVISION *v.* SOLIS, SECRETARY OF LABOR. C. A. 5th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 837.

No. 12–818. Bulldog Investors General Partnership *v.* Donoghue et al. C. A. 2d Cir. Certiorari denied. Reported below: 696 F. 3d 170.

No. 12–882. Sapp *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 12–1009. Iacaboni *v.* United States; and
No. 12–8840. Gianelli *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 687 F. 3d 439.

No. 12–1115. In re Application for Search Warrant. Sup. Ct. Vt. Certiorari denied. Reported below: 2012 VT 102, 193 Vt. 51, 71 A. 3d 1158.

No. 12–1123. School District of Kansas City, Missouri *v.* Missouri Board of Fund Commissioners et al. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 384 S. W. 3d 238.

No. 12–1127. Nucor Corp. et al. *v.* Brown et al. C. A. 4th Cir. Certiorari denied.

No. 12–1130. Walker *v.* Seldman et al. Ct. App. D. C. Certiorari denied. Reported below: 38 A. 3d 308.

No. 12–1133. Sevostiyanova *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 313 Ga. App. 729, 722 S. E. 2d 333.

No. 12–1134. Evans *v.* Crews, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 699 F. 3d 1249.

No. 12–1140. James et al. *v.* City of Costa Mesa, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 700 F. 3d 394.

No. 12–1142. Dennis Melancon, Inc., et al. *v.* City of New Orleans, Louisiana, et al. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 3d 262.

No. 12–1143. Inepar S. A. Industria e Construcoes *v.* IRB-Brasil Resseguros S. A. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 310, 982 N. E. 2d 609.

No. 12–1164. VEIGEL *v.* RABO AGRIFINANCE, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 288.

No. 12–1174. BUTLER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF BUTLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 702 F. 3d 749.

No. 12–1255. DESPOSITO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 704 F. 3d 221.

No. 12–1265. GREENE ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 56 A. 3d 1170.

No. 12–8378. LIMING *v.* DAMOS. Sup. Ct. Ohio. Certiorari denied. Reported below: 133 Ohio St. 3d 509, 2012-Ohio-4783, 979 N. E. 2d 297.

No. 12–8524. RAHMAAN *v.* MEDICAL UNIVERSITY OF SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 478 Fed. Appx. 26.

No. 12–8717. TYSON, AKA AL-HIZBULLAHI *v.* WOODFORD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 483 Fed. Appx. 366.

No. 12–8818. TAYLOR *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 145 So. 3d 103.

No. 12–9230. SINGH *v.* CUSICK, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9237. WEATHERSPOON *v.* LONG, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9240. CIELTO *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–9241. DEMOUCHETTE *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 12–9243. BAKER *v.* TIBBALS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 560.

No. 12–9245. ARCEO *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9249. MACK *v.* DILLON. C. A. 8th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 696.

No. 12–9250. O'NEAL *v.* NEWTON-EMBRY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 718.

No. 12–9254. JOHNSON *v.* COLEMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 506 Fed. Appx. 125.

No. 12–9257. SCHMITZ *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–9259. IBARRA ET AL. *v.* CITY OF LAREDO, TEXAS, ET AL. Ct. App. Tex., 4th Dist. Certiorari denied.

No. 12–9265. BIGGS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 12–9270. MITCHELL *v.* BUTTS, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 12–9271. MCCUNE *v.* MISSOURI. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 375 S. W. 3d 98.

No. 12–9272. TAYLOR *v.* BROWN, SUPERINTENDENT, WABASH CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 12–9279. BAILEY *v.* EMS VENTURES, INC. C. A. 11th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 986.

No. 12–9280. SWIFT *v.* MALACK ET AL. Sup. Ct. Pa. Certiorari denied.

No. 12–9281. SLAUGHTER, AKA JONES *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9288. WHITMAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 316 Ga. App. 655, 729 S. E. 2d 409.

No. 12–9293. KAMYAB *v.* URIBE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 585.

No. 12–9295. ROBINSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 12–9296. KWONG *v.* CONNECTICUT COMMISSIONER OF MOTOR VEHICLES. App. Ct. Conn. Certiorari denied. Reported below: 138 Conn. App. 904, 51 A. 3d 1212.

No. 12–9303. MALDONADO *v.* MCEWEN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9309. PAYNE *v.* HOME DEPOT U. S. A., INC. C. A. 3d Cir. Certiorari denied.

No. 12–9310. MCNAMARA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–9319. DAVIS *v.* CARTLEDGE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 451.

No. 12–9336. NELSON *v.* BROWN, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 12–9362. BANKS *v.* TRAMMELL, INTERIM WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 692 F. 3d 1133.

No. 12–9373. SOUTHERN *v.* ATLANTIC INDUSTRIAL SERVICES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 348.

No. 12–9381. RICHMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 100125–U.

No. 12–9416. BURTS *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–9441. CLARK *v.* CHEESEBORO ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 370.

No. 12–9464. JOHNSTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9479. CLEM *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–9533. HARGROVE *v.* CITY OF MONTGOMERY, ALABAMA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 894.

No. 12–9547. HERNANDEZ *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9556. PORTER *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 169 Wash. App. 1015.

No. 12–9569. FIELDS *v.* GIROUX, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MUNCY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9583. HOLMES *v.* SATTERBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 660.

No. 12–9602. ANDRADE *v.* HEATH, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9629. CARPENTER *v.* BECKSTROM, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9715. CHILDRESS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 169 Wash. App. 523, 280 P. 3d 1144.

No. 12–9732. PLEMONS *v.* FORTNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 492.

No. 12–9744. BROCK *v.* BRUNSMAN, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 135 Ohio St. 3d 188, 2013-Ohio-70, 985 N. E. 2d 465.

No. 12–9760. FENDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9789. WILSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 699 F. 3d 789.

No. 12–9791. DAVIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9792. COOPER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–9794. MARTINEZ-MELENDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–9795. JUDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 564.

No. 12–9796. EDWARDS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 343 Fed. Appx. 468.

No. 12–9797. Robinson *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 867.

No. 12–9801. Dominguez-Gabriel, aka Bellefleur *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 511 Fed. Appx. 17.

No. 12–9802. Benitez-Benitez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 443.

No. 12–9808. Baldenegro-Valdez *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 703 F. 3d 1117.

No. 12–9812. Rodriguez *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 643.

No. 12–9813. Stamps *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 825.

No. 12–9815. Danford *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 900.

No. 12–9818. Wilson *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 12–9819. Hargrove *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 701 F. 3d 156.

No. 12–9820. Shepard *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 12–9826. Robinson *v.* United States. Ct. App. D. C. Certiorari denied. Reported below: 50 A. 3d 508.

No. 12–9832. Rodriguez-Vasquez *v.* United States. C. A. 9th Cir. Certiorari denied.

No. 12–9833. Williams *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 12–9834. Washington *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 515 Fed. Appx. 384.

No. 12–9835. Yilmaz *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 508 Fed. Appx. 49.

No. 12–9842. Perez-Perez *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 12–9844. EASTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9846. MCKINNEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9848. WASHINGTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 706 F. 3d 1215.

No. 12–9854. MCGLOTHIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 705 F. 3d 1254.

No. 12–9855. OWENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 363.

No. 12–9856. ALADEKOBA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 Fed. Appx. 75.

No. 12–9859. BUCZKOWSKI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 236.

No. 12–9861. PELLETIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 3d 1109.

No. 12–9873. SALOMON RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–773. VALENZUELA, ACTING WARDEN *v.* CLIETT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 493 Fed. Appx. 846.

No. 12–1072. NATIVE VILLAGE OF KIVALINA ET AL. *v.* EXXON MOBIL CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 696 F. 3d 849.

No. 12–7518. SCALLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 683 F. 3d 680.

No. 12–7896. LEWIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 478 Fed. Appx. 32.

No. 12–9244. BLACK *v.* KILMARTIN, ATTORNEY GENERAL OF RHODE ISLAND, ET AL. C. A. 1st Cir. Certiorari denied. JUS-

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

No. 12–9806. DANIELS *v.* SEPANAK, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9828. BATTS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 490 Fed. Appx. 618.

Rehearing Denied

No. 12–382. MARSHALL, WARDEN *v.* RODGERS, *ante*, p. 58;
No. 12–897. BENTON *v.* CORY ET AL., 568 U. S. 1250;
No. 12–900. HAMPTON *v.* METHODIST HEALTHCARE SYSTEM OF SAN ANTONIO, LTD., L. L. P., ET AL., 568 U. S. 1250;
No. 12–1018. OU-YOUNG *v.* DONAHOE, POSTMASTER GENERAL, 568 U. S. 1251;
No. 12–5338. DAVIS *v.* FLORIDA, 568 U. S. 1195;
No. 12–7977. PERNA *v.* LATTIMORE, WARDEN, 568 U. S. 1215;
No. 12–8112. PORTER *v.* UNITED STATES, 568 U. S. 1183;
No. 12–8179. SIMMONS *v.* PRUDENTI ET AL., 568 U. S. 1236;
No. 12–8329. SANDRES *v.* MV TECH AUTOWORKS, 568 U. S. 1253;
No. 12–8397. GILCHRIST *v.* PARTH'S INC., DBA COMFORT INN, ET AL., 568 U. S. 1254;
No. 12–8455. RAGAB *v.* FLYNN, *ante*, p. 907;
No. 12–8477. HOLLAND *v.* HEAD AND NECK SPECIALTY GROUP OF NEW HAMPSHIRE ET AL., *ante*, p. 908; and
No. 12–8820. VANHOOK *v.* UNITED STATES, 568 U. S. 1256. Petitions for rehearing denied.

No. 11–10625. RODRIGUEZ *v.* DEPARTMENT OF STATE, 568 U. S. 852. Motion for leave to file petition for rehearing denied.

MAY 28, 2013

Miscellaneous Orders

No. 12A870. MARTINEZ *v.* QUEENS COUNTY, NEW YORK, ET AL. Family Ct., Kings County, N. Y. Application for stay, addressed to JUSTICE SOTOMAYOR and referred to the Court, denied.

No. D–2700. In re Disbarment of Kim. Disbarment entered. [For earlier order herein, see 568 U. S. 1066.]

No. D–2701. In re Disbarment of Pappas. Disbarment entered. [For earlier order herein, see 568 U. S. 1067.]

No. D–2702. In re Disbarment of Laurie. Disbarment entered. [For earlier order herein, see 568 U. S. 1067.]

No. D–2703. In re Disbarment of Huntley. Disbarment entered. [For earlier order herein, see 568 U. S. 1082.]

No. D–2704. In re Disbarment of Golden. Disbarment entered. [For earlier order herein, see 568 U. S. 1082.]

No. D–2705. In re Disbarment of Erickson. Disbarment entered. [For earlier order herein, see 568 U. S. 1154.]

No. D–2706. In re Disbarment of Allen. Disbarment entered. [For earlier order herein, see 568 U. S. 1154.]

No. D–2707. In re Disbarment of Weigel. Disbarment entered. [For earlier order herein, see 568 U. S. 1154.]

No. D–2708. In re Disbarment of Friedman. Disbarment entered. [For earlier order herein, see 568 U. S. 1226.]

No. D–2709. In re Disbarment of Wanninger. Disbarment entered. [For earlier order herein, see 568 U. S. 1226.]

No. D–2710. In re Disbarment of Fitzgerald. Disbarment entered. [For earlier order herein, see 568 U. S. 1226.]

No. 12M121. Claiborne *v.* Clarke, Director, Virginia Department of Corrections; and

No. 12M122. Wimberly *v.* Smith et al. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 12M123. Bell *v.* Florida Highway Patrol 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. 12M124. Sealed Appellant *v.* Sealed Appellee et al. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 12–9412. Missud *v.* D. R. Horton, Inc., et al. Sup. Ct. Nev.;

No. 12–9413. MISSUD *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal.;

No. 12–9432. MKRTCHYAN *v.* FIRST HAWAIIAN BANK. C. A. 9th Cir.;

No. 12–9571. WALKER *v.* FEDERAL RESERVE BANK OF RICHMOND. C. A. 4th Cir.; and

No. 12–9758. SCHAEFFER *v.* KANSAS. Sup. Ct. Kan. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 18, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–9864. IN RE LAN TRAN;

No. 12–9876. IN RE SCHUMAKER;

No. 12–9927. IN RE MCCLOUD; and

No. 12–10033. IN RE BOYD. Petitions for writs of habeas corpus denied.

No. 12–9970. IN RE HARRIS. 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. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 12–9359. IN RE DYDZAK. Petition for writ of mandamus denied.

Certiorari Granted

No. 12–895. ROSEMOND *v.* UNITED STATES. C. A. 10th Cir. Certiorari granted. Reported below: 695 F. 3d 1151.

No. 12–1036. MISSISSIPPI EX REL. HOOD, ATTORNEY GENERAL *v.* AU OPTRONICS CORP. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 701 F. 3d 796.

Certiorari Denied

No. 12–277. COMMISSIONER OF INTERNAL REVENUE *v.* ENTERGY CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 683 F. 3d 233.

No. 12–707. United Airlines, Inc. *v.* Equal Employment Opportunity Commission. C. A. 7th Cir. Certiorari denied. Reported below: 693 F. 3d 760.

No. 12–889. Hoffman et al. *v.* Ford Motor Co. C. A. 10th Cir. Certiorari denied. Reported below: 493 Fed. Appx. 962.

No. 12–901. Historic Boardwalk Hall, LLC, et al. *v.* Commissioner of Internal Revenue. C. A. 3d Cir. Certiorari denied. Reported below: 694 F. 3d 425.

No. 12–926. Director of the Department of Revenue of Montana et al. *v.* Department of the Treasury et al. C. A. 3d Cir. Certiorari denied. Reported below: 684 F. 3d 382.

No. 12–928. Intercollegiate Broadcasting System, Inc. *v.* Copyright Royalty Board et al. C. A. D. C. Cir. Certiorari denied. Reported below: 684 F. 3d 1332.

No. 12–941. Kuenzel *v.* Thomas, Commissioner, Alabama Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 690 F. 3d 1311.

No. 12–969. Edwards Angell Palmer & Dodge LLP et al. *v.* Ouwinga et al. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 3d 783.

No. 12–1029. THI of New Mexico at Casa Arena Blanca, LLC, dba Casa Arena Blanca Nursing Home *v.* Figueroa, Individually and as Personal Representative for the Estate of Figueroa, Deceased. Ct. App. N. M. Certiorari denied. Reported below: 2013–NMCA–077, 306 P. 3d 480.

No. 12–1039. Secretary of the Indiana Family and Social Services Administration et al. *v.* Planned Parenthood of Indiana, Inc., et al.; and

No. 12–1159. Planned Parenthood of Indiana, Inc. *v.* Secretary of the Indiana Family and Social Services Administration et al. C. A. 7th Cir. Certiorari denied. Reported below: 699 F. 3d 962.

No. 12–1149. Bennett *v.* Illinois. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 101909–U.

No. 12–1156. Martin *v.* State Bar of California et al. C. A. 9th Cir. Certiorari denied.

No. 12–1171. ZLATKOVSKIY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 53 A. 3d 941.

No. 12–1176. SCHMITZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 909, 288 P. 3d 1259.

No. 12–1195. QUINTANA *v.* SIMONS FIRM, L. L. P. Ct. App. N. M. Certiorari denied.

No. 12–1203. CAMERON M. *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 307 Conn. 504, 55 A. 3d 272.

No. 12–1213. JAIYEOLA *v.* FEDERAL-MOGUL CORP. C. A. 6th Cir. Certiorari denied.

No. 12–1251. BUTLER *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 12–1271. ALLMENDINGER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 F. 3d 330.

No. 12–1283. ADKINS LIMITED PARTNERSHIP ET AL. *v.* O STREET MANAGEMENT, LLC, ET AL. Ct. App. D. C. Certiorari denied. Reported below: 56 A. 3d 1159.

No. 12–1284. LOCASCIO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 488 Fed. Appx. 514.

No. 12–1285. DECOTEAU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–1317. EMPIRE WORLD TOWERS, LLC, ET AL. *v.* CDR CREANCES, S. A. S. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 89 So. 3d 1034.

No. 12–8306. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 319.

No. 12–8413. OVERSTREET *v.* WILSON, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 686 F. 3d 404.

No. 12–8498. MARSHALL *v.* MICHIGAN. Cir. Ct. Wayne County, Mich. Certiorari denied.

No. 12–8620. ALEXANDER *v.* BOONE HOSPITAL CENTER ET AL. (Reported below: 490 Fed. Appx. 836); and ALEXANDER *v.* CH

ALLIED SERVICES, INC., ET AL. C. A. 8th Cir. Certiorari denied.

No. 12–9338. LITTLE *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–9339. JEMISON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 12–9347. WALLIN *v.* ACHEN ET AL. C. A. 10th Cir. Certiorari denied.

No. 12–9353. DIXON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 519.

No. 12–9358. SPLAWN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 448.

No. 12–9364. THOMPSON *v.* MENDOZA-SALINAS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9369. SMITH *v.* IDAHO. Sup. Ct. Idaho. Certiorari denied.

No. 12–9378. ROGERS *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 12–9385. NAPPER *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9387. BAIDI *v.* FOULK, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9390. BEAN *v.* GIPSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9392. AGUIRRE *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9397. AHMED *v.* BELMONT COUNTY COURT OF COMMON PLEAS OF OHIO, PROBATE DIVISION. Ct. App. Ohio, Belmont County. Certiorari denied. Reported below: 2012-Ohio-1689.

No. 12–9398. BOYD *v.* KLLM TRANSPORT SERVICES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 464 Fed. Appx. 132.

No. 12–9399. BROWN *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENSBURG, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9401. ARCHIE *v.* VERIZON ET AL. Ct. App. D. C. Certiorari denied.

No. 12–9414. MILLER *v.* COLSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 694 F. 3d 691.

No. 12–9418. HEATH *v.* WARNER BROS. ENTERTAINMENT INC. ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–9419. TAJIDDIN *v.* NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE ET AL. C. A. 2d Cir. Certiorari denied.

No. 12–9420. WAELDER *v.* QUINCY HOUSING AUTHORITY. C. A. 7th Cir. Certiorari denied.

No. 12–9424. CHANCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 302.

No. 12–9426. CLEVELAND *v.* CREDIT BASED ASSET SERVICING ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 107 So. 3d 408.

No. 12–9428. HUNTER *v.* CIRCUIT COURT OF VIRGINIA, CITY OF FREDERICKSBURG. Sup. Ct. Va. Certiorari denied.

No. 12–9429. VALENCIA *v.* SULLIVAN, ACTING WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9430. WILLIAMS *v.* CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9431. FLEMINGS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 12–9433. PATE *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 822 N. W. 2d 122.

No. 12–9434. HOUCK *v.* BALL ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 934.

No. 12–9436. GORDON *v.* MCGINLEY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 89.

No. 12–9438. ARMENDARIZ *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9445. NAILS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9447. JOHNSON *v.* GIPSON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9448. EVANS *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 703 F. 3d 1316.

No. 12–9450. JORDAN *v.* FULLER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 752.

No. 12–9453. VAUGHN *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 564 Fed. Appx. 909.

No. 12–9473. KOCAKER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 119 So. 3d 1214.

No. 12–9495. EDMOND *v.* ALLEN, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 12–9537. MELGAR GUTIERREZ, AKA BURGES *v.* HOLDER, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 12–9553. HOPSON *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 170 Wash. App. 1012.

No. 12–9570. WOOD *v.* CLIPPER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9605. STEPHENS *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9630. CHAPMAN *v.* HARDY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 12–9636. MARTINAJ *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9638. ERWIN *v.* HEDGPETH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9677. JOHNSON *v.* STEVENSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 255.

No. 12–9687. ARIEGWE *v.* KIRKEGARD, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9690. KOCH *v.* ESTRELLA ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9705. JACOBO *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 2012 IL App (3d) 110047–U.

No. 12–9712. WILSON *v.* HINES, SUPERINTENDENT, WAYNE CORRECTIONAL CENTER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 315.

No. 12–9714. KATELY *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 3d 356.

No. 12–9718. WHITE *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 12–9719. BOHANNAN *v.* TEXAS. Sup. Ct. Tex. Certiorari denied. Reported below: 388 S. W. 3d 296.

No. 12–9737. DAWKINS *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9761. HOWELL *v.* YOUNG, JUDGE, SUPERIOR COURT OF DELAWARE, KENT COUNTY, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 512 Fed. Appx. 212.

No. 12–9787. WILLS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 107 So. 3d 407.

No. 12–9798. NIE *v.* CLARKE, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 231.

No. 12–9827. SNIPES *v.* ILLINOIS (two judgments). Sup. Ct. Ill. Certiorari denied.

No. 12–9847. POSTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 249.

No. 12–9849. WARREN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 775.

No. 12–9850. WALKER *v.* HOLLAND, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9858. BROWN *v.* HEIMGARTNER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 825.

No. 12–9863. VAN DYKE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 12–9865. WILLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9867. CHURCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9871. RUSSELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–9874. SMITH *v.* STEWARD, WARDEN. Ct. Crim. App. Tenn. Certiorari denied.

No. 12–9879. MARSHALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 936.

No. 12–9880. MCCOY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 707 F. 3d 184.

No. 12–9881. MCCASLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9882. MOBLEY, AKA COUNTRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 226.

No. 12–9885. DIALLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 507 Fed. Appx. 89.

No. 12–9894. BENTLEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9899. GREEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–9903. HANDY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 682.

No. 12–9904. FAULKNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 323.

No. 12–9907. HICKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 539.

No. 12–9909. NOBLE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 287.

No. 12–9913. RICE, AKA PAGE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 12–9918. POWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 327.

No. 12–9919. PANNELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 275.

No. 12–9928. GARVIN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 12–9931. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 686.

No. 12–9932. MIN ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 704 F. 3d 314.

No. 12–9945. HAMMONS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 804.

No. 12–9946. FREEMAN *v.* APKER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9947. FOWLKES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 304.

No. 12–9953. OSORIO-MARTINEZ, AKA OSORIO DE VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 306.

No. 12–9954. WILLIAMS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 496 Fed. Appx. 197.

No. 12–9959. BATES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9960. ACUNA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–9966. HALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 245.

No. 12–9968. HALEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 496 Fed. Appx. 771.

No. 12–9969. FORD *v.* KEFFER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 428.

No. 12–9971. GROHS *v.* FLORIDA DEPARTMENT OF CORRECTIONS ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9972. HUNT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–9997. MCALLISTER *v.* CROSS, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 12–9998. LOCKLEAR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 315.

No. 12–10002. LUJAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 509 Fed. Appx. 44.

No. 12–10003. JIMENEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 576.

No. 12–10007. PENTECOST *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 12–10016. BRUCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–10020. GUIDRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 514 Fed. Appx. 427.

No. 12–10022. ILEN-OTUMA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10026. HEWLETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–10027. FLETCHER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 497 Fed. Appx. 795.

No. 12–10089. GOOSLIN *v.* SEPANEK, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–971. CHAPPELL, WARDEN *v.* CUDJO. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 698 F. 3d 752.

No. 12–1137. ATLANTICUS HOLDINGS CORP., FKA COMPUCREDIT HOLDINGS CORP. *v.* AKANTHOS CAPITAL MANAGEMENT, LLC, ET AL. C. A. 11th Cir. Motion of petitioner to defer consideration of petition for writ of certiorari denied. Certiorari denied. Reported below: 698 F. 3d 1348.

No. 12–1181. KIRCH ET VIR *v.* EMBARQ MANAGEMENT CO. ET AL. C. A. 10th Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 702 F. 3d 1245.

No. 12–8325. SANTOS-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 482 Fed. Appx. 953.

No. 12–9890. 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: 473 Fed. Appx. 355.

No. 12–9902. HANKERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9937. HINES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

No. 12–9948. HUGHES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 484 Fed. Appx. 849.

No. 12–10019. FELICIANO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consid-

eration or decision of this petition. Reported below: 500 Fed. Appx. 905.

Rehearing Denied

No. 11–10983. HILL *v.* WALSH, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 568 U. S. 1157;

No. 12–891. SCHAFLER *v.* FIELD ET AL., 568 U. S. 1250;

No. 12–7849. FRANKLIN *v.* ROBINSON, WARDEN, *ante,* p. 906;

No. 12–8198. JACKSON *v.* DOORY, 568 U. S. 1236;

No. 12–8336. SMITH *v.* TEXAS, 568 U. S. 1253;

No. 12–8465. GARRETTE *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL., *ante,* p. 908;

No. 12–8470. CALDERON *v.* EVERGREEN OWNERS, INC., ET AL., *ante,* p. 908;

No. 12–8478. FORNEY *v.* BROWARD COUNTY SHERIFF'S OFFICE ET AL., *ante,* p. 908;

No. 12–8531. TRIPLETT *v.* DONAHOE, POSTMASTER GENERAL, 568 U. S. 1239; and

No. 12–8665. IN RE TIPPENS, *ante,* p. 917. Petitions for rehearing denied.

MAY 29, 2013

Certiorari Denied

No. 12–10418 (12A1128). CARROLL *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: 114 So. 3d 883.

JUNE 3, 2013

Certiorari Granted—Reversed and Remanded. (See No. 12–694, *ante,* p. 505.)

Certiorari Granted—Vacated and Remanded

No. 11–10870. WASHINGTON *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 464 Fed. Appx. 233;

No. 12–5906. BALENTINE *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir.;

No. 12–6656. AYESTAS *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 462 Fed. Appx. 474;

No. 12–6760. HAYNES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 489 Fed. Appx. 770;

No. 12–7612. GATES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 476 Fed. Appx. 336;

No. 12–7657. NEWBURY *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 481 Fed. Appx. 953; and

No. 12–8582. DANSBY *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Reported below: 682 F. 3d 711. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Trevino* v. *Thaler*, *ante*, p. 413.

No. 12–390. SMITH *v.* COLSON, WARDEN. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Trevino* v. *Thaler*, *ante*, p. 413.

No. 12–1067. SEARS, ROEBUCK & CO. *v.* BUTLER ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Comcast Corp.* v. *Behrend*, *ante*, p. 27. Reported below: 702 F. 3d 359.

No. 12–6257. VIZCARRA *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir.;

No. 12–6794. MANCILL *v.* FREEMAN, WARDEN, ET AL. C. A. 11th Cir.; and

No. 12–8093. STRATTON *v.* COLEMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *McQuiggin* v. *Perkins*, *ante*, p. 383.

Vacated and Remanded After Certiorari Granted

No. 12–7892. BURNSIDE *v.* WALTERS ET AL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 971.] Motion of petitioner to remand granted. Judgment vacated, and case remanded for further consideration in light of *LaFountain* v. *Harry*, 716 F. 3d 944 (CA6 2013).

Certiorari Dismissed

No. 12–9505. HELTON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

No. 12–9552. GARCIA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 98 App. Div. 3d 688, 950 N. Y. S. 2d 277.

Miscellaneous Orders

No. 12M125. THOMPSON *v.* MORRIS HEIGHTS HEALTH CENTER, INC.;

No. 12M126. FORMILIEN *v.* BEAU DIETL & ASSOCIATES, INC.; and

No. 12M127. NAKAGAWA *v.* NORTH RANGE BEHAVIORAL HEALTH. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 12M128. IN RE GRAND JURY PROCEEDINGS No. 4–10. Motion for leave to file petition for writ of certiorari with supplemental appendix under seal granted.

No. 12M129. MORRIS *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 12–11. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* JAMES, 568 U. S. 1224. Motion of respondent to retax costs granted.

No. 12–9748. DELEON *v.* UNITED STATES; and

No. 12–10093. ALEX *v.* MABUS, SECRETARY OF THE NAVY. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until June 24, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–10130. IN RE ALLOUSH;
No. 12–10139. IN RE THORPE;
No. 12–10184. IN RE LUEDTKE;
No. 12–10195. IN RE DAI NGUYEN; and
No. 12–10221. IN RE RODRIQUEZ. Petitions for writs of habeas corpus denied.

No. 12–9489. IN RE LUH. Petition for writ of mandamus denied.

No. 12–9529. IN RE COBBLE; and
No. 12–9603. IN RE AJAJ. Motions of petitioners for leave to proceed *in forma pauperis* denied, and petitions for writs of mandamus dismissed. See this Court's Rule 39.8.

Certiorari Granted

No. 12–873. LEXMARK INTERNATIONAL, INC. *v.* STATIC CONTROL COMPONENTS, INC. C. A. 6th Cir. Certiorari granted. Reported below: 697 F. 3d 387.

No. 12–1038. UNITED STATES *v.* APEL. C. A. 9th Cir. Certiorari granted. Reported below: 676 F. 3d 1202.

Certiorari Denied

No. 12–802. BEHENNA *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 71 M. J. 228.

No. 12–885. THOMPSON, WARDEN *v.* HARRIS. C. A. 7th Cir. Certiorari denied. Reported below: 698 F. 3d 609.

No. 12–935. AMERICAN INDEPENDENCE MINES & MINERALS CO. ET AL. *v.* DEPARTMENT OF AGRICULTURE. C. A. 9th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 724.

No. 12–1060. HELENA SAND & GRAVEL, INC. *v.* LEWIS AND CLARK COUNTY PLANNING AND ZONING COMMISSION ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 367 Mont. 130, 290 P. 3d 691.

No. 12–1145. Clements, Warden *v.* Ray. C. A. 7th Cir. Certiorari denied. Reported below: 700 F. 3d 993.

No. 12–1187. Hassan *v.* Colorado et al. C. A. 10th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 947.

No. 12–1188. Whitehead *v.* Chesapeake Operating, Inc., et al. C. A. 5th Cir. Certiorari denied. Reported below: 492 Fed. Appx. 469.

No. 12–1189. Grant et al. *v.* FIA Card Services, dba Bank of America. C. A. 3d Cir. Certiorari denied. Reported below: 505 Fed. Appx. 107.

No. 12–1197. PG Publishing Co., dba Pittsburgh Post-Gazette *v.* Aichele, Secretary of the Commonwealth of Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 705 F. 3d 91.

No. 12–1198. Moten *v.* Broward County Medical Examiner and Trauma Services. C. A. 11th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 968.

No. 12–1215. Flint *v.* Coach House, Inc., et al. Ct. App. Ky. Certiorari denied.

No. 12–1222. Sudler et al. *v.* City of New York, New York, et al. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 3d 159.

No. 12–1240. Giles *v.* Florida. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 103 So. 3d 1058.

No. 12–1305. National Wine & Spirits, Inc., et al. *v.* Ernst & Young, LLP. Sup. Ct. Ind. Certiorari denied. Reported below: 976 N. E. 2d 699.

No. 12–1307. Fordham *v.* United States; and
No. 12–9978. Williams *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 3d 1345.

No. 12–1310. Mitchell *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 751.

No. 12–1323. Rothenberg *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 12–5437. ORTIZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 664 F. 3d 1151.

No. 12–7973. DOMINGUEZ-COLON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 691 F. 3d 1.

No. 12–8150. CURNUTT *v.* LESTER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–8436. LAMPON *v.* LaVALLEY, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 504 Fed. Appx. 1.

No. 12–8507. GREEN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 12–8738. KNIGHT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 440.

No. 12–8783. ISAACSON *v.* BERRIGAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 453 Fed. Appx. 731.

No. 12–8906. SIMS *v.* HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied.

No. 12–9042. HARDY *v.* THOMAS, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 684 F. 3d 1066.

No. 12–9242. MANOS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9456. GIRALDO *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 82 So. 3d 1228.

No. 12–9461. ROBINSON *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 231.

No. 12–9474. KUMVACHIRAPITAG *v.* GATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9475. BOND *v.* RIVARD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 493.

No. 12–9477. COLEMAN *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9480. MARKOGLU *v.* FEDERATED FINANCIAL CORPORATION OF AMERICA. Super. Ct. N. J., App. Div. Certiorari denied.

No. 12–9482. RICHWINE *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 474 Fed. Appx. 756.

No. 12–9488. LUH *v.* MISSOURI. C. A. 8th Cir. Certiorari denied.

No. 12–9504. HOPPER *v.* WYANT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 790.

No. 12–9506. HUGHES *v.* OKLAHOMA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 744.

No. 12–9513. HARPER *v.* PADDEN ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–9515. VICTOR *v.* DOSSON ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–9516. LAVIGNE *v.* MCBRIDE, WARDEN. Sup. Ct. App. W. Va. Certiorari denied. Reported below: 230 W. Va. 291, 737 S. E. 2d 560.

No. 12–9523. GRESHAM *v.* CAPELLO, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 930.

No. 12–9530. CONFECTIONER *v.* BEARD, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION. C. A. 9th Cir. Certiorari denied.

No. 12–9534. GSSIME *v.* MARTUSCELLO, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY. Ct. App. N. Y. Certiorari denied. Reported below: 20 N. Y. 3d 1005, 983 N. E. 2d 766.

No. 12–9535. FRANKLIN *v.* CITY OF FORT WORTH, TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied.

No. 12–9536. HOUSTON *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 12–9538. GUEBARA *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 144 So. 3d 553.

No. 12–9540. GRAY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 12–9543. PEREZ GONI *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 119 So. 3d 443.

No. 12–9546. HAYES *v.* TILTON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9548. HAMMOND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 292 Ga. 237, 734 S. E. 2d 396.

No. 12–9554. TRI THANH NGUYEN *v.* FRANKLIN COUNTY SHERIFF'S DEPARTMENT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 512 Fed. Appx. 188.

No. 12–9555. MCCALL *v.* KENDALL, SUPERINTENDENT, LEATH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 506 Fed. Appx. 199.

No. 12–9561. ONEGA *v.* LEE, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 12–9563. DUONG NAM *v.* ALMAGER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9565. HERBERT *v.* DICKHAUT, SUPERINTENDENT, SOUZA BARANOWSKI CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied. Reported below: 695 F. 3d 105.

No. 12–9567. CARR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–9574. ROY *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 62 A. 3d 1183.

No. 12–9575. SORENSON *v.* MINNESOTA DEPARTMENT OF CORRECTIONS ET AL. C. A. 8th Cir. Certiorari denied.

No. 12–9577. SUTTON *v.* RAPELJE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9580. MOHIUDDIN *v.* CMRE FINANCIAL SERVICES INC. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–9585. BELL *v.* HOFFNER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 703 F. 3d 848.

No. 12–9631. CREDICO *v.* UNKNOWN EMPLOYEE OF THE HOUSTON FEDERAL BUREAU OF INVESTIGATION FORFEITURE UNIT ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9646. MUNSON *v.* ROCK, SUPERINTENDENT, UPSTATE CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 507 Fed. Appx. 53.

No. 12–9652. STOUT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 12–9702. DANNER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 103 So. 3d 156.

No. 12–9774. GEBREZGIABHER *v.* KREMER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 193.

No. 12–9779. MEJIA *v.* BITER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9783. SERRANO *v.* DICKHAUT, SUPERINTENDENT, SOUZA BARANOWSKI CORRECTIONAL CENTER. C. A. 1st Cir. Certiorari denied.

No. 12–9788. VASQUEZ *v.* KLIE. C. A. 2d Cir. Certiorari denied. Reported below: 513 Fed. Appx. 85.

No. 12–9803. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–9805. RYAHIM *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 12–9838. LAWSON *v.* BECKSTROM, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9875. ROBINSON *v.* MCCABE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 254.

No. 12–9922. CALHOUN *v.* UNITED STATES; and

No. 12–10100. KENNEDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 707 F. 3d 558.

No. 12–9925. PAYTON *v.* DEPARTMENT OF HOMELAND SECURITY. C. A. Fed. Cir. Certiorari denied. Reported below: 502 Fed. Appx. 942.

No. 12–9956. CHAPMAN *v.* LEW, SECRETARY OF THE TREASURY. C. A. 4th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 299.

No. 12–9957. BROWN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 401 S. C. 82, 736 S. E. 2d 263.

No. 12–9961. BROCKINGTON *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Certiorari denied. Reported below: 114 So. 3d 932.

No. 12–9962. SEBREROS-CASTRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 804.

No. 12–9963. SHORES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 700 F. 3d 366.

No. 12–9988. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–9995. CARRILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10008. PEAVY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 494.

No. 12–10012. LOVE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 747.

No. 12–10018. GRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 700 F. 3d 377.

No. 12–10028. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 283.

No. 12–10034. GARRETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–10036. FRANCISCO GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–10040. ZOGHEIB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 Fed. Appx. 15.

No. 12–10041. TORRES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 703 F. 3d 194.

No. 12–10043. KAUFMAN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 12–10047. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 706 F. 3d 264.

No. 12–10048. MARTORANO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 697 F. 3d 216.

No. 12–10051. RICHARDSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–10062. SOUTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–10063. TATIS-NUNEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 699 F. 3d 588.

No. 12–10064. PETERSON *v.* UNITED STATES; and
No. 12–10105. MUHAMMAD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 512 Fed. Appx. 154.

No. 12–10068. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 338.

No. 12–10070. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 12–10071. PATTON *v.* UNITED STATES; and
No. 12–10113. LEE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 139.

No. 12–10076. BOND *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 12–10079. POLANCO, AKA EL NEGRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 510 Fed. Appx. 10.

No. 12–10080. RAMSEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 653.

No. 12–10083. Fleming *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 12–10085. Graham *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 489 Fed. Appx. 503.

No. 12–10091. Atkins *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 577.

No. 12–10095. Blount *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 746.

No. 12–10096. Aquino-Lopez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 325.

No. 12–10102. Rudow *v.* United States. C. A. 3d Cir. Certiorari denied.

No. 12–10118. Sellers *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 319.

No. 12–10121. Tum *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 707 F. 3d 68.

No. 12–10122. Scott *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 521 Fed. Appx. 112.

No. 12–10123. Broxmeyer *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 699 F. 3d 265.

No. 12–10128. Almazan-Becerra *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 636.

No. 12–10135. Oliver *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 513 Fed. Appx. 311.

No. 12–10136. Paredes, aka Parades *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 520 Fed. Appx. 129.

No. 12–10142. Wimberly *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 853.

No. 12–10143. Wood *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 510 Fed. Appx. 257.

No. 12–10145. Woods *v.* United States. C. A. 6th Cir. Certiorari denied.

No. 12–10150. DE JESUS-CASTENEDA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 3d 1117.

No. 12–10157. DOBY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 12–10161. POLANCO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 506 Fed. Appx. 55.

No. 12–10162. MITCHELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 498 Fed. Appx. 339.

No. 12–10163. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 F. 3d 600.

No. 12–894. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* RUNNINGEAGLE. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 686 F. 3d 758.

No. 12–1190. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* LAMBRIGHT. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 698 F. 3d 808.

No. 12–1196. SHEIKH *v.* CISCO SYSTEMS, INC. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 472 Fed. Appx. 787.

No. 12–1241. CLAYWORTH ET AL. *v.* PFIZER, INC., ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition.

No. 12–1318. SECREST *v.* MERCK, SHARP & DOHME CORP. C. A. 2d Cir. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 707 F. 3d 189.

No. 12–9462. SIMPSON *v.* JPMORGAN CHASE BANK, N. A., AS TRUSTEE, ET AL. Sup. Ct. Mich. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 493 Mich. 871, 821 N. W. 2d 548.

No. 12–9604. BERRYMAN *v.* CHAPPELL, WARDEN. C. A. 9th Cir. Certiorari before judgment denied.

Rehearing Denied

No. 12–939. ARMATAS *v.* MAROULLETI ET AL., *ante*, p. 904;
No. 12–993. MARTINEZ OCHOA *v.* HOLDER, ATTORNEY GENERAL, *ante*, p. 919;
No. 12–1108. BYRD *v.* UNITED STATES, *ante*, p. 921;
No. 12–7124. ADAMS *v.* FLORIDA, *ante*, p. 922;
No. 12–7394. LOMBARDO *v.* UNITED STATES, 568 U. S. 1251;
No. 12–7498. LOCKWOOD *v.* FLORIDA, *ante*, p. 923;
No. 12–7620. CASTLEBERRY *v.* FLORIDA, *ante*, p. 923;
No. 12–8026. PHILLIPS *v.* UNITED PARCEL SERVICE, 568 U. S. 1233;
No. 12–8461. GREEN *v.* LOCKETT, WARDEN, 568 U. S. 1205;
No. 12–8480. FIELDS *v.* MILLER, WARDEN, *ante*, p. 908;
No. 12–8585. HAGBERG *v.* LAKES BROADCASTING GROUP, INC., ET AL., *ante*, p. 928;
No. 12–8623. ROY *v.* BOARD OF COUNTY COMMISSIONERS FOR WALTON COUNTY, FLORIDA, ET AL., *ante*, p. 929;
No. 12–8639. COLEMAN *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 929;
No. 12–8650. LOWE *v.* FLORIDA, *ante*, p. 930;
No. 12–8713. MOORE *v.* UNKNOWN UNITED STATES MARSHAL, *ante*, p. 931;
No. 12–8985. GIBSON *v.* OLIVER, WARDEN, *ante*, p. 934;
No. 12–8996. HELLSTROM *v.* FLORIDA, *ante*, p. 934;
No. 12–9071. CROCKETT *v.* UNITED STATES, *ante*, p. 936; and
No. 12–9105. IZAGUIRRE CABRERA *v.* UNITED STATES, *ante*, p. 936. Petitions for rehearing denied.

No. 12–7559. MCCORVEY *v.* YOUNG, WARDEN, 568 U. S. 1259. Petition for rehearing denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

JUNE 4, 2013

Dismissal Under Rule 46

No. 12–379. MICHIGAN DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS, UNEMPLOYMENT INSURANCE AGENCY, TRA SPECIAL PROGRAMS UNIT *v.* GERSTENSCHLAGER. Cir. Ct. Huron County, Mich. Certiorari dismissed under this Court's Rule 46.1.

JUNE 10, 2013

Dismissal Under Rule 46

No. 12–9173. PERA *v.* EIGHTH JUDICIAL DISTRICT COURT OF NEVADA, CLARK COUNTY, ET AL. Sup. Ct. Nev. Certiorari dismissed under this Court's Rule 46.

Certiorari Dismissed

No. 12–9725. RAISER *v.* CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS 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. Reported below: 494 Fed. Appx. 506.

Miscellaneous Orders

No. 12M130. RUPPERT, AS TRUSTEE OF FAIRMOUNT PARK, INC., RETIREMENT SAVINGS PLAN *v.* PRINCIPAL LIFE INSURANCE CO. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 12M131. CARRASCO *v.* CITY OF BRYAN, TEXAS. Motion for leave to proceed as a veteran denied.

No. 12M132. JOYCE H. ET VIR *v.* LORAIN COUNTY CHILDREN SERVICES; and

No. 12M133. HICKMAN *v.* HICKMAN. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 12–8561. PAROLINE *v.* UNITED STATES ET AL. C. A. 5th Cir.;

No. 12–9807. CARR *v.* UNITED STATES. C. A. 2d Cir.; and

No. 12–10014. RIVERA *v.* VENDITTO. App. Ct. Mass. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 1, 2013, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 12–8660. KRUG *v.* ROBERTS, CHIEF JUSTICE, SUPREME COURT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [568 U. S. 1248] denied.

No. 12–8887. COBBLE *v.* WILLIAMS, WARDEN, ET AL. Super. Ct. Tattnall County, Ga. Motion of petitioner for reconsideration

of order denying leave to proceed *in forma pauperis* [*ante*, p. 956] denied.

No. 12–10104. HUNT *v.* WILSON ET AL. C. A. 8th Cir. Motion of petitioner to expedite consideration of petition for writ of certiorari denied.

No. 12–10296. IN RE HICKINGBOTTOM; and
No. 12–10333. IN RE BROWNELL. Petitions for writs of habeas corpus denied.

No. 12–1211. IN RE DEL RIO. Petition for writ of mandamus denied.

No. 12–9665. IN RE STERLING. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 12–138. BG GROUP PLC *v.* REPUBLIC OF ARGENTINA. C. A. D. C. Cir. Motions of American Arbitration Association, Professors and Practitioners of Arbitration Law, AWG Group Limited, and United States Council for International Business for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 665 F. 3d 1363.

Certiorari Denied

No. 12–9. ARZOUMANIAN ET AL. *v.* MUNCHENER RUCKVERSICHERUNGS-GESELLSCHAFT AKTIENGESELLSCHAFT AG. C. A. 9th Cir. Certiorari denied. Reported below: 670 F. 3d 1067.

No. 12–855. LIMITED LIABILITY CO. ET AL. *v.* DOE. Sup. Ct. P. R. Certiorari denied.

No. 12–1065. WOLFE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 701 F. 3d 1206.

No. 12–1076. FLEMING ET AL., SPECIAL CO-ADMINISTRATORS OF THE ESTATE OF FLEMING, DECEASED *v.* MOSWIN ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 103475–B, 976 N. E. 2d 447.

No. 12–1077. SCOTT ET AL. *v.* SAINT JOHN'S CHURCH IN THE WILDERNESS ET AL. Ct. App. Colo. Certiorari denied. Reported below: 296 P. 3d 273.

No. 12–1080. PAPPAS *v.* FARR. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 12–1162. RALPHS GROCERY CO. *v.* UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 8. Sup. Ct. Cal. Certiorari denied. Reported below: 55 Cal. 4th 1083, 290 P. 3d 1116.

No. 12–1204. COHEN *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 481 Fed. Appx. 696.

No. 12–1205. MEDRANO ET UX. *v.* FLAGSTAR BANK ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 661.

No. 12–1207. JONES, ADMINISTRATRIX OF THE ESTATE OF JONES, ET AL. *v.* ABRAMS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 463.

No. 12–1209. WHITE ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* ALLEGHENY COUNTY, PENNSYLVANIA, ET AL. Commw. Ct. Pa. Certiorari denied. Reported below: 32 A. 3d 889.

No. 12–1210. R. E., INDIVIDUALLY AND ON BEHALF OF J. E. ET AL. *v.* NEW YORK CITY DEPARTMENT OF EDUCATION. C. A. 2d Cir. Certiorari denied. Reported below: 694 F. 3d 167.

No. 12–1219. ZEITCHICK *v.* LUCEY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 792.

No. 12–1220. WRIGHT *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–1225. NARDELLI ET UX. *v.* METROPOLITAN GROUP PROPERTY & CASUALTY INSURANCE CO. ET AL. Ct. App. Ariz. Certiorari denied. Reported below: 230 Ariz. 592, 277 P. 3d 789.

No. 12–1227. VOTER VERIFIED, INC. *v.* PREMIER ELECTION SOLUTIONS, INC.; and

No. 12–1228. VOTER VERIFIED, INC. *v.* ELECTION SYSTEMS & SOFTWARE, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 698 F. 3d 1374.

No. 12–1242. ARREAGA DIAZ *v.* HOLDER, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 524.

No. 12–1297. SCHWERING, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE ON BEHALF OF SCHWERING *v.* TRW VEHICLE SAFETY SYSTEMS, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 512 Fed. Appx. 556.

No. 12–1301. GOODIN *v.* FIDELITY NATIONAL TITLE INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 491 Fed. Appx. 139.

No. 12–1308. LASATER *v.* TEXAS A&M UNIVERSITY-COMMERCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 495 Fed. Appx. 458.

No. 12–1309. MIDDLEBROOK *v.* NAPEL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 698 F. 3d 906.

No. 12–1314. MITRANO *v.* MORRIS, TRUSTEE. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 347.

No. 12–1326. KATZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 679.

No. 12–6908. ACOSTA-RUIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 213.

No. 12–7424. AMR *v.* MOORE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 469 Fed. Appx. 209.

No. 12–7900. BROWN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 091940, 967 N. E. 2d 1004.

No. 12–7958. FORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 683 F. 3d 761.

No. 12–8270. MCDONALD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–8454. SEALS *v.* LOUISIANA. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 09–1089 (La. App. 5 Cir. 12/29/11), 83 So. 3d 285.

No. 12–8549. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 704 F. 3d 754.

No. 12–8572. READ ET UX. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 3d 219.

No. 12–8661. JOHNSTON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 12–8833. MARIN MORENO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 701 F. 3d 64.

No. 12–8969. RYE *v.* STATE PERSONNEL BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 12–9076. NIGHTINGALE *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 2012 ME 132, 58 A. 3d 1057.

No. 12–9087. TAYLOR *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: 382 S. W. 3d 78.

No. 12–9261. CHANEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 486 Fed. Appx. 363.

No. 12–9549. HILL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 2012 IL App (4th) 110023–U.

No. 12–9573. RUFUS *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–9579. PETAWAY *v.* DINITTO ET AL. C. A. 1st Cir. Certiorari denied.

No. 12–9589. RIDDLE *v.* CARUSO ET AL. C. A. 6th Cir. Certiorari denied.

No. 12–9591. HOWARD *v.* KERESTES, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY, ET AL. C. A. 3d Cir. Certiorari denied.

No. 12–9594. HOLDER *v.* CURTIN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9598. TAYLOR *v.* OCHOA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9608. ERVIN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 090669–U.

No. 12–9609. CALDWELL *v.* BONDI, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 895.

No. 12–9610. DIGGES *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 12–9617. PAGE *v.* KING. C. A. 9th Cir. Certiorari denied.

No. 12–9618. DAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 2012 IL App (1st) 092906–U.

No. 12–9626. POURAHMAD *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 12–9633. JAMES *v.* BAYWALK HOMEOWNERS ASSN. ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 12–9634. JONES *v.* THALER, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 12–9635. LEDLOW *v.* GIVENS. C. A. 11th Cir. Certiorari denied. Reported below: 500 Fed. Appx. 910.

No. 12–9637. LEWIS *v.* LEBLANC, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 508 Fed. Appx. 341.

No. 12–9641. SIMMONS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 2012 IL App (2d) 110146–U.

No. 12–9644. ROBINSON-REEDER *v.* KEARNS ET AL. C. A. D. C. Cir. Certiorari denied.

No. 12–9648. DAIAK *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 100 So. 3d 688.

No. 12–9650. JONES *v.* PLUS 4 CREDIT UNION. C. A. 5th Cir. Certiorari denied.

No. 12–9653. ESTRELLA *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 230 Ariz. 401, 286 P. 3d 150.

No. 12–9659. HOLSEY *v.* HUMPHREY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 694 F. 3d 1230.

No. 12–9666. RUFFA *v.* MCDANIEL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 12–9667. Barber *v.* Thaler, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied.

No. 12–9681. Underwood *v.* Berghuis, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–9688. Avalos *v.* Janda, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9692. Robinson et vir *v.* City of Harrisburg, Pennsylvania, et al. C. A. 3d Cir. Certiorari denied. Reported below: 488 Fed. Appx. 588.

No. 12–9694. Rosales *v.* Davey, Warden. C. A. 9th Cir. Certiorari denied.

No. 12–9696. Pannell *v.* Clarke, Director, Virginia Department of Corrections. C. A. 4th Cir. Certiorari denied. Reported below: 490 Fed. Appx. 591.

No. 12–9697. Smith *v.* McKee, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–9698. Richardson *v.* Woods, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–9699. Showers *v.* Kerestes, Superintendent, State Correctional Institution at Mahanoy, et al. C. A. 3d Cir. Certiorari denied.

No. 12–9700. Craddock et al. *v.* Beaufort County Sheriff's Department et al. C. A. 4th Cir. Certiorari denied. Reported below: 489 Fed. Appx. 712.

No. 12–9701. Davis *v.* Barbee, Warden. C. A. 6th Cir. Certiorari denied.

No. 12–9708. Gonzales Estrada *v.* Horne, Attorney General of Arizona, et al. C. A. 9th Cir. Certiorari denied.

No. 12–9727. Castro *v.* Roden, Superintendent, Massachusetts Correctional Institution at Norfolk. C. A. 1st Cir. Certiorari denied.

No. 12–9764. Dai Nguyen *v.* Sacramento County, California, et al. C. A. 9th Cir. Certiorari denied. Reported below: 481 Fed. Appx. 370.

No. 12–9770. HUDSON *v.* SCUTT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9782. STUPIN *v.* BUSBY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 12–9823. WATSON *v.* DENNIS. Ct. App. Ga. Certiorari denied. Reported below: 318 Ga. App. XXIII.

No. 12–9825. CONLEY *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 105 So. 3d 519.

No. 12–9831. BURD *v.* SESSLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 702 F. 3d 429.

No. 12–9857. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 936.

No. 12–9862. CHAPMAN *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9886. CLARDY *v.* BRUNSMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9888. LAWSON *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 60 A. 3d 599.

No. 12–9898. WALLACE *v.* HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 12–9914. SIMPSON *v.* WOLFENBARGER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–9920. NORTH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 108 So. 3d 1109.

No. 12–9950. GANDY *v.* REID, SHERIFF, HAMILTON COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 505 Fed. Appx. 908.

No. 12–9951. IRBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 3d 280.

No. 12–9955. WHISMAN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 128 Nev. 944, 381 P. 3d 675.

No. 12–9974. GRAHAM *v.* KELLER, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 480 Fed. Appx. 725.

No. 12–10011. KING *v.* RAPELJE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10039. WILSON *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 204 N. C. App. 371, 696 S. E. 2d 202.

No. 12–10054. SALAAM, AKA GEORGE, AKA FAVORS *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 12–10057. PIETRI *v.* CREWS, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 12–10067. EVANS *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10124. ALEXANDER *v.* MURDOCH ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 502 Fed. Appx. 107.

No. 12–10138. RAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 704 F. 3d 1307.

No. 12–10147. OLLIE *v.* PLANO INDEPENDENT SCHOOL DISTRICT ET AL. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 383 S. W. 3d 783.

No. 12–10164. LUIS CASTILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 516 Fed. Appx. 667.

No. 12–10166. SCHUSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 706 F. 3d 800.

No. 12–10167. SOLIS-MERCADO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 12–10168. SAAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 692.

No. 12–10169. SEABURY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 836.

No. 12–10170. THORNBERG *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 326 F. 3d 1023.

No. 12–10176. ANDRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 703 F. 3d 828.

No. 12–10179. CAMPBELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 488 Fed. Appx. 358.

No. 12–10182. MCCAULEY *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 466 Fed. Appx. 832.

No. 12–10192. PATTERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 12–10194. MONTGOMERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 701 F. 3d 1218.

No. 12–10199. ANTONIO LARIUS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 315.

No. 12–10206. MACKEY *v.* BERKEBILE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 12–10207. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 12–10212. CLARK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 312.

No. 12–10213. CLARK *v.* HUFFORD, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 504 Fed. Appx. 93.

No. 12–10218. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 658.

No. 12–10223. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 499 Fed. Appx. 257.

No. 12–10226. RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 353.

No. 12–10227. RICH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 708 F. 3d 1135.

No. 12–10228. DAWSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 624.

No. 12–10229. URIAS-CRUZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 511 Fed. Appx. 316.

No. 12–10234. BULLOCK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 509 Fed. Appx. 229.

No. 12–10237. JOHNSONMARIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 651.

No. 12–10238. JENKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 501 Fed. Appx. 685.

No. 12–10241. DARDEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 688 F. 3d 382.

No. 12–10242. COLMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 520 Fed. Appx. 514.

No. 12–10244. WULF *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 Fed. Appx. 800.

No. 12–10245. VAL SAINT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 504 Fed. Appx. 838.

No. 12–10246. URCIUOLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 12–10247. VELAZQUEZ-SEDANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 524 Fed. Appx. 347.

No. 12–10249. VILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 503 Fed. Appx. 487.

No. 12–10250. TORRES-GUARDADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 502 Fed. Appx. 654.

No. 12–10254. FLORES OLMOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 532 Fed. Appx. 462.

No. 12–10260. ALLEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 3d 98.

No. 12–10267. MADRID *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 12–10271. HURTH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 507 Fed. Appx. 731.

No. 12–976. VANCE ET AL. *v.* RUMSFELD. C. A. 7th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 701 F. 3d 193.

No. 12–1035. OKLAHOMA *v.* WOLF. Ct. Crim. App. Okla. Motion of respondent for leave to proceed *in forma pauperis*

granted. Certiorari denied. Reported below: 2012 OK CR 16, 292 P. 3d 512.

No. 12–1051. ANDERSON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 698 F. 3d 160.

No. 12–1236. SMITH *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 505 Fed. Appx. 560.

No. 12–1319. MINTON, EXECUTOR OF THE ESTATE OF MINTON *v.* EXXON MOBIL CORP. Sup. Ct. Va. Certiorari denied. JUSTICE ALITO took no part in the consideration or decision of this petition. Reported below: 285 Va. 115, 737 S. E. 2d 16.

No. 12–9887. CREDICO *v.* ADULT PROBATION/PAROLE (CHESTER COUNTY, PENNSYLVANIA) ET AL. C. A. 3d Cir. Certiorari before judgment denied.

No. 12–10193. PENA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 495 Fed. Appx. 209.

No. 12–10197. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. JUSTICE SOTOMAYOR took no part in the consideration or decision of this petition. Reported below: 511 Fed. Appx. 8.

No. 12–10248. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition. Reported below: 707 F. 3d 598.

No. 12–10261. BARNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. JUSTICE KAGAN took no part in the consideration or decision of this petition.

Rehearing Denied

No. 12–830. FORD *v.* DONLEY, SECRETARY OF THE AIR FORCE, 568 U. S. 1194;

No. 12–863. JOVANI FASHION, LTD. *v.* FIESTA FASHIONS ET AL., 568 U. S. 1230;

No. 12–1004. SMITH *v.* FRIEDMAN ET AL., *ante,* p. 947;

No. 12–6608. THORNTON *v.* IVES, WARDEN, 568 U. S. 1251;
No. 12–7546. J. O. *v.* C. L. S., 568 U. S. 1259;
No. 12–7854. GLAIR *v.* CITY OF LOS ANGELES, CALIFORNIA, ET AL., 568 U. S. 1197;
No. 12–8440. NEGRETE *v.* LEWIS, ACTING WARDEN, *ante*, p. 907;
No. 12–8635. COOPER *v.* GRAMIAK, WARDEN, *ante*, p. 929;
No. 12–8730. THOMPSON *v.* DOERING ET AL., *ante*, p. 931;
No. 12–8881. THOMAS *v.* ILLINOIS DEPARTMENT OF CORRECTIONS, *ante*, p. 960;
No. 12–8930. PLOTKIN *v.* COMMISSIONER OF INTERNAL REVENUE, *ante*, p. 933; and
No. 12–9177. BARKSDALE *v.* UNITED STATES, *ante*, p. 938. Petitions for rehearing denied.

JUNE 11, 2013

Dismissal Under Rule 46

No. 12–9996. MARY JO C. *v.* NEW YORK STATE AND LOCAL RETIREMENT SYSTEM ET AL. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 707 F. 3d 144.

JUNE 12, 2013

Certiorari Denied

No. 12–10696 (12A1184). VAN POYCK *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: 116 So. 3d 347.

No. 12–10730 (12A1192). CHESTER *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.

RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 19, 2013

EFFECTIVE JULY 1, 2013

The following are the Rules of the Supreme Court of the United States as revised on April 19, 2013. See *post*, p. 1042. The amended Rules became effective July 1, 2013, as provided in Rule 48, *post*, p. 1104.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, 493 U. S. 1099, 515 U. S. 1197, 519 U. S. 1161, 525 U. S. 1191, 537 U. S. 1249, 544 U. S. 1073, 551 U. S. 1195, and 558 U. S. 1161.

ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

FRIDAY, APRIL 19, 2013

IT IS ORDERED that the revised Rules of this Court, approved by the Court and lodged with the Clerk, shall be effective July 1, 2013, and be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated January 12, 2010, see 558 U. S. 1161, shall be rescinded as of June 30, 2013, and that the revised Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending.

RULES OF THE SUPREME COURT OF THE UNITED STATES

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RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED APRIL 19, 2013—EFFECTIVE JULY 1, 2013

PART I. THE COURT

Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. § 6103.

Rule 2. Library

1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.

Rule 3. Term

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See 28 U. S. C. § 2. At the end of each Term, all cases pending on the docket are continued to the next Term.

Rule 4. Sessions and Quorum

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.

Part II. Attorneys and Counselors

Rule 5. Admission to the Bar

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official

of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, ..., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $200, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

Rule 6. Argument *Pro Hac Vice*

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice.*

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice.*

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice.* It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.

Rule 7. Prohibition Against Practice

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.

Rule 8. Disbarment and Disciplinary Action

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

Part III. Jurisdiction on Writ of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Rule 12. Review on Certiorari: How Sought; Parties

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion shall precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i. e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the ap-

pendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a conditional cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, with the following exception: A response of a party aligned with petitioner below who supports granting the petition shall be filed within 30 days after the case is placed on the docket, and that time will not be extended. Counsel for such respondent shall ensure that counsel of record for all parties receive notice of its intention to file a brief in support within 20 days after the case is placed on the docket. A respondent not aligned with petitioner below who supports granting the petition, or a respondent aligned with petitioner

below who takes the position that the petition should be denied, is not subject to the notice requirement and may file a response within the time otherwise provided by Rule 15.3. Parties who file no document will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

Rule 13. Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. The application must clearly identify each party for whom an extension is being sought, as any extension that might be granted would apply solely to the party or parties named in the application. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

Rule 14. Content of a Petition for a Writ of Certiorari

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a corporate disclosure statement as required by Rule 29.6.

(c) If the petition prepared under Rule 33.1 exceeds 1,500 words or exceeds five pages if prepared under Rule 33.2, a table of contents and a table of cited authorities. The table of contents shall include the items contained in the appendix.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule,

and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter will be deemed timely.

Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not mandatory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the word or page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent

proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent shall prepare its brief in opposition, if any, as required by Rule 33.2, and shall file an original and 10 copies of that brief. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 14 days after the brief in opposition is filed, unless the petitioner expressly waives the 14-day waiting period.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

Rule 16. Disposition of a Petition for a Writ of Certiorari

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

PART IV. OTHER JURISDICTION

Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed, with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional

documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendix shall include a copy of the notice of appeal showing the date it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i. e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the

Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a peti-

tion by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 14 days after the motion is filed, unless the appellant expressly waives the 14-day waiting period.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule

12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is submitted in accordance with Rule 29.2 no more than 60 days after the date of the Clerk's letter, it will be deemed timely.

Rule 19. Procedure on a Certified Question

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari

prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis,* a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition together with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within

the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

PART V. MOTIONS AND APPLICATIONS

Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Non-dispositive motions and applications in cases in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed

shall state the position on the disposition of the motion or application of the other party or parties to the case. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an *amicus curiae* brief

(see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

Rule 22. Applications to Individual Justices

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. An application arising from the United States Court of Appeals for the Armed Forces shall be addressed to the Chief Justice. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

Rule 23. Stays

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See 28 U. S. C. § 2101(f).

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

Part VI. Briefs on the Merits and Oral Argument

Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended corporate disclosure statement as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds 1,500 words, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.*, App. 12, or to the record, *e. g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition

of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the word limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, *e. g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

Rule 25. Briefs on the Merits: Number of Copies and Time to File

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing

consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 30 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 30 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than 2 p.m. one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. If cross-petitions or cross-appeals have been consolidated for argument, the Clerk, upon request of the parties, may designate one of the parties to file an initial brief and reply brief as provided in paragraphs 1 and 3 of this Rule (as if the party were petitioner or appellant), and may designate the other party to file an initial brief as provided in paragraph 2 of this Rule and, to the extent appropriate, a supplemental brief following the submission of the reply brief. In such a case, the Clerk may establish the time for the submission of the briefs and alter the otherwise applicable word limits. Except as approved by the Court or a Justice, the total number of words permitted for the briefs of the parties cumulatively shall not exceed the maximum that would have been allowed in the absence of an order under this paragraph.

5. The time periods stated in paragraphs 1, 2, and 3 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

6. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies

of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

7. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

8. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

9. An electronic version of every brief on the merits shall be transmitted to the Clerk of Court and to opposing counsel of record at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed.

Rule 26. Joint Appendix

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4. (a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.,* captions, sub-

scriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Two lines must appear at the bottom of the cover of the joint appendix: (1) The first line must indicate the date the petition for the writ of certiorari was filed or the date the appeal was docketed; (2) the second line must indicate the date certiorari was granted or the date jurisdiction of the appeal was noted or postponed.

7. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

8. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

9. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

Rule 27. Calendar

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

Rule 28. Oral Argument

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 in time to be considered at a schedule Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed in time to be considered at a schedule Conference prior to the date of oral argument and no later than 7 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been

filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

8. Oral arguments may be presented only by members of the Bar of this Court. Attorneys who are not members of the Bar of this Court may make a motion to argue *pro hac vice* under the provisions of Rule 6.

Part VII. Practice and Procedure

Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk.

2. A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the details of

the filing and stating that the filing took place on a particular date within the permitted time.

3. Any document required by these Rules to be served may be served personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office of the counsel of record, either to counsel or to an employee therein. If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper address. When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier. Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court. An electronic version of the document shall also be transmitted to all other parties at the time of filing or reasonably contemporaneous therewith, unless the party filing the document is proceeding *pro se* and *in forma pauperis* or the electronic service address of the party being served is unknown and not identifiable through reasonable efforts.

4. (a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, offi-

cer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(a) may apply and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or

evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served, and bearing the address and telephone number of such counsel;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed. In addition, whenever there is a material change in the identity of the parent corporation or publicly held companies that own 10% or more of the corporation's stock, counsel shall promptly inform the Clerk by letter and include, within that

letter, any amendment needed to make the statement current.

Rule 30. Computation and Extension of Time

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing of any judgment or decision of the Court on the merits shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. An application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The application may be acted on by the

Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

Rule 31. Translations

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

Rule 32. Models, Diagrams, Exhibits, and Lodgings

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, exhibits, and other items placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

3. Any party or *amicus curiae* desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.

Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format

1. *Booklet Format:* (a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper, see, *e. g.*, Rules 21, 22, and 39, every document filed

with the Court shall be prepared in a 6 1/8- by 9 1/4-inch booklet format using a standard typesetting process (*e. g.*, hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters. The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in a Century family (*e. g.*, Century Expanded, New Century Schoolbook, or Century Schoolbook) 12-point type with 2-point or more leading between lines. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 10-point type with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4 1/8 by 7 1/8 inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix.

(d) Every booklet-format document, shall comply with the word limits shown on the chart in subparagraph 1(g) of this Rule. The word limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, the listing of counsel at the end of the document, or any appendix. The word limits include footnotes. Verbatim quotations required under Rule 14.1(f) and Rule 24.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the word limits, but

application for such leave is not favored. An application to exceed word limits shall comply with Rule 22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every booklet-format document, shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a booklet-format document shall be filed.

(g) Word limits and cover colors for booklet-format documents are as follows:

Type of Document	Word Limits	Color of Cover
(i) Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2)	9,000	white
(ii) Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4); Respondent's Brief in Support of Certiorari (Rule 12.6)	9,000	orange
(iii) Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8)	3,000	tan
(iv) Supplemental Brief (Rules 15.8, 17, 18.10, and 25.5)	3,000	tan
(v) Brief on the Merits for Petitioner or Appellant		

	Type of Document	Word Limits	Color of Cover
	(Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17)	15,000	light blue
(vi)	Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	light red
(vii)	Reply Brief on the Merits (Rule 24.4)	6,000	yellow
(viii)	Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17)	15,000	orange
(ix)	Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17)	15,000	yellow
(x)	Brief for an *Amicus Curiae* at the Petition Stage or pertaining to a Motion for Leave to file a Bill of Complaint (Rule 37.2)	6,000	cream
(xi)	Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	light green
(xii)	Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3)	9,000	dark green
(xiii)	Petition for Rehearing (Rule 44)	3,000	tan

(h) A document prepared under Rule 33.1 must be accompanied by a certificate signed by the attorney, the unrepresented party, or the preparer of the document stating that the brief complies with the word limitations. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document. The word-processing system must be set to include footnotes in the word count. The certificate must state the number of words in the document. The certificate shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. If the certificate is signed by a person other than a member of the Bar of this Court, the counsel of record, or the unrepresented party, it must contain

a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746.

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 8½- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The exclusions specified in subparagraph 1(d) of this Rule apply.

Rule 34. Document Preparation: General Requirements

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court

from which the action is brought (*e. g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 9.1), and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address and telephone number. Only one counsel of record may be noted on a single document. The names of other members of the Bar of this Court or of the bar of the highest court of a State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se,* in which case the party's name, address, and telephone number shall appear. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document (other than a joint appendix) that exceeds 1,500 words when prepared under Rule 33.1, or that exceeds five pages when prepared under Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(f) of this Rule, as may be desired.

4. Every appendix to a document must be preceded by a table of contents that provides a description of each document in the appendix.

5. All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified therein. In the event the provision has not been classified to the United States Code, citation should be to the Statutes at Large. Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument.

Rule 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after the filing of a petition for a writ of certiorari to this Court, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The

parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the

order is modified or an independent order respecting custody, enlargement, or surety is entered.

Rule 37. Brief for an *Amicus Curiae*

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored. An *amicus curiae* brief may be filed only by an attorney admitted to practice before this Court as provided in Rule 5.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended. An *amicus curiae* brief in support of a motion of a plaintiff for leave to file a bill of complaint in an original action shall be filed within 60 days after the case is placed on the docket, and that time will not be extended. An *amicus curiae* brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm. An *amicus curiae* filing a brief under this subparagraph shall ensure that the counsel of record for all parties receive notice of its intention to file an *amicus curiae* brief at least 10 days prior to the due date for the *amicus curiae* brief, unless the *amicus curiae* brief is filed earlier than 10 days before the due date. Only one signatory to any *amicus curiae* brief filed jointly by more than one *amicus curiae* must timely notify the parties of its intent to file that brief. The *amicus curiae* brief shall indicate that counsel of record received timely notice of the intent to file the brief under this Rule and shall specify

whether consent was granted, and its cover shall identify the party supported. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within 7 days after the brief for the party supported is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. Motions to extend the time for filing an *amicus curiae* brief will not be entertained. The 10-day notice requirement of subparagraph 2(a) of this Rule does not apply to an *amicus curiae* brief in a case before the Court for oral argument. An electronic version of every *amicus curiae* brief in a case before the Court for oral argument shall be transmitted to the Clerk of Court and to counsel for the parties at the time the brief is filed in accordance with guidelines established by the Clerk. The electronic transmission requirement is in addition to the requirement that booklet-format briefs be timely filed. The *amicus curiae* brief shall

specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing. Only one signatory to an *amicus curiae* brief filed jointly by more than one *amicus curiae* must obtain consent of the parties to file that brief. A petitioner or respondent may submit to the Clerk a letter granting blanket consent to *amicus curiae* briefs, stating that the party consents to the filing of *amicus curiae* briefs in support of either or of neither party. The Clerk will note all notices of blanket consent on the docket.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed 1,500 words. A party served with the motion may file an objection thereto, stating concisely the reasons

for withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the *amicus curiae*, its members, or its counsel, who made such a monetary contribution. The disclosure shall be made in the first footnote on the first page of text.

Rule 38. Fees

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

Rule 39. Proceedings *In Forma Pauperis*

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the court below appointed counsel for an indigent party, no affidavit or

declaration is required, but the motion shall cite the provision of law under which counsel was appointed, or a copy of the order of appointment shall be appended to the motion.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall be prepared under the Clerk's supervision. The Clerk also

will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis*.

Rule 40. Veterans, Seamen, and Military Cases

1. A veteran suing under any provision of law exempting veterans from the payment of fees or court costs, may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor and may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a seaman and be accompanied by an affidavit or declaration setting out the moving party's seaman status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the seaman.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under 28 U. S. C. § 1259 may proceed without prepayment of fees or costs or furnishing security there-

for and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

PART VIII. DISPOSITION OF CASES

Rule 41. Opinions of the Court

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the courts below may award interest to the extent permitted by law. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U. S. C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

Rule 44. Rehearing

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a

party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The time for filing a petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ will not be extended. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not

comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing submitted in accordance with Rule 29.2 no more than 15 days after the date of the Clerk's letter will be deemed timely.

Rule 45. Process; Mandates

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by 28 U. S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.

Rule 46. Dismissing Cases

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that

the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

Part IX. Definitions and Effective Date

Rule 47. Reference to "State Court" and "State Law"

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, the local courts of Guam, and the Supreme Court of the Virgin Islands. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the Territory of Guam, and the Territory of the Virgin Islands.

Rule 48. Effective Date of Rules

1. These Rules, adopted April 19, 2013, will be effective July 1, 2013.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible

or would work an injustice, in which event the former procedure applies.

3. In any case in which a petitioner or appellant has filed its brief on the merits prior to the effective date of these revised Rules, all remaining briefs in that case may comply with the October 1, 2007, version of the Rules of the Supreme Court of the United States rather than with these revised Rules.

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AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 16, 2013, 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. 1126. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, 538 U. S. 1071, 544 U. S. 1151, 547 U. S. 1221, 550 U. S. 983, 556 U. S. 1291, 559 U. S. 1119, and 563 U. S. 1045.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 16, 2013

To the Senate and House of Representatives of the United States of America in Congress Assembled:

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 16, 2013

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4.

[See *infra,* pp. 1129–1139.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2013, and shall govern in all proceedings in appellate cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

TITLE III. APPEALS FROM THE UNITED STATES TAX COURT

Rule 13. Appeals from the Tax Court.

(*a*) *Appeal as of right.*

(*1*) *How obtained; time for filing a notice of appeal.*

(A) An appeal as of right from the United States Tax Court is commenced by filing a notice of appeal with the Tax Court clerk within 90 days after the entry of the Tax Court's decision. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d). If one party files a timely notice of appeal, any other party may file a notice of appeal within 120 days after the Tax Court's decision is entered.

(B) If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order disposing of the motion or from the entry of a new decision, whichever is later.

(*2*) *Notice of appeal; how filed.*—The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk. If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.

(*3*) *Contents of the notice of appeal; service; effect of filing and service.*—Rule 3 prescribes the contents of a notice of appeal, the manner of service, and the effect of its filing and service. Form 2 in the Appendix of Forms is a suggested form of a notice of appeal.

(*4*) *The record on appeal; forwarding; filing.*

(A) Except as otherwise provided under Tax Court rules for the transcript of proceedings, the appeal is governed by the parts of Rules 10, 11, and 12 regarding the record on appeal from a district court, the time and manner of forwarding and filing, and the docketing in the court of appeals.

(B) If an appeal is taken to more than one court of appeals, the original record must be sent to the court named in the first notice of appeal filed. In an appeal to any other court of appeals, the appellant must apply to that other court to make provision for the record.

(*b*) *Appeal by permission.*—An appeal by permission is governed by Rule 5.

. . . . .

Rule 14. Applicability of other rules to appeals from the tax court.

All provisions of these rules, except Rules 4, 6–9, 15–20, and 22–23, apply to appeals from the Tax Court. References in any applicable rule (other than Rule 24(a)) to the district court and district clerk are to be read as referring to the Tax Court and its clerk.

. . . . .

Rule 24. Proceeding in forma pauperis.

(*a*) *Leave to proceed in forma pauperis.*

(*1*) *Motion in the district court.*—Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(*2*) *Action on the motion.*—If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless a statute provides otherwise. If the district court denies the motion, it must state its reasons in writing.

(*3*) *Prior approval.*—A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding; or

(B) a statute provides otherwise.

(*4*) *Notice of district court's denial.*—The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(*5*) *Motion in the court of appeals.*—A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(*b*) *Leave to proceed in forma pauperis on appeal from the United States Tax Court or on appeal or review of an administrative-agency proceeding.*—A party may file in the

court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1):

(1) in an appeal from the United States Tax Court; and

(2) when an appeal or review of a proceeding before an administrative agency, board, commission, or officer proceeds directly in the court of appeals.

(*c*) *Leave to use original record.*—A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

. . . . .

Rule 28. Briefs.

(*a*) *Appellant's brief.*—The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a corporate disclosure statement if required by Rule 26.1;

(2) a table of contents, with page references;

(3) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the brief where they are cited;

(4) a jurisdictional statement, including:

(A) the basis for the district court's or agency's subject-matter jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(B) the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction;

(C) the filing dates establishing the timeliness of the appeal or petition for review; and

(D) an assertion that the appeal is from a final order or judgment that disposes of all parties' claims, or information establishing the court of appeals' jurisdiction on some other basis;

(5) a statement of the issues presented for review;

(6) a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e));

(7) a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(8) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(9) a short conclusion stating the precise relief sought; and

(10) the certificate of compliance, if required by Rule 32(a)(7).

(*b*) *Appellee's brief.*—The appellee's brief must conform to the requirements of Rule 28(a)(1)–(8) and (10), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case; and

(4) the statement of the standard of review.

. . . . .

Rule 28.1. Cross-appeals.

. . . . .

(*c*) *Briefs.*—In a case involving a cross-appeal:

(*1*) *Appellant's principal brief.*—The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(*2*) *Appellee's principal and response brief.*—The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement.

(*3*) *Appellant's response and reply brief.*—The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(8) and (10), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case; and

(D) the statement of the standard of review.

(*4*) *Appellee's reply brief.*—The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (10) and must be limited to the issues presented by the cross-appeal.

. . . . .

FORM 4. AFFIDAVIT ACCOMPANYING MOTION FOR PERMISSION TO APPEAL IN FORMA PAUPERIS

United States District Court
for the
_____ District of _____

Name(s) of plaintiff(s),
Plaintiff(s)
v.
Case No. *Number*

Name(s) of defendant(s),
Defendant(s)

Affidavit in Support of Motion

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay the docket fees of my appeal or post a bond for them. I believe I am entitled to redress. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U. S. C. § 1746; 18 U. S. C. § 1621.)

Signed: _____
Date: _____

Instructions

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none," or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

My issues on appeal are:

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semi-annually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$_____	$_____	$_____	$_____
Self-employment	$_____	$_____	$_____	$_____
Income from real property (such as rental income)	$_____	$_____	$_____	$_____
Interest and dividends	$_____	$_____	$_____	$_____
Gifts	$_____	$_____	$_____	$_____
Alimony	$_____	$_____	$_____	$_____
Child support	$_____	$_____	$_____	$_____
Retirement (such as social security, pensions, annuities, insurance)	$_____	$_____	$_____	$_____
Disability (such as social security, insurance payments)	$_____	$_____	$_____	$_____
Unemployment payments	$_____	$_____	$_____	$_____
Public-assistance (such as welfare)	$_____	$_____	$_____	$_____
Other (specify): _____	$_____	$_____	$_____	$_____
Total monthly income:	$_____	$_____	$_____	$_____

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of employment	Gross monthly pay

4. How much cash do you and your spouse have? $ _____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial Institution	Type of Account	Amount you have	Amount your spouse has
		$	$
		$	$
		$	$

If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

Home (Value)	Other real estate (Value)	Motor vehicle #1 (Value)
		Make & year:
		Model:
		Registration #:

Motor vehicle #2 (Value)	Other assets (Value)	Other assets (Value)
Make & year:		
Model:		
Registration #:		

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse

7. State the persons who rely on you or your spouse for support.

Name [or, if a minor (i.e., underage), initials only]	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate.

	You	Your Spouse
Rent or home-mortgage payment (include lot rented for mobile home)	$_____	$_____
Are real estate taxes included? ☐ Yes ☐ No		
Is property insurance included? ☐ Yes ☐ No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	$_____	$_____
Home maintenance (repairs and upkeep)	$_____	$_____
Food	$_____	$_____
Clothing	$_____	$_____
Laundry and dry-cleaning	$_____	$_____
Medical and dental expenses	$_____	$_____
Transportation (not including motor vehicle payments)	$_____	$_____
Recreation, entertainment, newspapers, magazines, etc.	$_____	$_____
Insurance (not deducted from wages or included in mortgage payments)	$_____	$_____
Homeowner's or renter's:	$_____	$_____
Life:	$_____	$_____
Health:	$_____	$_____
Motor Vehicle:	$_____	$_____
Other: _____	$_____	$_____
Taxes (not deducted from wages or included in mortgage payments) (specify): _____	$_____	$_____

	You	Your Spouse
Installment payments	$_____	$_____
Motor Vehicle:	$_____	$_____
Credit card (name): _____	$_____	$_____
Department store (name): _____	$_____	$_____
Other: _____	$_____	$_____
Alimony, maintenance, and support paid to others	$_____	$_____
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$_____	$_____
Other (specify): _____	$_____	$_____
Total monthly expenses:	$_____	$_____

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☐ No If yes, describe on an attached sheet.

10. Have you spent—or will you be spending—any money for expenses or attorney fees in connection with this lawsuit?

☐ Yes ☐ No

If yes, how much? $_____

11. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

12. State the city and state of your legal residence.

_____

_____

Your daytime phone number: (___) _____
Your age: _____ Your years of schooling: _____
Last four digits of your social-security number: _____

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 16, 2013, 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. 1142. 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, 563 U. S. 1051, and 566 U. S. 1045.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 16, 2013

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 16, 2013

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 4004, 5009, 9006, 9013, and 9014.

[See *infra*, pp. 1145–1147.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2013, 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.

. . . . .

(*b*) *Schedules, statements, and other documents required.*

. . . . .

(7) Unless an approved provider of an instructional course concerning personal financial management has notified the court that a debtor has completed the course after filing the petition:

(A) An individual debtor in a chapter 7 or chapter 13 case shall file a statement of completion of the course, prepared as prescribed by the appropriate Official Form; and

(B) An individual debtor in a chapter 11 case shall file the statement if § 1141(d)(3) applies.

. . . . .

Rule 4004. Grant or denial of discharge.

. . . . .

(*c*) *Grant of discharge.*

(1) In a chapter 7 case, on expiration of the times fixed for objecting to discharge and for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge, except that the court shall not grant the discharge if:

(A) the debtor is not an individual;

(B) a complaint, or a motion under § 727(a)(8) or (a)(9), objecting to the discharge has been filed and not decided in the debtor's favor;

(C) the debtor has filed a waiver under § 727(a)(10);

(D) a motion to dismiss the case under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e)(1) is pending;

(G) the debtor has not paid in full the filing fee prescribed by 28 U. S. C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U. S. C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code, unless the court has waived the fees under 28 U. S. C. § 1930(f);

(H) the debtor has not filed with the court a statement of completion of a course concerning personal financial management if required by Rule 1007(b)(7);

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending;

(J) a motion to enlarge the time to file a reaffirmation agreement under Rule 4008(a) is pending;

(K) a presumption is in effect under § 524(m) that a reaffirmation agreement is an undue hardship and the court has not concluded a hearing on the presumption; or

(L) a motion is pending to delay discharge because the debtor has not filed with the court all tax documents required to be filed under § 521(f).

. . . . .

Rule 5009. Closing Chapter 7 liquidation, Chapter 12 family farmer's debt adjustment, Chapter 13 individual's debt adjustment, and Chapter 15 ancillary and cross-border cases.

. . . . .

(*b*) *Notice of failure to file Rule 1007(b)(7) statement.*—If an individual debtor in a chapter 7 or 13 case is required to file a statement under Rule 1007(b)(7) and fails to do so within 45 days after the first date set for the meeting of creditors under § 341(a) of the Code, the clerk shall promptly notify the debtor that the case will be closed without entry of a discharge unless the required statement is filed within the applicable time limit under Rule 1007(c).

. . . . .

Rule 9006. Computing and extending time; time for motion papers.

. . . . .

(*d*) *Motion papers.*—A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than seven days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion. Except as otherwise provided in Rule 9023, any written response shall be served not later than one day before the hearing, unless the court permits otherwise.

. . . . .

Rule 9013. Motions: form and service.

A request for an order, except when an application is authorized by the rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion, other than one which may be considered ex parte, shall be served by the moving party within the time determined under Rule 9006(d). The moving party shall serve the motion on:

(a) the trustee or debtor in possession and on those entities specified by these rules; or

(b) the entities the court directs if these rules do not require service or specify the entities to be served.

. . . . .

Rule 9014. Contested matters.

. . . . .

(*b*) *Service.*—The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004 and within the time determined under Rule 9006(d). Any written response to the motion shall be served within the time determined under Rule 9006(d). Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

. . . . .

AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 16, 2013, 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. 1150. 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 Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, 538 U. S. 1083, 544 U. S. 1173, 547 U. S. 1233, 550 U. S. 1003, 553 U. S. 1149, 556 U. S. 1341, and 559 U. S. 1139.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 16, 2013

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 Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) JOHN G. ROBERTS, JR.
Chief Justice of the United States

SUPREME COURT OF THE UNITED STATES

APRIL 16, 2013

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 37 and 45.

[See *infra*, pp. 1153–1159.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2013, and shall govern in all proceedings in civil 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 Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 37. Failure to make disclosures or to cooperate in discovery; sanctions.

. . . . .

(*b*) *Failure to comply with a court order.*

(*1*) *Sanctions sought in the district where the deposition is taken.*—If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court. If a deposition-related motion is transferred to the court where the action is pending, and that court orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

(*2*) *Sanctions sought in the district where the action is pending.*

. . . . .

Rule 45. Subpoena.

(*a*) *In general.*

(*1*) *Form and contents.*

(*A*) *Requirements—in general.*—Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that

person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(d) and (e).

(*B*) *Command to attend a deposition—notice of the recording method.*—A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(*C*) *Combining or separating a command to produce or to permit inspection; specifying the form for electronically stored information.*—A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(*D*) *Command to produce; included obligations.*—A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.

(*2*) *Issuing court.*—A subpoena must issue from the court where the action is pending.

(*3*) *Issued by whom.*—The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the issuing court.

(*4*) *Notice to other parties before service.*—If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party.

(*b*) *Service.*

(*1*) *By whom and how; tendering fees.*—Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

(*2*) *Service in the United States.*—A subpoena may be served at any place within the United States.

(*3*) *Service in a foreign country.*—28 U. S. C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(*4*) *Proof of service.*—Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(*c*) *Place of compliance.*

(*1*) *For a trial, hearing, or deposition.*—A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(*2*) *For other discovery.*—A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(*d*) *Protecting a person subject to a subpoena; enforcement.*

(*1*) *Avoiding undue burden or expense; sanctions.*—A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(*2*) *Command to produce materials or permit inspection.*

(*A*) *Appearance not required.*—A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(*B*) *Objections.*—A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or modifying a subpoena.

(*A*) *When required.*—On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(*B*) *When permitted.*—To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(*C*) *Specifying conditions as an alternative.*—In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(*e*) *Duties in responding to a subpoena.*

(*1*) *Producing documents or electronically stored information.*—These procedures apply to producing documents or electronically stored information:

(*A*) *Documents.*—A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize

and label them to correspond to the categories in the demand.

(*B*) *Form for producing electronically stored information not specified.*—If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(*C*) *Electronically stored information produced in only one form.*—The person responding need not produce the same electronically stored information in more than one form.

(*D*) *Inaccessible electronically stored information.*—The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(*2*) *Claiming privilege or protection.*

(*A*) *Information withheld.*—A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(*B*) *Information produced.*—If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the

person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(*f*) *Transferring a subpoena-related motion.*—When the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances. Then, if the attorney for a person subject to a subpoena is authorized to practice in the court where the motion was made, the attorney may file papers and appear on the motion as an officer of the issuing court. To enforce its order, the issuing court may transfer the order to the court where the motion was made.

(*g*) *Contempt.*—The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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 16, 2013, 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. 1162. 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, 563 U. S. 1063, and 566 U. S. 1053.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 16, 2013

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 16, 2013

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 11 and 16.

[See *infra*, pp. 1165–1166.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2013, and shall govern in all proceedings in criminal 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 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 11. Pleas.

. . . . .

(*b*) *Considering and accepting a guilty or nolo contendere plea.*

(*1*) *Advising and questioning the defendant.*—Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

. . . . .

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U. S. C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

. . . . .

Rule 16. Discovery and inspection.

(*a*) *Government's disclosure.*

. . . . .

(*2*) *Information not subject to disclosure.*—Except as permitted by Rule 16(a)(1)(A)–(D), (F), and (G), this rule does not authorize the discovery or inspection of reports,

memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U. S. C. § 3500.

. . . . .

AMENDMENT TO FEDERAL RULES OF EVIDENCE

The following amendment to the Federal Rules of Evidence was prescribed by the Supreme Court of the United States on April 16, 2013, pursuant to 28 U. S. C. § 2072, and was reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1168. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier reference to the Federal Rules of Evidence, see 409 U. S. 1132. For earlier publication of the Federal Rules of Evidence and amendments thereto, see 441 U. S. 1005, 480 U. S. 1023, 485 U. S. 1049, 493 U. S. 1173, 500 U. S. 1001, 507 U. S. 1187, 511 U. S. 1187, 520 U. S. 1323, 523 U. S. 1235, 529 U. S. 1189, 538 U. S. 1097, 547 U. S. 1281, 559 U. S. 1157, and 563 U. S. 1075.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 16, 2013

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 amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying this rule 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 16, 2013

ORDERED:

1. That the Federal Rules of Evidence be, and they hereby are, amended by including therein an amendment to Evidence Rule 803.

[See *infra*, p. 1171.]

2. That the foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2013, 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 amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

Rule 803. Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

. . . . .

(*10*) *Absence of a public record.*—Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice—unless the court sets a different time for the notice or the objection.

. . . . .

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HABEAS CORPUS—Continued.

"clearly established Federal law," 28 U. S. C. § 2254(d)(1). Marshall v. Rodgers, p. 58.

3. *Exclusion of extrinsic evidence for witness impeachment.*—Ninth Circuit's grant of habeas relief was unreasonable here, where Nevada Supreme Court held that evidence of a rape victim's previously reported, but unsubstantiated, assault allegations against respondent were properly excluded at his trial, and where no prior decision of this Court clearly established that Confrontation Clause entitles a defendant to introduce extrinsic evidence for impeachment purposes. Nevada v. Jackson, p. 505.

4. *Ineffective assistance of trial counsel—Lack of meaningful opportunity to raise claim on direct appeal—Procedural default.*—Where a State's procedural framework makes it highly unlikely that a defendant will typically have a meaningful opportunity to raise an ineffective-assistance-of-trial-counsel claim on direct appeal, exception recognized in *Martinez* v. *Ryan*, 566 U. S. 1, 17—that "a procedural default will not bar" federal habeas review of a substantial ineffective-assistance-of-trial-counsel claim "if, in [State's] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective"—applies. Trevino v. Thaler, p. 413.

5. *Retrial for murder—Diminished-capacity defense—Retroactive application of state appellate decision—Due process.*—Respondent is not entitled to federal habeas relief on claim that judge at retrial for first-degree murder violated due process by retroactively applying Michigan Supreme Court case rejecting diminished-capacity defense. Metrish v. Lancaster, p. 351.

HEALTH BENEFITS PLANS. See **Employee Retirement Income Security Act of 1974.**

HOME SEARCHES. See **Constitutional Law,** IV, 2.

IMMIGRATION AND NATIONALITY ACT.

Marijuana distribution conviction—Removal for aggravated felony offense.—If a noncitizen's conviction for a marijuana distribution offense fails to establish that offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under Act, which prohibits Attorney General from granting discretionary relief from removal to an aggravated felon. Moncrieffe v. Holder, p. 184.

IMMUNITY FROM SUIT. See **Federal Tort Claims Act.**

IMPEACHMENT EVIDENCE. See **Habeas Corpus,** 3.

INTERNATIONAL LAW. See **Alien Tort Statute.**

INTERSTATE COMPACTS. See **Constitutional Law,** I, 1.

JUDICIAL DEFERENCE. See **Administrative Law.**

JURISDICTION. See also **Administrative Law; Alien Tort Statute.**

Subject-matter jurisdiction—Dismissal of collective action—Mootness.—Respondent's collective action under Fair Labor Standards Act of 1938 was appropriately dismissed for lack of subject-matter jurisdiction where her individual claim became moot and she had no personal interest in representing unnamed claimants, nor any other continuing interest that would preserve her suit from mootness. Genesis HealthCare Corp. v. Symczyk, p. 66.

LAW OF NATIONS. See **Alien Tort Statute.**

LIFE INSURANCE BENEFICIARIES. See **Federal Employees' Group Life Insurance Act of 1954.**

MICHIGAN. See **Habeas Corpus,** 5.

MOOTNESS. See **Jurisdiction.**

NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986.

Untimely petitions for compensation—Attorney's fees.—A petition under Act found to be untimely may qualify for an award of attorney's fees if it is filed in good faith and there is a reasonable basis for its claim. Sebelius v. Cloer, p. 369.

NEVADA. See **Habeas Corpus,** 3.

OKLAHOMA. See **Constitutional Law,** I, 1.

PATENTS.

1. *Naturally occurring DNA segment—Synthetically created complementary DNA.*—A naturally occurring DNA segment is a product of nature and not patent eligible merely because it has been isolated, but synthetically created complementary DNA (cDNA) is patent eligible because it is not naturally occurring. Association for Molecular Pathology v. Myriad Genetics, Inc., p. 576.

2. *Patent exhaustion doctrine—Reproduction of patented seed.*—Where petitioner farmer used soybeans harvested for consumption from patented Roundup Ready seeds to produce more Roundup Ready soybeans for planting, patent exhaustion doctrine—which gives purchaser, or any subsequent owner, of a patented article right to use or resell that article—did not permit him to reproduce patented seeds without patent holder's permission. Bowman v. Monsanto Co., p. 278.

POLICE BOOKING PROCEDURES. See **Constitutional Law,** IV, 1.

PORT AUTHORITY REGULATION. See **Federal Aviation Administration Authorization Act of 1994,** 1.

PRE-EMPTION OF STATE LAW. See **Federal Aviation Administration Authorization Act of 1994; Federal Employees' Group Life Insurance Act of 1954.**

PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION. See **Alien Tort Statute.**

PRIVILEGES AND IMMUNITIES OF STATE CITIZENS. See **Constitutional Law,** III.

PROBABLE CAUSE. See **Constitutional Law,** IV, 1.

PROCEDURAL DEFAULT. See **Habeas Corpus,** 1.

PUBLIC RECORDS. See **Constitutional Law,** I, 2; III.

RED RIVER COMPACT. See **Constitutional Law,** I, 1.

REIMBURSEMENT FOR MEDICAL EXPENSES. See **Employee Retirement Income Security Act of 1974.**

REMOVAL OF ALIENS. See **Immigration and Nationality Act.**

RIGHT TO COUNSEL. See **Habeas Corpus,** 2, 4.

SIXTH AMENDMENT. See **Habeas Corpus,** 2, 3, 4.

STATUTES OF LIMITATIONS. See **Habeas Corpus,** 1; **National Childhood Vaccine Injury Act of 1986.**

SUBJECT-MATTER JURISDICTION. See **Jurisdiction.**

SUPREME COURT.

1. Rules of the Supreme Court, p. 1045.
2. Amendments to Federal Rules of Appellate Procedure, p. 1125.
3. Amendments to Federal Rules of Bankruptcy Procedure, p. 1141.
4. Amendments to Federal Rules of Civil Procedure, p. 1149.
5. Amendments to Federal Rules of Criminal Procedure, p. 1161.
6. Amendment to Federal Rules of Evidence, p. 1167.

TAKING OF PROPERTY. See **Agricultural Marketing Agreement Act of 1937.**

TAXES.

Federal income tax—Credit for United Kingdom "windfall tax."— United Kingdom's one-time "windfall tax" on specified U. K. companies is creditable on PPL's federal income taxes pursuant to 26 U. S. C. § 901(b)(1), which permits a credit for "income, war profits, and excess profits taxes" paid overseas. PPL Corp. v. Commissioner, p. 329.

TELECOMMUNICATIONS. See **Administrative Law; Federal Rules of Civil Procedure,** 2.

TEXAS. See **Habeas Corpus,** 4.

TRANSPORTATION. See **Federal Aviation Administration Authorization Act of 1994.**

TUCKER ACT. See **Agricultural Marketing Agreement Act of 1937.**

UNITED STATES SENTENCING GUIDELINES. See **Constitutional Law,** II.

UNJUST ENRICHMENT. See **Employee Retirement Income Security Act of 1974.**

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VIRGINIA. See **Constitutional Law,** I, 2; III; **Federal Employees' Group Life Insurance Act of 1954.**

WAIVER OF IMMUNITY FROM SUIT. See **Federal Tort Claims Act.**

WAIVER OF RIGHT TO COUNSEL. See **Habeas Corpus,** 2.

WARRANTLESS SEARCHES. See **Constitutional Law,** IV.

WIRELESS TELECOMMUNICATIONS. See **Administrative Law.**

WORDS AND PHRASES.

"[D]efalcation." Bankruptcy Code, 11 U. S. C. § 523(a)(4). Bullock v. BankChampaign, N. A., p. 267.

"[E]xcess profits taxes." Internal Revenue Code, 26 U. S. C. § 901(b)(1). PPL Corp. v. Commissioner, p. 329.